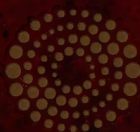


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JURY INSTRUCTIONS

Prepared by

NEBRASKA SUPREME COURT COMMITTEE
ON PRACTICE AND PROCEDURE

CIVIL

Second Edition

[NJI2d Civ.]

INCLUDING 2021 UPDATES

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CHAIRMAN'S PREFACE

This volume contains new Pattern Civil Jury Instructions which are expected to be used, where applicable, in all trial courts of Nebraska. It is hoped that this work will not only assist the bench in properly instructing juries, but will also serve as a valuable and time-saving research tool for judges and practitioners alike.

These instructions are the work product of the combined intellect, knowledge, and skill of all of the members of the Supreme Court Committee on Civil Practice and Procedure. Each member labored patiently, diligently and with the utmost dedication to the task at hand. The members of the Committee themselves have recognized the collegial effort involved, each having expressed on various occasions that each one got more out of the Committee work than each put into it.

Individual Committee members should be recognized for the long and tireless hours devoted to the final product. Over the past several years, about every six weeks, on Friday afternoons and Saturday mornings, judges, law professors and practicing attorneys gathered around a table in a jury room in the County-City Building in Lincoln, Nebraska, where they argued vigorously over this word or that, over one phrase or another, over one sentence or another, over which interpretation of a line of cases was correct. On virtually every instruction, there was unanimous agreement as to the content and wordage. No remuneration was paid to any Committee member for the time spent on the weekend meetings.

Extraordinary recognition should be given to Professor G. Michael Fenner of Creighton University Law School in Omaha who served as reporter for the Committee. It was Professor Fenner who wrote the first drafts of the Pattern Jury Instructions. It was he who was responsible for the research and comments after each instruction. None of his work was accepted at face value. It had to stand the close scrutiny of other learned members of the Committee. Professor Fenner had to defend all of his research and everything he wrote. When overruled by the Committee (which was not often), Professor Fenner accepted it graciously and with good humor. He thereafter returned to his research and rewrote an instruction until it was accepted by the Committee. His patience and tenacity in writing what the members of the Committee determined to be the law was truly remarkable.

CHAIRMAN'S PREFACE

This project was funded by state tax dollars and money from the Nebraska State Bar Association. In addition, the Creighton University School of Law provided a substantial amount of support for this work in the form of secretarial time, photocopying, postage, paper, computer time and much more. On behalf of the Committee members, I express our appreciation for all of this support. To each member of the Committee, I express my personal appreciation and commendation. Each of them gave the chairman 100 percent cooperation. Each member was patient and courteous to each other. Although at times there was discord as to how an instruction should be worded, through it all, each member was a gentleman. The members made it a privilege and pleasure for me to serve as the chairman of the Committee and made the chairmanship not only less arduous than it could have been, but also enjoyable.

DALE E. FAHRNBRUCH, CHAIRMAN
Nebraska Supreme Court Committee
on Civil Practice and Procedure

JANUARY, 1989

REPORTER'S PREFACE

As the Reporter for Pattern Jury Instructions, it was my job to do first drafts of the pattern instructions and to write the Comments and Authorities. The drafts of the instructions were submitted to the Supreme Court Committee on Practice and Procedure, whose members spared neither time nor effort in improving them. These pattern instructions are the Committee's, and they are patterns in which every member of the Committee can take a great deal of pride.

I have never been involved with a committee that works as long and as hard as this one has (and still does). I have never been involved with a committee whose members so unhesitatingly put themselves and their ideas on the line, or whose members show each other such respect. About every six weeks, they give up a Friday and a Saturday to this work. They come not only because they know they are accomplishing something important, but also because it is work they enjoy, done alongside people they enjoy. From the Committee, I have made many wonderful friends.

As I assess what this project has meant to me, I am immediately aware that the members of this Committee taught me a lot about the law and about how to write well. More importantly, and just as immediately, I am aware that this project has provided me with the opportunity to get to know and to become friends with two groups of the best individuals our profession has to offer: the other members of the Committee and the Creighton students who have helped me so much with this project.

Though these jury instructions are truly a committee effort, I offer special thanks to Judge Dale Fahrnbruch who chaired this Committee from the start of this project to the finish. Judge Fahrnbruch was always there when I needed to call on him; he saw to it that we did not lose our funding; he worked hard for this Committee behind the scenes.

During the life of this project, I had the opportunity to work with many of the best and the brightest students ever to come through the Creighton University School of Law. This project could never have been done without them. I want to thank them, and to say that not only I, but every attorney who practices law in the State of Nebraska, owes them a debt of gratitude.

I particularly want to thank Kathleen J. Ford. Kathy worked the longest and the hardest on this project; her sense of humor

REPORTER'S PREFACE

helped me through the three most difficult years of the project; and the quality of her work was unsurpassed. Of all of the students who assisted in the preparation of these pattern instructions, she contributed the most.

I also want to make particular mention of Frank E. Talbott, class of '86, a trial attorney in Burlington, Vermont, who contributed not only to this project, but to many of my other writings; Mary Elizabeth Phelan, class of '84, now teaching at the Thomas M. Cooley School of Law; and Marian G. Heaney, class of '83, in private practice in Minneapolis.

Invaluable contributions were also made by Larry J. Steier, '88, in private practice in Omaha; Mary Jo Donahue, '88, law clerk to a federal judge in Missouri; Damon Jerome Savoy, '89, soon to be a law clerk on the Nebraska Supreme Court; Greg Notarianni, '85, in private practice in Denver; P. Joseph O'Neill, '84; Virginia K. Troia, '82, now in Basking Ridge, New Jersey, legal counsel to an international corporation; Joseph W. Bruckner, '82, in private practice in St. Paul, Minnesota.

For logistical support for this project, I want to express my appreciation to the Creighton University School of Law. Over the six years of this project, Creighton contributed a lot of secretarial time and photocopying, mailing, and other expenses. Professor Robert Kelly, Director of our law library, and his staff were most supportive, patient, and cooperative, and I thank them. My colleague Professor Larry L. Teply showed me such a large project could be done, and taught me a great deal about how to do it, and I thank him.

For a large part of my time in Omaha, I have been of counsel with McGill, Parsonage & Lanphier, P.C. I thank them for continuing that relationship even though for the last few years it has been mostly one-sided, while I devoted my spare time to this project.

Three other people were indispensable to the success of this project: Eileen Leuschen Schwery, Vicki Simants, and Joni Karsten. They typed; they did layouts; they handled, even drafted correspondence; they made phone calls, did research, and put up with me. This project would not have been possible in a lifetime without their assistance.

The Honorable John C. Burke, retired, got me involved in this project. There were times when I wondered whether to thank him. I have decided. Thanks!

Finally, and most importantly, this project has taken a great deal of time, much of it time taken away from my family. For that, I thank my wife, Anne, and my daughter and son, Hilary

REPORTER'S PREFACE

and Ben; I thank them for their understanding, their support, and their patience. (I have been blessed with a family of writers: Anne has published a book of her own; Hilary and Ben are talented writers. Maybe they understand better than most what it takes.)

G. MICHAEL FENNER
REPORTER FOR PATTERN CIVIL JURY
Instructions

Creighton University
Omaha, NE
January, 1989

COMMITTEE HISTORY: SUPREME COURT COMMITTEE ON PRACTICE AND PROCEDURE

In 1942, the Nebraska District Court Judges' Association established a committee of its members to prepare a set of pattern jury instructions. Seven years later their work was published in pamphlet form.

In 1963, the Association decided it was time that a new set of pattern instructions be done, and asked the Nebraska Supreme Court to appoint a committee to do just that. In response, in 1965 the court created the Supreme Court Committee on Pattern Jury Instructions. This Committee was placed in the capable hands of its first chairman, Judge Elmer M. Scheele, and its first two reporters, Professor David Dow, from the University of Nebraska College of Law, and Mr. John E. North, then Professor North of the Creighton University School of Law. The result of its work is found in the hard bound book *Nebraska Jury Instructions*(1969), the book of pattern instructions Nebraska judges and attorneys used for the next 20 years.

The publication of NJI (1969) was not the end of the Committee. The same year its pattern instructions were published, the Committee was reconstituted, renamed the Supreme Court committee on Practice and Procedure, and recharged to consider Nebraska's rules of evidence.

While at work on the rules of evidence, with the illness and untimely death of Judge Scheele, the Committee received its second chairman: The Honorable John C. Burke. In 1973, under the leadership of Judge Burke, and with Professor Dow and Mr. North continuing as Reporters, the Committee published the *Proposed Nebraska Rules of Evidence*. With very few changes, this work was enacted into law as Chapter 27 of the Nebraska Revised Statutes, and, as of August 24, 1975, the State of Nebraska had a new evidence code.

When it finished its work on the rules of evidence, the Committee turned its attention back to jury instructions. In 1975, the Committee produced a pocket part to the 1969 book of pattern instructions.

At this point, the Honorable Dale E. Fahrnbruch, then a District Court Judge for the 3rd Judicial District, now a Judge of

COMMITTEE HISTORY

the Nebraska Supreme Court, succeeded Judge Burke and became the third chairman of the Committee. Also at this point, the Committee turned its attention to Nebraska's procedural statutes, supreme court rules on discovery, and the like. With Professor Roger Kirst from the University of Nebraska College of Law as its Reporter for Rules of Civil Procedure, the Committee produced much of Nebraska's current law on civil procedure and many of the supreme court's rules on the same subject.

In 1981, the Committee began thinking about the need for a revision of the pattern jury instructions. Professor G. Michael Fenner, from the Creighton University School of Law, was named the Reporter for Jury Instructions, and he began the work necessary to such a revision. Before he got too far into the project, it became apparent that what was needed was not so much a revision as a whole new work. Much had changed since 1969, and there were many areas of the law for which pattern instructions were appropriate but not to be found in the 1969 volume.

The result of this effort is the Instructions, Comments, and Authorities contained herein. The Instructions are the result of Committee review of instructions prepared by Professor Fenner. The Comments and Authorities are mostly Professor Fenner's own work.

Having finished pattern instructions for civil cases, the Committee has not slowed its pace. Professor Josephine R. Potuto has been named a Reporter. Her task is to prepare jury instructions for use in criminal cases. Her work, and the Committee's, on these instructions is well under way.

There are two members of the Committee who worked on the 1969 bound volume of instructions, the 1975 pocket part, and the instructions published in this volume (and all of the evidence and civil procedure legislation in between), and who are now working on the pattern instructions in criminal cases. They are The Honorable Lyle E. Strom and The Honorable Warren K. Urbom, both United States District Court judges. After 1949, the mark of these two men is on every pattern instruction published in the State of Nebraska. The 1949 patterns were published in a pamphlet; the 1969 patterns, in a 344 page book; the 1989 patterns, in a 900-some page book.

USE NOTE FOR PATTERN CIVIL INSTRUCTIONS

This Use Note concerns the pattern jury instructions for use in civil cases. It contains information about style used in the drafting of these patterns, about the translation of the pattern instructions into instructions to be given in a particular case. Notes on the use of various instructions also appear in the Comments and Authorities following each instruction and in the Introductory Comment following the Rule Adopted By the Supreme Court of Nebraska With Reference to Nebraska Jury Instructions, Second Edition. Additionally, at least two of the chapters have their own Introduction, which consist in part of use notes for the chapter.

The first, and most important, general note is that each individual instruction is written to be used only after the accompanying Comment and Authorities have been read. Many of the Comments include caveats about the use of the instruction, suggested alternative language for various specific situations that may arise, cross references to other possibly relevant instructions, and the like.

Throughout these pattern instructions, the participants in the lawsuit are designated by their status, e.g., plaintiff, defendant, third-party defendant, principal, agent, and so on. Names may be substituted, and often should be.

In this book, references and cross references to other Nebraska pattern instructions are designated as follows, using pattern instruction number 2.01 as the example:

- “NJI2d Civ. 2.01” is a cross reference to pattern civil instruction number 2.01 as it appears in this volume, the second edition of the Nebraska Jury Instructions.
- “NJI 2.01 (1969)” is a reference to pattern instruction number 2.01 as it appears in the hard-bound predecessor to this volume, published by West Publishing Co. in 1969.
- “NJI 2.01 (pocket part 1975)” is a reference to the pocket part to the 1969 hard-bound predecessor to this volume.

Many of the pattern instructions contain material in parentheses. The Committee uses parentheses in the body of a pattern instruction to indicate places where the instruction must be tailored and to set off italicized warnings to the user of the instruction. Parentheses are most commonly used in one of five ways:

- To set off examples of tailoring, that is, a menu of choices, NJI2d Civ. 2.01, for example, states that the plaintiff must prove “that the (occurrence, accident, collision, fall, et cetera) was a proximate cause of some damage to the plaintiff.”

- To set off a general statement of the kind of tailoring called for, but without examples. NJI2d Civ. 2.01 also states that plaintiff claims defendant “was negligent in one or more of the following ways: (Insert a list of statements of the negligence claimed by the plaintiff, against the defendant.)”

- To set off a word as a signal that it should not be used unthinkingly and a substitution may be preferable. These parentheses do not contain examples of tailoring, nor do they contain a general statement of the kind of tailoring called for; rather, they alert the user to consider tailoring. The Damages to Property instructions in Part C of Chapter 4 begin “If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to the plaintiff’s (property), then you must. . . .” The word “property” is in parentheses to alert the user that it might be a better jury instruction if a more specific word is used (car, house, building, et cetera).

- To set off italicized explanations about the use of what follows, for example, NJI2d Civ. 2.01’s statement: “(If there will not be any affirmative defense instructions, then the following two paragraphs constitute Part C of this instruction).”

- If it becomes necessary, parenthesis will be used to set off a warning within the body of a pattern instruction.

A number of the pattern instructions contain material in brackets. The Committee has used brackets to set off material that is not to be used routinely. Sometimes the brackets indicate that the court can, but, in the Committee’s view, does not have to include the bracketed material in the instruction. Other times the brackets indicate that the material within is only appropriate in some cases and should only be used where appropriate to the particular facts of the case on trial.

There is an entry in this work for almost every instruction in NJI (1969). The most important omission from this work is this: Chapter 14 of NJI (1969) contained instructions for use in criminal cases. Chapter 14 of this work is vacant. The pattern instructions for use in criminal cases are published as a separate body of work, though, as of the 2000 edition, the instructions for use in civil and criminal cases are published together in this same paperback volume.

There are a great many instructions in this work for which there was no counterpart in NJI (1969). Two examples of instructions that are brand new to this work are all of Chapter 15, Contracts, and Part E of Chapter 4, Damages For Breach of

USE NOTE

Contracts.

Regarding most of the instructions for use in civil actions, the instruction numbers in NJI (1969) have been carried forward into this work. That means that, with a few exceptions, old and new cases turned up in a computer search run by instruction number should be on the same topic.

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NEBRASKA JURY INSTRUCTIONS

SECOND CIVIL

RULE ADOPTED BY THE SUPREME COURT OF NEBRASKA WITH REFERENCE TO NEBRASKA JURY INSTRUCTIONS, SECOND EDITION

On March 8, 1989, the Supreme Court of Nebraska adopted the following rule to govern the use of NJI2d pattern jury instructions, Civil and Criminal:

(a) Nebraska Jury Instructions, Second Edition (NJI2d), is designed for use when the instruction correctly states the law and the pleadings and evidence calls for such an instruction. Where applicable, a trial judge may utilize an appropriate NJI instruction.

(b) The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions. The trial court may direct counsel for either party to prepare designated instructions. Counsel may object at the conference on instructions to any instruction regardless of who prepared it. At the conference on instructions, each counsel should aid the trial court by stating any specific objection that he or she has on any instruction proposed to be given.

The rule of practice adopted by this court on November 20, 1968, requiring use of the Nebraska Jury Instructions is hereby rescinded.

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I. PURPOSE OF AN INSTRUCTION

"The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired."¹

Furthermore, the court's instruction to the jury may cure an erroneous admission of evidence.²

¹First Nat'l Bank v. Bolzer, 221 Neb. 415, 420, 377 N.W.2d 533, 536-37 (1985) (quoting Bodtke v. Bratten, 166 Neb. 36, 45, 88 N.W.2d 159, 166 (1958)). *Accord* Nguyen v. Rezac, 256

Neb. 458, 464, 590 N.W.2d 375, 379 (1999).

²*E.g.*, Pantano v. Am. Blue Ribbon Holdings, 303 Neb. 156, 163, 927 N.W.2d 357, 364 (2019); Olson v. City

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II. THE TRIAL JUDGE'S GENERAL DUTY REGARDING JURY INSTRUCTION

The Nebraska Supreme Court has often stated the rule that the trial judge must define the issues of the lawsuit. Presenting a case to the jury is properly done through a clear and concise statement of those issues that find support in the evidence. The trial court must instruct on the issues presented by the pleadings and the evidence, whether requested to do so or not, "and failure to do so constitutes prejudicial error."³ Furthermore, the trial court's duty is to submit only issues raised by the pleadings and supported by the evidence.⁴

of Omaha, 232 Neb. 428, 432, 441 N.W.2d 149, 153 (1989); Thomas v. Shea, 90 Neb. 823, 833, 134 N.W. 933, 936 (1912) (citing cases).

³Brown v. Kaar, 178 Neb. 524, 529, 134 N.W.2d 60, 63 (1965). *Accord*, e.g., In re Application of SID No. 384, 259 Neb. 351, 360, 609 N.W.2d 679, 687 (2000); Battle Creek State Bank v. Haake, 255 Neb. 666, 686, 587 N.W.2d 83, 95 (1998); McLaughlin v. Hellbusch, 251 Neb. 389, 395, 557 N.W.2d 657, 661 (1997) (tendered instruction properly refused because incorrect; even though tendered instruction incorrect, trial court had duty to give correct instruction); Wilson v. Misko, 244 Neb. 526, 543, 508 N.W.2d 238, 250 (1993) (plaintiffs proposed instruction properly refused because incomplete; because issue raised by pleading and evidence, trial court must give correct instruction on its own motion); Enyeart v. Swartz, 213 Neb. 732, 734-35, 331 N.W.2d 513, 515 (1983), *appeal after remand* 218 Neb. 425, 355 N.W.2d 786 (1984) (Uniform practice in Nebraska: trial court instructs as to specific acts of negligence pleaded and evidenced, and "failure to do so, even though not requested, is error"); Whittington v. Neb. Natural Gas Co., 177 Neb. 264, 279, 128 N.W.2d 795, 804 (1964); Watson Bros. Trans. Co. v. Jacobson, 168 Neb. 862, 868, 97 N.W.2d 521, 526 (1959); Thurow v. Schaeffer, 151 Neb. 651, 656, 38 N.W.2d 732, 736 (1949) (citing cases); Derr v. Gunnell, 127 Neb. 708, 711, 256 N.W. 725, 726 (1934).

⁴E.g., Jacobs Engr. Group v. ConAgra Foods, 301 Neb. 38, 72, 917 N.W.2d 435, 462 (2018); Rodriguez v. Surgical Assoc., 298 Neb. 573, 582, 905 N.W.2d 247, 257 (2018); Armstrong v. Clarkson Coll., 297 Neb. 595, 624, 901 N.W.2d 1, 22 (2017) (finding no error in the failure to give the tendered instruction because it "was not warranted by the evidence."); Roth v. Wiese, 271 Neb. 750, 767, 716 N.W.2d 419, 435 (2006); Streeks v. Diamond Hill Farms, 258 Neb. 581, 599, 605 N.W.2d 110, 124 (2000) ("Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial."); Hausman v. Cowen, 257 Neb. 852, 860, 601 N.W.2d 547, 553 (1999) ("This is so because instructions on matters not at issue in the litigation improperly distract the jury from its efforts to answer legitimate factual questions raised during the trial."); Rosberg v. Lingenfelter, 246 Neb. 85, 87, 516 N.W.2d 625, 626 (1994) (error to submit issue not pleaded); Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 784, 515 N.W.2d 756, 762 (1994) ("The issues of a case are framed by the pleadings."); Jensen v. Archbishop Bergan Mercy Hosp., 236 Neb. 1, 8-9, 459 N.W.2d 178, 182 (1990) ("Jury instructions should be confined to issues presented by the pleadings and supported by evidence. Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial." (citation and paragraph break

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Presenting a case to the jury is properly done through a clear and concise statement of those issues that find support in the evidence.⁵

Note that a pleading may be amended to conform to the proof if the proposed amendment does not change substantially the claim or defense.⁶

The trial judge's duty to instruct the jury on the applicable law, and to get it right, is also discussed in various of its aspects below, throughout this Introductory Comment & Authorities.

III. USE OF THESE PATTERN INSTRUCTIONS

"The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used." That is, the pattern instruction is to be used whenever instruction is called for and there is a pattern that correctly states the law.⁷ And, said a bit differently, these pattern instructions "are designed to be used when they reflect the law and the pleadings and the evidence call for such an instruction."⁸

"[A]s a general matter a trial court retains discretion in the wording of jury instructions."⁹ These instructions are patterns and may need

omitted)); *Kluender v. Mattea*, 214 Neb. 327, 331-32, 334 N.W.2d 416, 419-20 (1983) ("trial court must eliminate all matters not in dispute and submit . . . only the controverted questions of fact upon which the verdict must depend"); *Chard v. New York Life Ins. Co.*, 145 Neb. 429, 439, 16 N.W.2d 858, 864 (1944) (citing cases).

⁵*Kresha Constr. Co. v. Kresha*, 184 Neb. 188, 191, 166 N.W.2d 589, 591 (1969); *Franks v. Jirdon*, 146 Neb. 585, 585, 20 N.W.2d 597, 598 (1945) (paragraph 5 of the syllabus by the court), quoted in *Snyder v. Farmers Irrig. Dist.*, 157 Neb. 771, 774, 61 N.W.2d 557, 560 (1953), and paraphrased in *Nama v. Shada*, 150 Neb. 362, 369-70, 34 N.W.2d 650, 654 (1948). See also *Schmidt v. Johnson*, 184 Neb. 643, 647, 171 N.W.2d 64, 66 (1969) ("The question is, primarily, whether or not the instructions given have support in the evidence.").

⁶*Neb. Rev. Stat. § 25-852* (Reissue 2016); *Meyer v. Sandhills Beef, Inc.*, 211 Neb. 388, 389, 318 N.W.2d 863, 864 (1982).

⁷See *State v. Greer*, 257 Neb. 208, 215, 596 N.W.2d 296, 302 (1999) (criminal case: "Whenever an instruction from Nebraska Jury Instruction is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on [the] subject is appropriate, the instruction in the Nebraska Jury Instructions should be used").

⁸*Nguyen v. Rezac*, 256 Neb. 458, 464, 590 N.W.2d 375, 379 (1999) (emphasis and multiple quotation marks omitted). *Accord, e.g.*, *McClure v. Forsman*, 266 Neb. 90, 99, 662 N.W.2d 566, 574 (2003); *Mahoney v. Neb. Methodist Hosp.*, 251 Neb. 841, 850, 560 N.W.2d 451, 457 (1997); *Anderson v. Nashua Corp.*, 246 Neb. 420, 426, 519 N.W.2d 275, 280 (1994) (citing *Neb. Ct. R. regarding NJI2d Civ.*).

⁹*State v. Brunzo*, 248 Neb. 176, 200, 532 N.W.2d 296, 311 (1995). *Accord, e.g.*, *Nguyen v. Rezac*, 256 Neb. 458, 464, 590 N.W.2d 375, 379 (1999) (deviation from the pattern instruction is not per se erroneous); *State v. Medina*, 227 Neb. 736, 739, 419 N.W.2d

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to be tailored to the particular lawsuit.¹⁰ As noted in the paragraph above, however, whenever one of the pattern instructions applies, it should be used.

“Obviously, any instruction derived from the comments to the Nebraska Jury Instructions must also meet the same criteria.”¹¹

It is equally clear that “failure to use the pattern instruction does not require reversal.”¹²

These instructions are not evidence of the law of Nebraska.¹³

IV. DRAFTING NEW INSTRUCTIONS

When new instructions must be drafted, they should, when possible, be drafted as positive rather than negative statements.¹⁴ And they “should be couched in neutral and nonargumentative language.”¹⁵

The trial court is not required to use the exact language used by the Supreme Court in stating a rule of law.¹⁶ See also part III of this Introductory Comment & Authorities, above, noting that the trial court retains discretion in the wording of jury instructions.

“[T]he trial court is not required to define language commonly used and generally understood.”¹⁷

“The meaning of an instruction, and not its phraseology is the important consideration An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.”¹⁸

864, 867 (1988).

¹⁰*Nguyen v. Rezac*, 256 Neb. 458, 464, 590 N.W.2d 375, 379 (1999).

¹¹*Mahoney*, 251 Neb. at 850, 560 N.W.2d at 457 (instruction using language from Comment not per se erroneous).

¹²*McClure v. Forsman*, 266 Neb. 90, 99, 662 N.W.2d 566, 574 (2003).

¹³*Mahoney*, 251 Neb. at 850, 560 N.W.2d at 457; *Anderson*, 246 Neb. at 426, 519 N.W.2d at 280.

¹⁴See *Jones v. Foutch*, 203 Neb. 246, 255–56, 261, 278 N.W.2d 572, 580 (1979). Cf. *Kluender v. Mattea*, 214 Neb. 327, 333, 334 N.W.2d 416, 420 (1983) (“Generally, the trial court is

not required to instruct negatively.”); *O’Neil v. Behrendt*, 212 Neb. 372, 376, 322 N.W.2d 790, 792–93 (1982).

¹⁵*Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 443, 345 N.W.2d 300, 307 (1984).

¹⁶*Lange Bldg. & Farm Supply, Inc. v. Open Circle “R”, Inc.*, 216 Neb. 1, 9, 342 N.W.2d 360, 364 (1983).

¹⁷*Omaha Nat’l Bank v. Mfrs Life Ins. Co.*, 213 Neb. 873, 878–79, 332 N.W.2d 196, 200 (1983).

¹⁸*Omaha Nat’l Bank v. Mfrs Life Ins. Co.*, *supra* (quoting *Greenberg v. Bishop Clarkson Mem’l Hosp.*, 201 Neb. 215, 221, 266 N.W.2d 902, 907 (1978) (ellipses added in *Omaha Nat’l Bank*). *Accord* *Melcher v. Bank of*

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V. COPYING THE PLEADINGS CONDEMNED AS A METHOD OF JURY INSTRUCTION

The practice of substantially copying the pleadings into instructions or reading the pleadings to the jury as a way of stating the issues has been "consistently condemned." The trial court has the duty "to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions."¹⁹ The trial court should eliminate immaterial matters from the pleadings and submit only those matters properly to be decided by the jury.²⁰ Substantially copying the pleadings is sufficient grounds for reversal if it results in prejudice to the complaining party.²¹

VI. A PARTY'S SUBMISSION OF REQUESTED INSTRUCTIONS

By statute, parties must submit requested instructions in writing.²² "[A]lthough [the statute] directs that a requested instruction be written, when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction."²³

Unless counsel waives this requirement in open court, instructions must be reduced to writing before they are given to the jury.²⁴ This does not require however, that the court reduce to writing all admonitions given to the jury during the progress of a trial.²⁵

Regarding invited error, *see* part VII(C) of this Introductory Comment & Authorities, below.

Madison, 248 Neb. 793, 801, 539 N.W.2d 837, 843 (1995).

¹⁹*Greenberg v. Bishop Clarkson Mem'l Hosp.*, 201 Neb. 215, 220, 266 N.W.2d 902, 906 (1978) (quoting *Marquardt v. Nehawka Farmers Coop. Co.*, 186 Neb. 494, 498, 184 N.W.2d 617, 621 (1971)). *Accord, e.g.*, *Kresha Constr. Co. v. Kresha*, 184 Neb. 188, 191, 166 N.W.2d 589, 591 (1969); *Franks v. Jirdon*, 146 Neb. 585, 592, 20 N.W.2d 597, 601 (1945).

²⁰*Empire State Bldg. Co. v. Bryde*, 211 Neb. 184, 192, 318 N.W.2d 65, 70 (1982) (citing cases).

²¹*Neb. State Bank v. Dudley*, 194 Neb. 1, 4, 229 N.W.2d 559, 561 (1975), *appeal after remand*, 198 Neb. 132, 252 N.W.2d 277 (1977); *Kroeger v. Safranek*, 161 Neb. 182, 187-88, 72 N.W.2d 831, 838 (1955). It is sufficient grounds for reversal if it may have

misled the members of the jury. *Snyder v. Farmers Irrig. Dist.*, 157 Neb. at 774, 61 N.W.2d at 560; *Weisenmiller v. Nestor*, 154 Neb. at 842, 49 N.W.2d at 682; *Conley v. Hays*, 153 Neb. at 740-41, 45 N.W.2d at 905; *Franks v. Jirdon*, 146 Neb. at 592, 20 N.W.2d at 601 (citing cases).

²²Neb. Rev. Stat. § 25-1111 (Reissue 2016) (annotating cases).

²³*State v. Grant*, 242 Neb. 364, 369-70, 495 N.W.2d 253, 257 (1993) (citing cases).

²⁴Neb. Rev. Stat. § 25-1111 (Reissue 2016). *See also* Neb. Rev. Stat. § 25-1107(5) (Reissue 2016) ("instructions shall be reduced to writing if either party requires it").

²⁵*Grandsinger v. State*, 161 Neb. 419, 438-39, 73 N.W.2d 632, 646 (1955).

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VII. TIMELY AND SPECIFIC OBJECTION REQUIRED (ABSENT PLAIN ERROR)

A. TIMELY AND SPECIFIC OBJECTION

Absent plain error indicative of a probable miscarriage of justice, a party who does not object when the trial court submits an instruction for review, may not object to that instruction on appeal.²⁶ “Because [the plaintiff] failed to object to the giving of the instruction, we review for plain error. Plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.”²⁷

A party may not complain that an instruction was not specific enough when he or she did not request a more specific instruction.²⁸

“The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.”²⁹

²⁶*E.g.*, *Scheele v. Rains*, 292 Neb. 974, 983, 874 N.W.2d 867, 872 (2016); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 1027, 858 N.W.2d 196, 215-16 (2015); *Kuhnel v. BNSF Ry Co.*, 287 Neb. 541, 546, 844 N.W.2d 251, 254 (2014); *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 56, 793 N.W.2d 338, 346 (2011); *Shipferling v. Cook*, 266 Neb. 430, 434-35, 665 N.W.2d 648, 653 (2003); *Russell v. Stricker*, 262 Neb. 853, 861, 635 N.W.2d 734, 740 (2001) (defining and finding plain error); *Farmers & Merchs. Bank v. Grams*, 250 Neb. 191, 198, 548 N.W.2d 764, 770 (1996) (party objected to instruction on an issue not pled, but on the wrong grounds: i.e. because he wanted it worded differently); *Long v. Hacker*, 246 Neb. 547, 554-55, 520 N.W.2d 195, 200 (1994) (defines plain error; notes plain error may be first asserted on appeal or noted by appellate court on its own motion); *Crewdson v. Burlington N. R.R. Co.*, 234 Neb. 631, 639, 452 N.W.2d 270, 278 (1990) (“Although BN objected to one portion of instruction no. 2 at the instruction conference, it did not object to those portions of which it now complains. Under the cir-

cumstances, objections to those portions of the instruction not raised at the instruction conference have been waived.”).

²⁷*Scheele*, *supra* (footnotes omitted). *Accord*, *e.g.*, *Foundation One Bank v. Svoboda*, 303 Neb. 624, 632, 931 N.W.2d 431, 437 (2019); *Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 8, 892 N.W.2d 74, 80 (2017). *See also* part VII(B) of this Introductory Comment & Authorities.

²⁸*Beatty v. Davis*, 224 Neb. 663, 671, 400 N.W.2d 850, 855 (1987); *McCauley v. Briggs*, 218 Neb. 403, 408, 355 N.W.2d 508, 512 (1984); *Erickson v. Monarch Indus.*, 216 Neb. 875, 883, 347 N.W.2d 99, 107 (1984); *O’Neil v. Behrendt*, 212 Neb. 372, 378, 322 N.W.2d 790, 793 (1982); *State v. Buchanan*, 210 Neb. 20, 25, 312 N.W.2d 684, 687 (1981); *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 702, 211 N.W.2d 914, 916 (1973). *See also* *Stahlhut v. County of Saline*, 176 Neb. 189, 203, 125 N.W.2d 520, 529 (1964).

²⁹*Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 659, 658 N.W.2d 662, 666-67 (2003). *Accord* *Steele v.*

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"[O]bjections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned."³⁰

As noted above, the general rule is that counsel must object to instructions when submitted to him or her for review. Anything later than that is not a timely objection. This general rule "does not prevent the trial judge from correcting his or her instruction error by sustaining a motion for a new trial."³¹

The timely and specific objection must be on the record.³²

Where the record does not contain the jury instruction complained of on appeal, the decision of the lower court will be affirmed.³³

Whether requested to do so or not, the trial judge has the duty to instruct the jury on the applicable law, and to get it right. Though it is not error for the trial court to refuse to give a requested instruction if that instruction does not correctly state the law, it may be error for the trial court to give no instruction at all on the issue. If the court either does not instruct on the applicable law or does so improperly, Nebraska appellate courts may notice such error as plain error. The issue may be raised on appeal even if there was no objection at trial. This is discussed in part II of this Introductory Comment & Authorities, above.

Where the court gives two instructions that are substantially simi-

Sedlacek, 267 Neb. 1, 8, 673 N.W.2d 1, 9 (2003); Olson v. Sherrerd, 266 Neb. 207, 213, 663 N.W.2d 617, 622 (2003) (quoting *Kment*, *supra*).

³⁰Bradley T. & Donna T. v. Central Catholic High Sch., 264 Neb. 951, 960, 653 N.W.2d 813, 820 (2002).

³¹Wheeler v. Bagley, 254 Neb. 232, 236, 575 N.W.2d 616, 618 (1998).

³²Shipferling v. Cook, 266 Neb. 430, 434-35, 665 N.W.2d 648, 653 (2003) (the jury instruction conference was not recorded; there is, therefore, no record of whether or not counsel objected to the jury instruction given (and complained of on appeal); the assigned errors were not preserved for review and there was no plain error; therefore, the assigned errors will not be considered).

³³In re Application of SID No. 384, 259 Neb. 351, 359, 609 N.W.2d 679, 686 (2000) (here, however, the complained of instruction was in the record of an earlier appeal of this same case and the court took judicial notice

of that record); Lange v. Crouse Cartage Co., 253 Neb. 718, 724, 572 N.W.2d 351, 355 (1998) (citing cases) (appellant has the burden of directing the clerk to include in the transcript the instructions given and those tendered but refused); Leonard v. Wilson, 238 Neb. 1, 4, 468 N.W.2d 604, 606 (1991) (complaining party must present a record to support the error assigned; instructions given by trial court were not in the record); Terry v. Duff, 246 Neb. 524, 529, 519 N.W.2d 550, 553 (1994) (appellant complained court erred in giving one of its instructions and in not giving appellant's proposed instruction instead; instructions given were included in the record, but proposed instruction was not; pointing out that party appealing must present record supporting assigned errors, court limited review to whether it was error to give instruction given, and did not extend review to whether it was error to refuse proposed instruction).

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lar and counsel objects to one but not to the other, only the former will be considered on appeal. Any error caused by the instruction to which objection was lodged is rendered harmless by the instruction to which no objection was lodged. *See* the discussion of harmless error, below in part VIII(C) of this Introductory Comment & Authorities.

On a related matter, unless counsel offers at trial a sufficiently specific objection to the admission of evidence, then the admission of the evidence is not grounds for appeal.³⁴

B. PLAIN ERROR

Absent plain error indicative of a probable miscarriage of justice, a party who does not object when the trial court submits an instruction for review, may not object to that instruction on appeal. *See* the discussion in part VII(A) of this Introductory Comment & Authority, above. Plain error in the jury instructions can be raised on appeal even if there was no objection at trial. It can be asserted by the party prejudiced or noted by the appellate court on its own motion.³⁵

Similarly, Nebraska statutes provide that when giving or refusing to give instruction to the jury adversely affects the substantial rights of the litigant, the litigant may preserve his or her rights without noting an exception thereto on the record.³⁶

Plain error exists where there is error, plainly evident from the record but not complained of at trial or before the Court of Appeals, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.³⁷

C. INVITED ERROR

“A party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury.”³⁸ This is part of the larger rule that “[a] party cannot complain of error which the party

³⁴E.g., *U.S. Pipeline v. Northern Nat. Gas Co.*, 303 Neb. 444, 471, 930 N.W.2d 460, 478 (2019).

³⁵*Worth v. Kolbeck*, 273 Neb. 163, 175, 728 N.W.2d 282, 293 (2007).

³⁶Neb. Rev. Stat. § 25-1139 (Reissue 2016).

³⁷Same quotation: *Worth v. Kolbeck*, 273 Neb. 163, 175, 728 N.W.2d 282, 293 (2007); *Jolly v. State*, 252 Neb. 289, 290, 562 N.W.2d 61, 63

(1997); *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 458, 558 N.W.2d 303, 304 (1997); *Priest v. Priest*, 251 Neb. 76, 79, 554 N.W.2d 792, 795-96 (1996). *See additionally* the cases footnoted in the first paragraph of subpart A of this part of this Introductory Comment & Authorities, above.

³⁸*Wooley v. Kittle*, 209 Neb. 669, 674, 309 N.W.2d 805, 808 (1981).

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has invited the court to commit.”³⁹ Regarding invited error and jury instruction after the jury has retired to deliberate, see *Brodersen v. Traders Insurance Co.*, where the judge “refused to answer” questions the jury submitted during deliberation. The Supreme Court held that even if this was error, since the judge did this with the agreement of the parties, it was invited and cannot be raised on appeal.⁴⁰

VIII. ERRONEOUS INSTRUCTION

A. QUESTION OF LAW ON APPEAL

“Whether the jury instructions given by a trial court are correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.”⁴¹

B. ERROR

“It is not error for a trial court to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or are inapplicable to the issues involved.”⁴²

The trial court may, however, be required to give a correct instruction in place of the incorrect tendered instruction. “A litigant is entitled to have the jury instructed upon only those theories of the case that are presented by the pleadings and that are supported by competent

³⁹Terry v. Duff, 246 Neb. 524, 529, 519 N.W.2d 550, 553 (1994).

⁴⁰Brodersen v. Traders Ins. Co., 246 Neb. 688, 691, 523 N.W.2d 24, 26 (1994).

⁴¹Same quotation, e.g.: O’Brien v. Cessna Aircraft Co., 298 Neb. 109, 143, 903 N.W.2d 432, 461 (2017); Armstrong v. Clarkson Coll., 297 Neb. 595, 611–12, 901 N.W.2d 1, 16 (2017); Anderson v. Union Pac. RR. Co, 295 Neb. 785, 792, 890 N.W.2d 791, 796 (2017) (citations omitted); United Gen. Title Ins. Co. v. Malone, 289 Neb. 1006, 1018, 858 N.W.2d 196, 210 (2015) (footnotes omitted). Accord, e.g., Bank v. Mickels, 302 Neb. 1009, 1016, 926 N.W.2d 97, 103 (2019); Jacobs Engr. Group v. ConAgra Foods, 301 Neb. 38, 51, 917 N.W.2d 435, 450 (2018); Lindsay Internat. Sales & Serv. v. Wegener, 301 Neb. 1, 10, 917 N.W.2d

133, 141 (2018); First Nat. Bank North Platte v. Cardenas, 299 Neb. 497, 502, 909 N.W.2d 79, 85 (2018); Rodriguez v. Surgical Assoc., 298 Neb. 573, 582, 905 N.W.2d 247, 256 (2018); RM Campbell Indus. v. Midwest Renewable Energy, 294 Neb. 326, 332, 886 N.W.2d 240, 249 (2016); In re Estate of Clinger, 292 Neb. 237, 246, 872 N.W.2d 37, 46 (2015); Golnick v. Callender, 290 Neb. 395, 400, 860 N.W.2d 180, 187 (2015); Gary’s Implement v. Bridgeport Tractor Parts, 281 Neb. 281, 289, 799 N.W.2d 249, 257 (2011); Smith v. Colorado Organ Recovery Sys., Inc., 269 Neb. 578, 583, 694 N.W.2d 610, 618 (2005). See also the cases and discussion under the subheading “Burden on Appeal,” below.

⁴²Grote v. Meyers Land & Cattle Co., 240 Neb. 959, 972–73, 485 N.W.2d 748, 759 (1992) (emphasis omitted).

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evidence.”⁴³ The trial court’s duty to instruct on the applicable law is discussed above, in part II of this Introductory Comment; *see also* N.JI2d Civ. 1.01, Comment; N.JI2d Civ. 2.01, Comment & Authorities.

“It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.”⁴⁴

“In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is not prejudicial error.”⁴⁵

“[I]t is not error . . . to refuse a request for additional instructions

⁴³*Domjan v. Faith Reg’l Health Servs.*, 273 Neb. 877, 887–88, 735 N.W.2d 355, 362–63 (2007). *Accord Rodriguez*, 298 Neb. at 582, 905 N.W.2d at 256; *Armstrong*, 297 Neb. at 611, 901 N.W.2d at 16; *RM Campbell Indus.*, 294 Neb. at 341, 886 N.W.2d at 254; *Worth v. Kolbeck*, 273 Neb. 163, 169, 728 N.W.2d 282, 289 (2007); *Shipler v. Gen’l Motors Corp.*, 271 Neb. 194, 204, 238, 710 N.W.2d 807, 821, 843 (2006); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 50, 555 N.W.2d 32, 36 (1996).

⁴⁴Same quotation: *Karel v. Neb. Health Sys.*, 274 Neb. 175, 184, 738 N.W.2d 831, 839 (2007); *Steele v. Sedlacek*, 267 Neb. 1, 8, 673 N.W.2d 1, 9 (2003); *Carnes v. Weesner*, 229 Neb. 641, 646, 428 N.W.2d 493, 497 (1988); *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186, 188 (1983) (syllabus by the court). *Accord, e.g.*, *First Nat. Bank North Platte v. Cardenas*, 299 Neb. 497, 504, 909 N.W.2d 79, 86 (2018); *Armstrong*, 297 Neb. at 612, 901 N.W.2d at 16; *Golnick v. Callender*, 290 Neb. 395, 413, 860 N.W.2d 180, 195 (2015); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 1026, 858 N.W.2d 196, 215 (2015); *Worth v. Kolbeck*, 273 Neb. 163, 173, 728 N.W.2d 282, 292 (2007); *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 659, 658 N.W.2d 662, 667 (2003); *McLain v. Ortmeier*, 259 Neb. 750, 753, 758, 612 N.W.2d 217, 221, 224 (2000); *McLaughlin v. Hellbusch*, 251 Neb. 389, 395, 557 N.W.2d, 657, 661 (1997) (citing

cases) (detailed instruction requested; shorter, more generic instruction given).

⁴⁵*McLain v. Ortmeier*, 259 Neb. 750, 754, 758, 612 N.W.2d 217, 221, 224 (2000). *Accord, e.g.*, *Douglas Cty. Sch. Dist. No. 10 v. Tribedo, LLC*, 307 Neb. 716, 729, 950 N.W.2d 599, ____ (2020) (stating that the requested instructions correctly stated the law, the requesting party was not prejudiced by the court’s failure to give them); *Dick v. Koski Prof. Group*, 307 Neb. 599, 633, 950 N.W.2d 321, ____ (2020) (“Jury instructions must be read together; they must be read conjunctively rather than separately in isolation.”); *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 72, 917 N.W.2d 435, 462 (2018); *First Nat. Bank North Platte*, 299 Neb. at 504, 299 N.W.2d at 86; *Rodriguez*, 298 Neb. at 583, 905 N.W.2d at 247; *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 143, 903 N.W.2d 432, 461 (2017); *Armstrong*, 297 Neb. at 612, 901 N.W.2d at 16; *In re Estate of Clinger*, 292 Neb. 237, 246, 872 N.W.2d 37, 51 (2015); *United Gen. Title Ins.*, 289 Neb. at 1026, 858 N.W.2d at 215; *Wulf v. Kunnath*, 285 Neb. 472, 479, 827 N.W.2d 248, 254 (2013); *Gary’s Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 290, 799 N.W.2d 249, 258 (2011); *Smith v. Fire Ins. Exch. of L.A.*, 261 Neb. 857, 860, 626 N.W.2d 534, 537 (2001) (reviewing one particular instruction in light of the others, the Court finds prejudicial error); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 634, 587 N.W.2d 355,

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where [the court] has, on its own motion, fairly and fully instructed the jury on a party's theory of the case."⁴⁶ On the other hand, it is error to refuse to give proper requested instructions that are not covered by other instructions.⁴⁷

"A trial court is not required to give a proffered instruction upon a subordinate issue or which unduly emphasizes a part of the evidence in a case."⁴⁸

"The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the discretion of the trial court."⁴⁹

The repetition of a proposition of law in the instructions is not reversible error unless the effect was to confuse or mislead the jury or the "instructions . . . so repetitiously cover a point of law or its application as to grossly overstate its effect on one side to the explicit detriment of the other side."⁵⁰ Likewise, though duplication might sometimes prejudice a party, the key is not whether there is duplication, but whether the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.⁵¹ Normally, then, the key to whether duplication is prejudicial is whether, taking the instructions as a whole, it is misleading.

Generally: "A party's right to a fair trial may be substantially impaired by jury instructions that contain incorrect information, sug-

362 (1998) (court could have added words for clarity but not doing so was not prejudicial error); *Melcher v. Bank of Madison*, 248 Neb. 793, 801, 539 N.W.2d 837, 843 (1995) (a more complete definition might have been preferable but lack of same was not prejudicial error).

⁴⁶*Gilbert v. Archbishop Bergan Mercy Hosp.*, 228 Neb. 148, 154, 421 N.W.2d 760, 764 (1988). *See also, e.g.*, *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 863, 468 N.W.2d 105 (1991); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 568, 407 N.W.2d 170, 174 (1987).

⁴⁷*Neb. Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 48, 497 N.W.2d 657, 667 (1993).

⁴⁸*Kluender v. Mattea*, 214 Neb. 327, 331, 334 N.W.2d 416, 419 (1983). Regarding undue emphasis, *accord*, *Denesia v. St. Elizabeth Cmty. Health*

Ctr., 235 Neb. 151, 167-70, 454 N.W.2d 294, 305-306 (1990) (undue emphasis through cumulative instructions); *State v. Harrison*, 221 Neb. 521, 525, 378 N.W.2d 199, 202 (1985); *Havelock Bank of Lincoln v. Borgen*, 212 Neb. 70, 76, 321 N.W.2d 432, 436 (1982).

⁴⁹*Anderson v. Babbe*, 304 Neb. 186, 193, 933 N.W.2d 813, 816 (2019).

⁵⁰*Watson v. McNamara*, 229 Neb. 1, 3, 424 N.W.2d 611, 613 (1988). *Accord Denesia*, 235 Neb. at 169-70, 454 N.W.2d at 306 (four instructions "so repetitiously emphasized the point . . . as to overstate the point's effect and thereby confuse and mislead the jury"). *See also* *State v. Andersen*, 213 Neb. 695, 705, 331 N.W.2d 507, 513 (1983) (criminal case).

⁵¹*Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 51, 555 N.W.2d 32, 36 (1996).

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gest an improper shift of the burden of proof, misstate the law upon a vital issue, improperly single out or give undue prominence to particular evidence or facts, contain inconsistencies, or confuse or mislead the jury.”⁵²

Specifically:

■ “ ‘Jury instructions should be confined to issues presented by the pleadings and supported by evidence.’ ‘Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial.’ ”⁵³

■ “A jury instruction that misstates issues or defenses and has a tendency to mislead the jury is erroneous.”⁵⁴

■ “A trial court is not required to submit repetitious allegations of the same act of negligence.”⁵⁵

⁵²*Neb. Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. at 47, 497 N.W.2d at 667 (citing cases). *Accord*

Domjan v. Faith Reg'l Health Servs., 273 Neb. 877, 888, 735 N.W.2d 355, 363 (2007) (“confuse or mislead”); *Pribil v. Koinzan*, 266 Neb. 222, 231, 665 N.W.2d 567, 575 (2003); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 47, 575 N.W.2d 341, 347 (1998) (containing inconsistencies; confusing or misleading).

⁵³*Renne v. Moser*, 241 Neb. 623, 633, 490 N.W.2d 193, 200 (1992) (citations and paragraph break omitted). *Accord* *First Nat. Bank North Platte v. Cardenas*, 299 Neb. 497, 502, 909 N.W.2d 79, 85 (2018) (supporting the first sentence); *Long v. Hacker*, 246 Neb. 547, 552, 520 N.W.2d 195, 199 (1994) (“A trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. . . . Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.”). *See* *NJI2d Civ. 2.01, Comment* (citing and discussing

cases).

“A party may not complain of the failure of the trial court to instruct on issues that are outside the scope of the pleadings.” *Dick v. Koski Prof. Group*, 307 Neb. 599, 632, 950 N.W.2d 321, — (2020).

⁵⁴*Terry v. Duff*, 246 Neb. 524, 531, 519 N.W.2d 550, 554 (1994). *Accord* *Scheele v. Rains*, 292 Neb. 974, 983, 874 N.W.2d 867, 874 (2016) (footnotes omitted) (“ ‘an instruction which misstates the law upon a vital issue is not cured by another which states the law correctly’ ”); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 636, 587 N.W.2d 355, 363 (1998); *Tapp*, 254 Neb. at 57, 575 N.W.2d at 353; *Storjohn v. Fay*, 246 Neb. 454, 456, 519 N.W.2d 521, 524 (1994).

⁵⁵*O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 144, 903 N.W.2d 432, 461 (2017) (“This court . . . has placed the duty squarely upon the trial court to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions.”).

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■ “[I]t is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.”⁵⁶

■ “Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.”⁵⁷

■ “A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.”⁵⁸

■ “[I]t is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.”⁵⁹

■ In *Gary's Implement Inc. v. Bridgeport Tractor Parts, Inc.*, the Court held that the trial court committed prejudicial error when it gave a jury instruction that affirmatively stated the existence of a fact-in-issue that was for the jury to decide.⁶⁰

■ Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not misled.⁶¹

■ “[F]or those cases where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense, we

⁵⁶*Dolberg v. Paltani*, 250 Neb. 297, 305, 549 N.W.2d 635, 640 (1996) (error at least in this case) (citing cases). *Accord* *Long v. Hacker*, 246 Neb. 547, 552, 520 N.W.2d 195, 199 (1994) (“[I]nstruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.”) (citations omitted). *See* *NJI2d Civ. 2.01*, Comment (citing and discussing cases).

⁵⁷Same quotation: *Domjan v. Faith Reg'l Health Servs.*, 273 Neb. 877, 886, 735 N.W.2d 355, 361 (2007); *Jay v. Moog Auto.*, 264 Neb. 875, 883, 652 N.W.2d 872, 881 (2002); *Springer v. Bohling*, 259 Neb. 71, 77, 607 N.W.2d 836, 840 (2000).

⁵⁸Same quotation: *Pribil supra*; *Barks v. Cosgriff Co.*, 247 Neb. 660, 669, 529 N.W.2d 749, 755 (1995). *Accord* *Kirchner v. Wilson*, 251 Neb. 56, 60, 554 N.W.2d 782, 785 (1996) (“We . . . now specifically rule that” since instruction that misstates burden of

proof has tendency to mislead jury, “it is prejudicially erroneous”).

⁵⁹*Wheeler v. Bagley*, 254 Neb. 232, 236, 575 N.W.2d 616, 618 (1998). For more on this point, *see* part II and VII(B) of this Introductory Comment & Authorities, above.

⁶⁰In *Gary's Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 300, 702 N.W.2d 355, 367 (2005) (“When the error in this case consisted of supplying terms to an ambiguous contract in the jury instruction, such error cannot be cured by the giving of other jury instructions. This is so because such an error consists not in the omission of some material fact, but in the affirmative statement by the court as to the existence of a fact which the jury ought to decide.”).

⁶¹*Pribil*, 266 Neb. at 231, 665 N.W.2d at 575; *Juniata Feedyards v. Nuss*, 216 Neb. 29, 34, 342 N.W.2d 1, 4 (1983) (citing cases). *See also* *Hamer-nick v. Essex Dodge Ltd.*, 247 Neb. 392, 394, 527 N.W.2d 196, 197 (1995).

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hold that it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with [Neb. Rev. Stat.] § 25-21,185.09.”⁶²

C. HARMLESS ERROR

“Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.”⁶³

D. BURDEN ON APPEAL

To establish reversible error from a court’s failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court’s failure to give the requested instruction.⁶⁴

To establish reversible error based on instructions given by the

⁶²Wheeler, 254 Neb. at 239, 575 N.W.2d at 620. *Accord* Russell v. Stricker, 262 Neb. 853, 857-60, 635 N.W.2d 734, 738-40 (2001) (a verdict form may not serve as a substitute for the jury instruction required by the statute).

⁶³Same quotation: Rodriguez v. Surgical Assoc., 298 Neb. 573, 582, 905 N.W.2d 247, 256 (2018); Jay v. Moog Auto., 264 Neb. 875, 883, 652 N.W.2d 872, 881 (2002); Smith v. Fire Ins. Exch. of L.A., 261 Neb. 857, 860, 626 N.W.2d 534, 537 (2001); Nelson v. Lusterstone Surfacing Co., 258 Neb. 678, 681-82, 605 N.W.2d 136, 140 (2000); Bunnell v. Burlington N. R.R. Co., 247 Neb. 743, 745, 530 N.W.2d 230, 231 (1995). *Accord, e.g.*, Dick v. Koski Prof. Group, 307 Neb. 599, 632, 950 N.W.2d 321, — (2020); Orduna v. Total Constr. Servs. Inc., 271 Neb. 557, 566, 713 N.W.2d 471, 480 (2006); Morris v. Rochester Midland Corp., 259 Neb. 870, 874-75, 612 N.W.2d 921, 924 (2000) (holding that where the court gives two instructions that are substantially similar and counsel objects to one but not to the other, counsel may only object to the former on appeal (see part VII(A) of this Introductory Comment & Authorities for a

discussion of timely and specific objection.); any error caused by the instruction to which objection was lodged is rendered harmless by the instruction to which no objection was lodged.); Corcoran v. Lovercheck, 256 Neb. 936, 941, 594 N.W.2d 615, 620 (1999) (any error in a contributory negligence instruction is harmless when “a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiffs’ contributory negligence”); Fales v. Books, 253 Neb. 491, 494-95, 570 N.W.2d 841, 843 (1997) (citing cases); Sedlak Aerial Spray v. Miller, 251 Neb. 45, 50, 555 N.W.2d 32, 36 (1996) (citing cases).

⁶⁴Same quotation, *e.g.*: Douglas Cty. Sch. Dist. No. 10 v. Tribedo, LLC, 307 Neb. 716, 725, 728-29 950 N.W.2d 599, —, — (2020); Dick v. Koski Prof. Group, 307 Neb. 599, 632, 950 N.W.2d 321, — (2020); Bank v. Mickels, 302 Neb. 1009, 1016-17, 926 N.W.2d 97, 103 (2019); Foundation One Bank v. Svoboda, 303 Neb. 624, 629, 631 N.W.2d 461, 436 (2019); Rodriguez v. Surgical Assoc., 298 Neb. 573, 583, 905 N.W.2d 247, 253 (2018); In re Estate of Clinger, 292 Neb. 237, 246, 872 N.W.2d 37, 51 (2015); United Gen. Title Ins. Co. v. Malone, 289 Neb.

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trial court, “the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.”⁶⁵

“It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. Because we cannot determine that the court’s failure to give this instruction was error, the district court’s ruling is affirmed.”⁶⁶

The need for a timely and specific objection to instructions given or refused is discussed in part VII of this Introductory Comment & Authorities, above (under the heading “Timely and Specific Objection Required (Absent Plain Error)”).

E. PLAIN ERROR

Plain error in the jury instructions can be raised on appeal even if there was no objection at trial. It can be asserted by the party prejudiced or noted by the appellate court on its own motion. This is discussed in part VII of this Introductory Comment & Authorities, above.

F. INVITED ERROR

A party may not complain on appeal that the judge committed reversible error by giving an instruction that the very same party tendered. This is discussed in part VII of this Introductory Comment & Authorities, above.

G. ERRONEOUS INSTRUCTION IN AN EQUITABLE ACTION

“[A] jury in an equitable action serves only in an advisory role.

1006, 1026, 858 N.W.2d 196, 214–15 (2015). *Accord, e.g.*, First Nat. Bank North Platte v. Cardenas, 299 Neb. 497, 504, 909 N.W.2d 79, 86 (2018); O’Brien v. Cessna Aircraft Co., 298 Neb. 109, 143, 903 N.W.2d 432, 460–61 (2017); RM Campbell Indus. v. Midwest Renewable Energy, 294 Neb. 326, 332, 341, 886 N.W.2d 240, 249, 254 (2016); Malena v. Marriott Int’l, 264 Neb. 759, 762, 651 N.W.2d 850, 853 (2002) (choice-of-laws and, therefore, choice-of-instruction question); Paulk v. Central Lab. Assocs., 262 Neb. 838, 845–46, 636 N.W.2d 170, 177 (2001) (citing then recent cases not cited here); Traphagan v. Mid-America Traffic Marking, 251 Neb. 143, 154, 555 N.W.2d 778, 786 (1996).

⁶⁵Same quotation: Facilities Cost Mgt. Group v. Otoe Cty. Sch. Dist., 291

Neb. 642, 658, 868 N.W.2d 67, 78 (2015); Karel v. Neb. Health Sys., 274 Neb. 175, 185, 738 N.W.2d 831, 840 (2007); Domjan v. Faith Reg’l Health Servs., 273 Neb. 877, 887, 735 N.W.2d 355, 362 (2007); Washington v. Qwest Commc’ns Corp., 270 Neb. 520, 527, 704 N.W.2d 542, 548 (2005); Gary’s Implement Inc. v. Bridgeport Tractor Parts, Inc., 270 Neb. 286, 297, 300, 702 N.W.2d 355, 365, 367 (2005); Veskerna v. Erickson, 254 Neb. 559, 565, 577 N.W.2d 736, 740 (1998) (citing cases). *Accord, e.g.*, Worth v. Kolbeck, 273 Neb. 163, 173, 728 N.W.2d 282, 292 (2007); Pribil v. Koinzan, 266 Neb. 222, 226, 665 N.W.2d 567, 572 (2003).

⁶⁶Worth v. Kolbeck, 273 Neb. 163, 176, 728 N.W.2d 282, 294 (2007).

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[W]hen the jury's role is advisory only, the trial court cannot commit reversible error in the giving or refusing of instructions."⁶⁷

IX. VERDICT FORMS

"Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted."⁶⁸ "[O]bjections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned."⁶⁹ *See also* NJI2d Civ. 2.01, Comment, and NJI2d Civ. 5.01, Comment.

X. PROVIDING JURORS WITH A WRITTEN COPY OF THE INSTRUCTIONS PRIOR TO THEIR BEING READ

The Committee recommends that each juror be provided with a copy of the instructions prior to their being read to the jury.

XI. GIVING FURTHER INSTRUCTION AND ANSWERING QUESTIONS AFTER THE JURY HAS BEGUN DELIBERATING

By statute (and as discussed above), all instructions given to the jury shall be reduced to writing. Furthermore, the trial judge is not allowed to give oral explanations of the instructions given to the jury. Violation of these provisions "shall be error . . . and sufficient cause for the reversal of the judgment rendered therein." Neb. Rev. Stat. § 25-1115 (Reissue 2016).

"[D]irecting a jury to reread properly given instructions is not an instruction as contemplated by § 25-1115."⁷⁰

By statute, if, after the jurors have retired for deliberation, there is a disagreement among them as to part of the testimony or "the law arising in the case," then, in court and "in the presence of or after notice to the parties or their counsel," the court may give its recollection of the testimony and information on the point of law. Neb. Rev. Stat. § 25-1116 (Reissue 2016). Under this statute, it is error to answer the jury's

⁶⁷D & S Realty v. Markel Ins. Co., 280 Neb. 567, 573, 789 N.W.2d 1, 8-9 (2010).

⁶⁸Highway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc., 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990) (including this: objections to any errors in verdict forms must be made at the instruction conference).

⁶⁹Bradley T. & Donna T. v. Cent. Catholic High Sch., 264 Neb. 951, 960,

653 N.W.2d 813, 820 (2002) (failure so to object constitutes waiver of objection).

⁷⁰In re Petition of Omaha Pub. Power Dist., 268 Neb. 43, 49, 680 N.W.2d 128, 135 (2004). *See also* Sesostri Temple Golden Dunes v. Schuman, 226 Neb. 7, 14-15, 409 N.W.2d 298, 303 (1987) (distinguishing between additional instruction and telling jury to reread previous instructions).

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question in the jury room, rather than in “open court.”⁷¹ It is also error to answer the jury’s questions without notice to the parties or their counsel.⁷²

Doing one or both of these things—answering the jury’s questions somewhere other than in the courtroom or without notice to the parties or their counsel—is error, but it is not necessarily reversible error. If the court responds to jury questions by telling them to reread the instructions already given, then it is not prejudicial error for the court to do so in the jury room, instead of the courtroom, and without notice to the parties or their counsel.⁷³

“[W]e have long held that whether to recall a jury after it has retired for deliberations is a matter entrusted to the discretion of the trial court.”⁷⁴

“[W]hether to answer a question of law posed by a jury which has retired for deliberations is likewise a matter entrusted to the discretion of the trial court.”⁷⁵ This is so even though the applicable statute states that, after the jury has begun deliberation, if they wish to be informed on any point of law “*information upon the point of law shall be given.*”⁷⁶ “[W]hile the word ‘shall’ may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word ‘shall’ be construed as permissive rather than mandatory, such will be done.”⁷⁷ The permissive interpretation of “shall”

⁷¹*In re Petition of Omaha Pub. Power Dist.*, 268 Neb. at 49, 680 N.W.2d at 136.

⁷²*Id.* at 49, 680 N.W.2d at 135-36. See also, e.g., *State v. Hudson*, 277 Neb. 182, 189, 761 N.W.2d 536, 542 (2009) (same as *In re Estate of Corbett*, *infra*); *State v. Jackson*, 264 Neb. 420, 430-31, 648 N.W.2d 282, 291 (2002) (criminal case); *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 690-91, 523 N.W.2d 24, 25-26 (1994); *In re Estate of Corbett*, 211 Neb. 335, 340, 318 N.W.2d 720, 723-24 (1982) (“‘If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instruction in writing in the presence of the parties or their counsel.’ . . . ‘[B]ut if it clearly appears that prejudice did not and could

not flow therefrom, this is error without prejudice and not ground for reversal.’”) (citations omitted).

⁷³*In re Petition of Omaha Pub. Power Dist.*, 268 Neb. at 49-50, 680 N.W.2d at 136; *Sesostriis Temple Golden Dunes*, 226 Neb. at 14-15, 409 N.W.2d at 303; *In re Estate of Corbett*, 211 Neb. at 340, 318 N.W.2d at 724 (quoted in the preceding paragraph).

⁷⁴*Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 55, 555 N.W.2d 32, 39 (1996).

⁷⁵*Sedlak Aerial Spray*, 251 Neb. at 55, 555 N.W.2d at 39.

⁷⁶*Sedlak Aerial Spray*, 251 Neb. at 54, 555 N.W.2d at 38, (quoting Neb. Rev. Stat. § 5-1116 (Reissue 1995) (emphasis supplied in *Sedlak*)).

⁷⁷*Sedlak Aerial Spray*, 251 Neb. at 55, 555 N.W.2d at 39.

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is not the general rule: “As a general rule, the word *shall* is considered mandatory and is inconsistent with the idea of discretion.”⁷⁸

XII. THE “PRESUMPTION” THAT THE JURY FOLLOWED THE INSTRUCTIONS

“It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.”⁷⁹ This is not a statutory presumption under Neb. Evid. R. 303, Neb. Rev. Stat. § 27-303 (Reissue 2016); rather, it is more a statement of the rule of law that the party challenging the verdict (here arguing the jury’s failure to follow instructions) has the burden of proving what it takes for his or her challenge to succeed.⁸⁰

XIII. JUROR TESTIMONY TO IMPEACH A VERDICT

Nebraska Evidence Rule 602 generally prohibits juror testimony and receipt of juror affidavits on inquiry into the validity of a verdict.⁸¹

XIV. GENERAL COMMENTS & AUTHORITIES

Regarding the order of trial, *see* Neb. Rev. Stat. §§ 25-1107, 29-2016 (Reissue 2016) (civil and criminal cases, respectively).

These pattern instructions refer to the participants in the lawsuit mostly by status (*e.g.*, plaintiff, defendant, third-party defendant, principal, agent, etc.). Names may, and often should, be substituted.

See also NJI2d Civ. 1.01, Authorities.

⁷⁸*Spaghetti Ltd. P’ship v. Wolfe*, 264 Neb. 365, 370, 647 N.W.2d 615, 620 (2002). *Accord, e.g.*, *Huntington v. Pedersen*, 294 Neb. 294, 305, 883 N.W.2d 48, 57 (2016).

⁷⁹*In re Estate of Clinger*, 292 Neb. 237, 246, 872 N.W.2d 37, 53 (2015) (the context here was instruction to the jury, during the trial, to disregard

certain evidence).

⁸⁰*See* NJI2d Civ. 12.04A, Comment & Authorities, part II.

⁸¹Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2016). This rule is discussed at some length in *Golnick v. Callender*, 290 Neb. 395, 413-17, 860 N.W.2d 180, 196-97 (2015).

CHAPTER 1

PRELIMINARY INSTRUCTIONS; RECESS INSTRUCTIONS; “FUNCTION OF JUDGE, JURY, AND COUNSEL”; INSTRUCTIONS ON EVIDENCE

TABLE OF INSTRUCTIONS

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NJI2d Civ. 1.00**PRELIMINARY INSTRUCTION TO JURY BEFORE
CIVIL TRIAL**

Members of the jury, before we go any further, I would like to make a few remarks about what we are going to do.

Near the end of the trial, you will be given detailed instructions explaining the rules of law that apply to this case. What I say now is not a substitute for those more detailed instructions, but only an introduction to this trial.

(1) It is my duty to see that this trial is conducted fairly and efficiently and in a manner consistent with Nebraska law. As part of that duty, I will rule upon objections and other legal questions that come up during the trial.

(2) It is the duty of the attorneys to use all honorable means to protect their clients' interests, including making any objections they deem proper.

(3) It is your duty to determine what the facts are. You, and you alone, are the judges of the facts. The only reason for a trial is that there is some dispute regarding the facts. It is your duty to resolve that dispute.

(4) In determining what the facts are, you must rely solely upon the evidence that is presented here within the four walls of this courtroom and that general knowledge that everyone has. Other than that general knowledge that everyone has, you must disregard your personal knowledge of any of the facts in this case.

Do not use any electronic device in any way to discover or share any information about this case. This includes cell phones, Blackberries, computers, and other electronic devices. This includes searching, blogging, emailing, texting, using Facebook, Twitter, My Space, LinkedIn, or any similar social network.

Do not conduct any of your own independent research about this case. Do not consult dictionaries, other reference materials, or electronic devices to obtain any information about this case—about the parties, the issues, the locations, or anything else that has to do with this case. [Do not go near any of the places discussed in this case.]

Do not pay any attention to any news reports regarding this case.

Any information obtained outside of this courtroom, whether

through reference materials, newspapers, television, [or] computers or other electronic devices, [or visits to the places involved in this case,] could be misleading, inaccurate, or incomplete. For example, information found in newspapers or books, or on the internet, may be wrong. [The places involved in this case may have changed.] In addition, relying on any of this information would be unfair because the parties would not have the opportunity to refute, explain, or correct it.

(5) You are not allowed to use a computer, cell phone, or other electronic device at all while you are in the courtroom and during your deliberations near the end of the trial. You may use such devices during breaks or recesses, but you may not use them to obtain or disclose information about this case or any of the people involved in this case.

(6) The evidence in this trial will consist of the testimony of witnesses, documents, and other things received as exhibits, any facts that have been stipulated—that is, formally agreed to by the parties—and any facts that have been judicially noticed, that is, facts I say you must accept as having been proved, even without further evidence.

Statements and arguments by the lawyers for the parties in this case are not evidence. Objections to questions are not evidence. Do not be influenced by any objection. If I sustain an objection, disregard the question and do not speculate as to what the answer might have been. Testimony that I tell you to disregard is not evidence and you must not consider it.

(7) Do not take anything I say or do as expressing my opinion as to how this case should come out or how you should resolve any issue of fact.

Do not allow sympathy or prejudice to influence you. Do not indulge in any speculation, guess, or conjecture. Do not make any inferences that are not supported by the evidence.

Do not make up your minds in this case until it is submitted to you for your verdict.

(8) You alone will decide the credibility, that is, the believability, of the witnesses. You alone will decide how much weight to give each piece of evidence and how to resolve any conflicts in the evidence.

In determining this, you may consider: the sources of the witness's testimony, including the witness's ability to have seen, or heard, or known the things about which he or she testifies; the witness's ability to remember and to communicate accurately; the conduct and demeanor of the witness while testifying; whether the witness has an interest in the outcome of this case, a relationship to

the parties, or any bias or prejudice; any previous statement or conduct of the witness, which tends to support or to contradict the witness's testimony at this trial; the reasonableness of the testimony of the witness; and any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

[(9) (Here insert a short, basic, general, and unbiased statement of who the parties are and what the case is about.)]

[(10) The trial will proceed in the following order:

First, the attorneys for the plaintiff[, name,] and the attorneys for the defendant[, name,] will have an opportunity to present opening statements; this is their opportunity to outline what they think the evidence will show. This should help you to understand the evidence as it is presented to you during the trial.

Next, the plaintiff will introduce evidence in support of (his, her, its) contentions.

Following the plaintiff's presentation of evidence, the defendant will have the opportunity to present evidence in (his, her, its) behalf[, but (he, she, it) is not obligated to do so].

After all of the evidence has been presented, each party will have the opportunity to present a closing argument; that is where the attorneys tell you what they think they have proved.

Either just before or just after the closing arguments, I will tell you what the law is, as it relates to this case. Then you will begin your deliberations and consider your verdict.]

[(11) (Insert a glossary of some of the terms to be used, such as negligence, proximate cause, et cetera. If used, this subparagraph might be introduced as follows: "Throughout this trial, you may hear a number of terms with which you might not be familiar. I will take a moment right now to define a few of these terms for you.")]

(12) (At this point, it is recommended that the jury be instructed as to whether they will be allowed to take notes.) You will not be allowed to ask questions during this trial. A transcript of the testimony at this trial will *not* be provided at the close of the evidence.

(13) You may not discuss this case with your fellow jurors until the case is submitted to you for your verdict. You may not discuss it with anyone other than your fellow jurors until you have reached your verdict. Do not let others talk to you about this case, and do not listen to any conversations on the subject.

If anyone speaks to you about this case, tell that person that you are on the jury and that you are not allowed to talk about the case. If anyone keeps trying to talk to you about this case, please let me know.

During this trial, you must not talk with the lawyers, witnesses, or parties in this case. If you see any of them and they do not speak to you, do not think they are being rude.

Again let me remind you that you must not discuss this case with anyone, not even with each other, until near the end of the trial when I tell you to do so and you go into the jury room to discuss your verdict. You must not send, search for, or receive any communication about this case, whether in person, on the phone, through any electronic device, or in any other way until such time as I instruct you that you may do so. You must not make up your minds regarding this case until after I submit it to you for your consideration and your verdict.

[(14) And finally, . . . (if it has not already been done, introduce members of the court staff and describe briefly the function each performs.)]

COMMENT

I. GENERAL COMMENT

Before the trial the court should give the jury a rather complete explanation of the jury's duties. It makes little sense to have jurors listen to days of testimony only then to be told, for example, they are the sole judges of the facts.

The purpose of this instruction is to put the jurors in the best possible position to perform the tasks assigned to them while the trial is in progress. The practice of charging the entire jury panel varies from district to district. Some districts provide jurors printed handbooks. Others show them video explaining the trial process and the jury's role therein. Whatever else the court does, it is felt that there is no substitute for the live, face-to-face instruction and explanation from the judge on the bench.

As drafted, this instruction would be given immediately after the jury is sworn and in the presence of a court reporter. Instructing the entire jury panel at some previous time may be an acceptable, or even preferred, alternative. Or, the court may give some of this instruction to the entire panel and some to individual jurors.

This preliminary instruction is for use in civil cases only. In criminal cases, see the pattern instructions for criminal cases. (There are sig-

nificant differences. For example, the reference in paragraph (6) to “facts I say you must accept as having been proved” is not a correct statement of the law in a criminal case.¹

Some of the subparagraphs of this instruction contain shortened versions of instructions that will be given after the close of the evidence and before the jury retires to consider the verdict. This preliminary instruction is given in addition to and not as a substitute for those instructions.

Depending upon the nature and, in some cases, the anticipated length of the lawsuit, one or more of the bracketed paragraphs might be omitted and other instructions might be inserted.

The Committee has written this pattern instruction for use in the usual case where there will not be a jury view of evidence outside of the courtroom. If there is to be a jury view change the part of paragraph (4) of the instruction that tells the jurors they “must rely solely upon the evidence that is presented here within the four walls of this courtroom.” One way to change this part of the pattern instruction is to tell the jurors that at some point during the trial court personnel may escort them from the courtroom to view some of the evidence in the case, and tell them who will accompany them. Other than evidence presented to them during this escorted trip outside of the courtroom, they must rely solely upon the evidence that is presented here within the four walls of the courtroom.

As drafted above, paragraph (10) applies to the usual civil case where the plaintiff goes first. The applicable statute provides that the party who “must first produce his evidence” is “[t]he party who would be defeated if no evidence were given on either side.” Neb. Rev. Stat. § 25-1107(3) (Reissue 2016). Occasionally that could be someone other than the plaintiff; if so, the user will have to change this instruction accordingly. Note that Neb. Rev. Stat. § 25-1107(5)–(7) (Reissue 2016), order of trial, can be interpreted to provide for jury instruction when the evidence is concluded and before the closing arguments. (Regarding the order of trial in criminal cases, see Neb. Rev. Stat. § 29-2016 (Reissue 2008)).

II. NOTE TAKING BY JURORS

Regarding paragraph (12) of the instruction, in 1990, in the context of an appeal of a criminal conviction, the Supreme Court addressed juror note taking as follows:

1.00

¹Neb. Evid. R. 201(7), Neb. Rev. Stat. § 27-201(7) (Reissue 2016). In a

criminal case, that must be changed to “. . . may, but [are] not required to, accept” *Id.*

We . . . rule that henceforth, jurors shall be permitted to take notes if, and only if, the parties agree, outside the jury's presence, (1) that jurors may, but need not, take notes and (2) that such notes as are taken may be used during the jury's deliberations but not preserved for review on appeal; rather, the notes shall be treated as confidential between the juror making them and the other jurors. In the event the parties so agree, the trial judge shall ensure the confidentiality of the notes during the course of trial and the jury's deliberations, and shall cause the notes to be destroyed immediately upon return of the verdict.²

Subsequently, the Unicameral passed a statute that reads as follows:

Jurors shall be permitted, but not required, to take notes. The notes may be used during the jury's deliberations, but not preserved for review on appeal. The notes shall be treated as confidential between the juror making them and the other jurors. The trial judge shall ensure the confidentiality of the notes during the course of the trial and the jury's deliberations and shall cause the notes to be destroyed immediately upon return of the verdict.³

The difference between the Court's statement regarding juror note taking and the subsequent statute's is that the statute does not require that the parties agree to allow note taking.

III. JUROR QUESTIONING OF WITNESSES

Paragraph (12) of the instruction used to mention the possibility of jurors asking questions. Now it tells the jurors that asking questions is not allowed. The Supreme Court has disapproved of that practice: "We therefore rule that in the trial courts of this state, juror questioning of witnesses is prohibited."⁴

²State v. Kipf, 234 Neb. 227, 254, 450 N.W.2d 397, 415 (1990). *Accord* Paro v. Farm and Ranch Fertilizer, Inc., 243 Neb. 390, 394, 499 N.W.2d 535, 539 (1993) (civil action).

³Neb. Rev. Stat. § 29-2011 (2016) (operative April 17, 2016).

⁴State v. Zima, 237 Neb. 952, 956, 468 N.W.2d 377, 380 (1991).

IV. INSTRUCT ONLY ON THEORIES PRESENTED BY THE PLEADINGS AND SUPPORTED BY THE EVIDENCE

“A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.”⁵

This is discussed at greater length on the Introductory Comment & Authorities that precede this chapter, found above beginning on page 1. This rule applies to the preliminary instructions, as well as to the final instructions.⁶ There is, however, a “risk inherent in undertaking to preliminarily instruct a jury other than to briefly, and in very general terms, state the nature of the case and describe the manner in which the trial will proceed. One cannot know what allegations will be supported by the evidence until the parties have rested.”⁷

V. THE PROBLEM OF ELECTRONIC DEVICES

A. THE 2010 AMENDMENT

In 2010 the Committee added admonitions to this pattern instruction regarding juror use of electronic devices. The problems include jurors using such devices to do independent research and to communicate with others, outside the courtroom or in, about the trial. A large part of the Committee’s approach to this problem is an attempt to educate jurors about the problem and how seriously the court (and the lawyers) takes the problem.

The Committee recommends that this education begin immediately.

■ *Juror handbooks or videos:* If your district provides potential jurors with a handbook or shows them video regarding jury service, the Committee suggests that the handbook or video explain that neither prospective nor selected jurors will be able to use electronic devices to discover, discuss, or share any information about the case for which they are called or selected.

■ *Pre-voir dire instruction:* As highlighted again below, in part II(B), this Committee recommends that before the voir dire the judge admonish the entire jury panel against the use of such devices.

■ *Preliminary instruction once the jury is empaneled:* The education of the jury continues with this instruction, NJI2d Civ. 1.00, the preliminary instruction to the jury before a civil trial.

⁵*Shipler v. General Motors Corp.*, 271 Neb. 194, 202, 710 N.W.2d 807, 821 (2006). *Miller*, 251 Neb. 45, 50, 555 N.W.2d 32, 36 (1996).

⁷*Sedlak Aerial Spray*, 251 Neb.

Sedlak Aerial Spray, Ltd. v. at 52, 555 N.W.2d at 37.

■ *Admonition before and after recess:* Before breaks in the courtroom proceedings, the court will again instruct the jurors on inappropriate uses of electronic devices. NJI2d Civ. 1.00A covers recess admonitions. At NJI2d Civ. 1.00A, Comment & Authorities, there is also a recommendation regarding post-recess inquiry into whether the jurors followed the pre-recess electronic-devices admonition.

■ *Instruction preceding submission of the case to the jury:* The instruction upon submission of the case to the jury, NJI2d Civ. 5.01, continues this education, this time specifically directed at the use of electronic devices during jury deliberations.

As noted above, the admonitions regarding electronic devices attempt to educate jurors to the problem. There may be more that individual judges can do in this regard and the Committee suggests that judges consider and try whatever they think is necessary to accomplish this goal.

One thing that judges might consider is instructing jurors on the consequences of violating these electronic-device admonitions: mistrials, new trials, waste of time, money, and resources.

B. INSTRUCTION OF THE PANEL BEFORE VOIR DIRE

The Committee believes that juror education regarding electronic devices must start early—with the entire jury panel. Use of electronic devices during voir dire can taint a juror just as easily as use during the trial. The Committee recommends that the judge give electronic-device admonitions to the entire panel, before the start of the questioning of the potential jurors.

C. BE ALERT TO NEW DEVICES AND NEW PROBLEMS

The world of electronic devices is particularly fast moving. Please be alert to new devices and new problems (such as the at-one-time new problems of jurors reading news reports off of small, handheld devices, jurors taking in-court photographs with their phones, and intimidating text messages being sent to jurors).

AUTHORITIES

Neb. Rev. Stat. § 25-1107 (Reissue 2016) sets out the order of a civil trial by jury. The annotation thereto lists a number of cases that are not repeated here.⁸

⁸Regarding the order of trial in 2016 (Reissue 2016). criminal cases, see Neb. Rev. Stat. § 29-

Regarding the opening statement, see the cases and the cross reference footnoted here.⁹

Neb. Rev. Stat. § 25-1110 (Reissue 2016) sets out the court's duty in a civil trial to admonish a jury not to discuss the case. *See also* NJI2d 1.00A, Comment. (Regarding criminal trials, *see* Neb. Rev. Stat. § 29-2022 (Reissue 2016).)

Regarding the jurors and the lawyers speaking to one another, the reader's attention is called to *State v. Polinski*.¹⁰ *Polinski* is a criminal case and the reversal of defendant's conviction was based on defendant's right to a fair trial before an impartial jury. With that in mind, in the context of small talk exchanged between the prosecutor and a juror as they simultaneously exited the courtroom, the court stated: "There is no doubt that the circumstances of the conversation between prosecutor and juror were improper."¹¹

Regarding authorities for those subparagraphs that are shortened versions of final instructions to the jury, *see* the Authorities listed under the more complete, final versions, appearing at various places throughout NJI2d Civ.

NJI2d Civ. 1.00A

ADMONITION AT RECESS

Members of the jury, we will now (insert phrase describing the recess, e.g., recess for the day, recess for lunch, take a brief recess, et cetera). Before we do, let me [again] remind you that, as jurors, there are certain things you are not allowed to do:

1. Do not talk about or discuss this case among yourselves or with anyone else, either in person or through the use of an electronic device.
2. Do listen to any conversation about this case.
3. Do not do any of your own research into anything involved in

⁹*Yount v. Seager*, 181 Neb. 665, 667-68, 150 N.W.2d 245, 248-49 (1967); *Lybarger v. State*, Dept. of Roads, 177 Neb. 35, 39-46, 128 N.W.2d 132, 137-40 (1964); *Buhrman v. Smollen*, 164 Neb. 655, 670-71, 83 N.W.2d 386, 398 (1957), and other cases cited at NJI 1.11, (1969).

¹⁰*State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988).

¹¹*Id.* at 44, 429 N.W.2d at 727 (since the judge failed to hold an impartial-jury hearing on the matter, the error was reversible). *See also* *State v. Palser*, 238 Neb. 193, 203, 469 N.W.2d 753, 760 (1991); *Auer v. Burlington Northern R. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988) (juror conversation with judge).

this case. Do not consult any reference materials or use any electronic devices to obtain any information about anything involved in this case.

[4. Do not read, watch, or listen to any reports about this case in the newspaper, on television, on the radio, on your computer, or on any other electronic device. If any information about this case does come to your attention, you must immediately disregard it.]

[5. You are not to go near any of the locations discussed in this case.]

6. And you must not form or express an opinion on the case until all of the evidence has been received and I submit the case to you for your decision.

COMMENT & AUTHORITIES

I. GENERAL COMMENT & AUTHORITIES

See the Comment and the Authorities to NJI2d Civ. 1.00.

"If the jury [in a civil trial] are permitted to separate either during the trial or after the case is submitted to them," the court shall admonish them not to discuss the case and not to form or express an opinion thereon. Neb. Rev. Stat. § 25-1110 (Reissue 2016). Regarding admonishing the jury in a criminal trial, *see* Neb. Rev. Stat. § 29-2022 (Reissue 2016).¹ These two statutes are similar. Regarding the statute applicable to criminal trials, the Court has stated that "[t]he statute does not require an admonition each time the jury is permitted to separate. While repeated admonitions might be advisable, it cannot be assumed that they are necessary. . . . It is not the number of admonitions but the fact of admonition that is important."² Required or not, the committee believes that such instruction is advisable.

Regarding the first numbered paragraph of this instruction, presubmission discussion among jurors is considered "extraneous prejudicial information" or "outside influence."³ This means that, "upon inquiry into the validity of a verdict or indictment"⁴ a juror may testify to presubmission discussion among jurors.

The bracketed parts of this admonition should be included as appropriate.

1.00A

N.W.2d at 698.

¹*See also* State v. Bautista, 193 Neb. 476, 478, 227 N.W.2d 835, 838 (1975); Sundahl v. State, 154 Neb. 550, 562, 48 N.W.2d 689, 698 (1951).

²*Sundahl*, 154 Neb. at 562, 48

³*Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

⁴Neb. Evid. R., 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2016).

II. THE PROBLEM OF ELECTRONIC DEVICES

A. THE 2010 AMENDMENTS

In 2010 the Committee amended this pattern instruction and others to include admonitions regarding juror use of electronic devices. The Comment to NJI2d Civ. 1.00 discusses these changes generally.

B. POST-RECESS INSTRUCTION RECOMMENDATIONS

In addition to the admonition given right before the recess, the Committee recommends that as court reconvenes the judge ask the jurors if they abided by the admonishment, if they followed the pre-recess instruction. In a multi-day trial the judge might want to ask these post-recess questions the first few times court reconvenes and then only once a day, at the beginning of each day.

A part of the whole point of the electronic-device admonitions is to educate and remind jurors about the problems these devices present and how serious the court and the lawyers consider these problems to be. The Committee believes that these post-recess questions will help convey to the jury just how serious the court is about the admonitions.

NJI2d Civ. 1.01

FUNCTION OF JUDGE, JURY, AND COUNSEL

Members of the jury, now that you have heard all of the evidence [and the arguments of counsel], it is my duty to instruct you in the law.

(1) The law does not permit me to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely.

You must not interpret any of my statements, actions, or rulings, nor any of the inflections of my voice, as reflecting an opinion as to how this case should be decided.

(2) It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.

In determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact.

(3) You must apply the law in these instructions, even if you believe that the law is or should be different.

No one of these instructions contains all of the law applicable to this case. You must consider each instruction in light of all of the others.

The law demands of you a just verdict. You must not indulge in any speculation, guess, or conjecture. You must not allow sympathy or prejudice to influence your verdict.

(4) The attorneys have a duty to represent their clients. In arguing their clients' case, attorneys may draw legitimate deductions and inferences from the evidence.

The attorneys have a duty to make all objections they deem proper. Do not be influenced by any objection.

[(5) During this trial I have ruled on objections to certain evidence. You must not concern yourselves with the reasons for such rulings, since they are controlled by rules of law. You must not speculate as to possible answers to questions I did not permit to be answered; you must not consider the fact that objections to evidence were overruled. You must disregard all evidence ordered stricken.]

COMMENT & AUTHORITIES

The Committee recommends that an instruction comparable to this one be given in all cases.

(1) Regarding improper comments by the court, on the evidence or the credibility of witnesses *see* N.JI2d Civ. 1.41, Authorities.

(2) It is the trial court's duty to instruct the jury on the law, whether requested to or not. N.JI2d Civ. 2.01, Authorities. As a result, the practice of counsel reading law to the jury is "condemned." N.JI2d Civ. 2.01, Authorities.

Failure to instruct on the applicable law, or improper instruction thereon, constitutes plain error. *See* part VII of the Introductory Comment to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes Chapter 1, above, for cases and cross references.

It is the jury's function to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of evidentiary explanations, and weigh the evidence.¹

1.01

¹*E.g.*, Walkenhorst v. State, Dept. of Roads, 253 Neb. 986, 997, 573

N.W.2d 474, 484 (1998); Youngs v. Potter, 237 Neb. 583, 588, 467 N.W.2d 49, 52 (1991); Chadron Energy Corp.

The trial court has the discretion to give or not to give an “instruction that the jury is not to allow sympathy or prejudice to control or affect its finding.”²

“Triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.”³ “[J]urors may apply to the subject before them that general knowledge which anyone may be presumed to have.”⁴ In fact, “[u]ncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge. . . .”⁵

(3) It is the jury’s duty to follow the instructions given whether correct or not⁶ and whether or not the jurors think the law should be different.⁷

All of the instructions must be considered together and if, when considered as a whole, they properly submit the issues to the jury, they do not constitute error. This is discussed above, at part VIII (B) of the Introductory Comment to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition.

The prohibition against “speculation, guess, or conjecture” is discussed below.⁸

v. First Nat. Bank of Omaha, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990); Joyner v. Steenson, 227 Neb. 766, 769, 420 N.W.2d 278, 280 (1988); Bay v. House, 226 Neb. 521, 523, 412 N.W.2d 466, 468 (1987); Bentz v. Nebraska Public Power Dist., 211 Neb. 844, 848, 850–51, 320 N.W.2d 763, 766–68 (1982); Styskal v. Brickey, 158 Neb. 208, 211, 62 N.W.2d 854, 858 (1954).

²Buhrman v. Smollen, 164 Neb. 655, 672, 83 N.W.2d 386, 399 (1957) (on these facts, however, refusal to give such instruction was reversible error).

³McIntosh By and Through McIntosh v. Omaha Pub. Sch., 249 Neb. 529, 536, 544 N.W.2d 502, 507 (1996), *abrogated on other grounds by* Heins v. Webster Cty., 250 Neb. 750, 552 N.W.2d 51 (1996) and *overruled on other grounds by* Bronsen v. Dawes Cty., 272 Neb. 320, 722 N.W.2d 17 (2006). *Accord, e.g.,* State v. Knutson,

288 Neb. 823, 844, 852 N.W.2d 307, 324 (2014) (criminal case).

⁴Yount v. Seager, 181 Neb. 665, 671, 150 N.W.2d 245, 250 (1967).

⁵In re McCartney’s Estate, 213 Neb. 550, 556, 330 N.W.2d 723, 727 (1983).

⁶Barton v. Shull, 62 Neb. 570, 574, 87 N.W. 322, 324 (1901).

⁷State v. Chaney, 184 Neb. 734, 740, 171 N.W.2d 787, 791 (1969) (“even though the jury may decide that the laws should be otherwise.”).

⁸See NJI2d Civ. 1.31, Comment; NJI2d Civ. ch. 4, Introduction. *See also* G. Michael Fenner, *Circumstantial Evidence in Nebraska*, 19 Creighton L. Rev. 236 (1986); Shibata v. College View Properties, 234 Neb. 134, 143, 449 N.W.2d 544, 550 (1989) and the authorities cited in each. *And see* McVane v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, 237

(4) Attorneys are officers of the court.⁹ It is their duty to use all honorable means to protect their clients' interests.¹⁰

In their arguments, attorneys may draw legitimate deductions and inferences from the evidence.¹¹ While their remarks need not be totally complete or technically exact,¹² attorneys should scrupulously avoid improper statements and arguments not within the issues, and the court should interfere even on its own motion to prevent an unwarranted appeal to the passion and prejudice of jurors.¹³ This includes "an invitation to jurors to put themselves in the place of a party."¹⁴

In *Macholan v. Wynegar*¹⁵ the trial court instructed the jury from part (4) of this instruction that "attorneys have a duty to represent their clients. In arguing their clients' case, attorneys may draw legitimate deductions and inferences from the evidence."¹⁶ The court refused plaintiffs' oral request for an instruction that attorneys' statements are not evidence. See NJI2d Civ. 1.02. The Supreme Court held that giving the former while refusing a request for the latter is error and, in *Macholan*, was reversible error.¹⁷

Because proof frequently fails to come up to expectation, attorneys must be allowed considerable latitude during opening statements when stating the evidence to sustain their causes of action or defenses.¹⁸

Neb. 451, 462, 466 N.W.2d 499, 508 (1991).

⁹State ex rel. Nebraska State Bar Ass'n v. Dunker, 203 Neb. 589, 597, 279 N.W.2d 609, 614 (1979); State ex rel. Nebraska State Bar Ass'n v. Tesar, 183 Neb. 272, 273, 159 N.W.2d 572, 574 (1968); State ex rel. Nebraska State Bar Ass'n v. Dunker, 160 Neb. 779, 783, 71 N.W.2d 502, 505 (1955).

¹⁰Lybarger v. State, Dept. of Roads, 177 Neb. 35, 57-58, 128 N.W.2d 132, 146 (1964) (Carter, J., concurring); Chicago, B. & Q.R. Co. v. Kellogg, 54 Neb. 127, 74 N.W. 454, 456 (1898); Omaha & R.V. Ry. Co. v. Brady, 39 Neb. 27, 57 N.W. 767, 772 (1894).

¹¹Lybarger, 177 Neb. at 57-58, 128 N.W.2d at 146 (Carter, J., concurring); Sandomierski v. Fixemer, 163 Neb. 716, 721, 81 N.W.2d 142, 146 (1957), *abrogated by* Kennedy v. Kennedy, 221 Neb. 724, 380 N.W.2d 300 (1986); Cooper v. State, 120 Neb. 598, 234 N.W. 406 (1931) (Rose, J., dissenting); *Chicago, B. & Q. R.R. v. Kel-*

logg, supra; *Omaha & R.V. Ry. v. Brady, supra*.

¹²Temple v. Cotton Transfer Co., 126 Neb. 287, 295, 253 N.W. 349, 353 (1934).

¹³Krum v. Sullivan & Schaberg Transfer & Fuel Co., 97 Neb. 491, 497, 150 N.W. 640, 643 (1915).

¹⁴Paro v. Farm and Ranch Fertilizer, Inc., 243 Neb. 390, 399, 499 N.W.2d 535, 542 (1993) (stating that though there was "improper argument," it is not grounds for reversal unless jury was "prejudicially affected").

¹⁵Macholan v. Wynegar, 245 Neb. 374, 513 N.W.2d 309 (1994).

¹⁶*Id.*, at 513 N.W.2d at 315.

¹⁷*Id.*

¹⁸Lybarger, *supra*; Buhrman v. Smollen, 164 Neb. 655, 671, 83 N.W.2d 386, 398 (1957); *Temple v. Cotton Transfer Co., supra*; Yechout v. Tesnohldek, 97 Neb. 387, 150 N.W. 199, 200 (1914).

Counsel, however, may not make statements that are known or should be known to be false.¹⁹

(5) Paragraph (5), the bracketed paragraph of this instruction, should not be included as a matter of course. As a general rule, it should be included when there has been a considerable amount of controversy over the receipt of evidence. The last sentence should only be given where there has been evidence ordered stricken from the record.

NJI2d Civ. 1.02

EVIDENCE

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that have been stipulated—that is, formally agreed to by the parties; and
4. Any facts that have been judicially noticed—that is, facts I say you must accept as true even without other evidence.

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom.

COMMENT

Subparagraph 4 to the first paragraph deals with judicial notice. It should not be given unless it is appropriate. The committee suggests the possibility of the court having two versions of this instruction available, one with all of the subparagraphs and one that omits the first of the subparagraphs numbered 4. Each version would be ready to be given as appropriate. In an eminent domain case, *see* NJI2d Civ. 13.04.

¹⁹*Lybarger, supra; Buhrman v. Smollen, supra.*

As worded, subparagraph 4 to the first paragraph is appropriate in civil cases, but never appropriate in criminal cases. Neb. Rev. Stat. § 27-201 (Reissue 2016), Neb. Evid. R. 201.¹

For a complete treatment of the many problems associated with judicial notice, with a focus on the nuances of Nebraska law, see the authorities footnoted here.² Regarding judicial notice of adjudicative facts from an already decided, interwoven and interdependent case that involved one of the parties in the present case and the difference between judicial notice of adjudicative and legislative facts, see the cases cited in this footnote.³

Subparagraph 3 to the first paragraph may be omitted when there are no stipulated facts, but such omission is not necessary. If it is to be omitted, the court may wish to keep on hand a third version of the instruction.

In the unusual case where one of the attorneys for the parties in a case testifies in the same case, subparagraph 1 to the second paragraph of the instruction will have to be changed.

At the instruction conference in the trial of *Macholan v. Wynegar*⁴ plaintiff's counsel orally requested, and the trial court refused, instruction very much like subparagraph 1 to the second paragraph of this instruction: statements by the attorneys are not evidence. The trial court did instruct the jury, from NJI2d Civ. 1.01, that "attorneys have a duty to represent their clients. In arguing their clients' case, attorneys may draw legitimate deductions and inferences from the evidence."⁵ The

1.02

¹See NJI2d Crim. 2.3 for the instruction regarding jury use of judicial notice in criminal cases.

²R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article II (vol. 3, Nebraska Practice Series, West Group); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE* 65-102 5th ed. 2012; R. Collin Mangrum, *Judicial Notice in Nebraska*, 22 Creighton L. Rev. 801 (1989).

³Western Ethanol Co., LLC v. Midwest Renewable Energy, 305 Neb. 1, 16-17, 938 N.W.2d 329, — (2020) (Neb. Rev. Stat. § 27-201(2)(b) ("Reissue 2016) provides that judicial notice may be taken of any fact not subject to reasonable dispute, when such fact is capable of accurate ad ready determi-

nation by resort to sources whose accuracy cannot reasonable be questioned. . . . In interwoven and interdependent cases, we may examine our own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties. We have further held that we may take judicial notice of a document, including briefs filed in an appeal in a separate but related action concerning the same subject matter in the same court.") (footnotes omitted); Strunk v. Chromy-Strunk, 270 Neb. 917, 927, 708 N.W.2d 821, 832 (2006).

⁴*Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994).

⁵*Macholan*, 245 Neb. at 383, 513 N.W.2d at 315.

Court held that giving the latter while refusing a request for the former is error and in *Macholan* it was reversible error.⁶

If any evidence has been received outside of the courtroom, such as during a jury view, subparagraph 4 to the second paragraph will have to be changed, perhaps by adding the following: “except where I specifically told you otherwise during the trial.” If there has been a jury view, it might be advisable to add a fifth subparagraph to the first paragraph advising the jury that what they saw (and heard) during the view of the premises is evidence. See NJI2d Civ. 13.04 for a model, and for a general discussion of Nebraska law regarding jury views.

AUTHORITIES

Neb. Rev. Stat. § 25-1108 (Reissue 2016) codifies the court’s power to order a jury view (and the annotation thereto cites cases). See also the Authorities to NJI2d Civ. 13.04.

NJI2d Civ. 1.11

STATEMENTS OF COUNSEL

Recommend no separate instruction.

COMMENT & AUTHORITIES

What was NJI 1.11 (1969), Statements of Counsel, has been incorporated into paragraph (4) of NJI2d Civ. 1.01 and subparagraphs 1 and 2 to the second paragraph of NJI2d Civ. 1.02.

NJI2d Civ. 1.21

RULINGS UPON EVIDENCE

Recommend no separate instruction.

COMMENT & AUTHORITIES

What was NJI 1.21 (1969), Rulings Upon Evidence, has been incorporated into NJI2d Civ. 1.01, as paragraph (5).

NJI2d Civ. 1.31

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence, direct and circumstantial.

⁶*Id.*

Direct evidence is either physical evidence of a fact or testimony by someone who has first-hand knowledge of a fact by means of his or her senses. Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred.

The law makes no distinction between these two kinds of evidence. A fact may be proved by either direct evidence or circumstantial evidence or both.

COMMENT & AUTHORITIES

I. THE COURT APPROVED THIS INSTRUCTION

In *Brown v. Farmers Mutual Insurance Co.* the Supreme Court specifically approved NJI2d Civ. 1.31.¹

II. DEFINITIONS

For cases supporting this instruction's definition of direct and circumstantial evidence *see*, among others, those footnoted here.²

III. BASING A VERDICT ON CIRCUMSTANTIAL EVIDENCE ALONE

"Circumstantial evidence is not inherently less probative than direct evidence, and a fact proved by circumstantial evidence is nonetheless a proven fact."³ (There may seem to be tension between what was just said and some of what is said below in this Comment & Authorities in part IV, Confusion Regarding the Value of Circumstantial Evidence: Two Lines of Cases; as explained there, that tension is not real; rather, what is said above is simply a clearer and more direct way of expressing the rule.)

"[C]ircumstantial evidence is not sufficient to sustain a

1.31

¹*Brown v. Farmers Mut. Ins. Co. of Nebraska*, 237 Neb. 855, 468 N.W.2d 105 (1991) (stating that the trial court's instruction was taken verbatim from NJI2d Civ. 1.31, *Brown*, at 863, 468 N.W.2d at 112, and that the trial court did not err in giving the instruction, *id.* at 864, 468 N.W.2d at 112).

²*State v. Kofoed*, 283 Neb. 767, 788, 817 N.W.2d 225, 242 (2012) (criminal case) ("Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists."); *Father Flanagan's Boys'*

Home v. Agnew, 256 Neb. 394, 404, 590 N.W.2d 688, 695 (1999); *Carpenter v. Cullan*, 254 Neb. 925, 937, 581 N.W.2d 72, 80 (1998); *Brown v. Farmers Mut. Ins. Co. of Nebraska*, 237 Neb. 855, 863, 468 N.W.2d 105, 112 (1991); *Bland v. Fox*, 172 Neb. 662, 665, 111 N.W.2d 537, 540 (1961). *See also Pantano v. Am. Blue Ribbon Holdings*, 303 Neb. 156, 166, 927 N.W.2d 357, 365 (2019) ("Negligence is not presumed and must be proved by evidence, direct or circumstantial.").

³*Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 65, 917 N.W.2d 435, 458 (2018).

verdict that depends solely thereon unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Where, instead, under the facts viewed in a light most favorable to the nonmoving party, the nonexistence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.⁴

IV. CONFUSION REGARDING THE VALUE OF CIRCUMSTANTIAL EVIDENCE: TWO LINES OF CASES

On the subject of circumstantial evidence in a civil case, the Supreme Court has said:

The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.

However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.

The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.

Conjecture, speculation, or choice of quantitative possibilities are [sic] not proof. There must be something more which

⁴Roskop Dairy, L.L.C. v. GEA 177–78, 871 N.W.2d 776, 798 (2015) Farm Technologies, Inc., 292 Neb. 148, (footnotes omitted).

would lead a reasoning mind to one conclusion rather than to the other.⁵

This quotation is followed by this caveat: "While we recognize that these statements . . . have been viewed as internally inconsistent and perhaps different than the standard applied in criminal cases, . . . we need not, at this time, address those statements further," because in the case at hand there was sufficient direct evidence to support the verdict.⁶

State v. Kofoed is a criminal case in which the court states that "circumstantial evidence is not inherently less probative than direct evidence."⁷

The statement in the lengthy quotation above that circumstantial evidence will support a verdict when "the conclusion reached by the jury is *the only one that can fairly and reasonably be drawn* therefrom,"⁸ has been criticized as follows:

1. This statement first appeared as dicta in the *Blid* case.⁹ It appears to have been lifted from an earlier case where it had supported an entirely different proposition.¹⁰

2. *Blid* made the statement without analysis, but with three "supporting" citations: one to a case from Iowa, which has been overruled; and one each to cases from South Carolina and New York, neither of which supports the statement for which it is cited.¹¹ From *Blid* on, none of the cases supporting this statement has analyzed it, let alone offered any good reason for saying it.

3. The better rule is to treat direct and circumstantial evidence the same, recognizing that, just like direct evidence, some circumstantial

⁵*Ditloff v. State Farm Fire and Cas. Co.*, 225 Neb. 375, 379–80, 406 N.W.2d 101, 104 (1987) (internal quotation marks and citations omitted; brackets in *Ditloff*). More recently the Court has made similar statements in the rather narrow context of circumstantial evidence used to support a finding of fraud in an equity action where plaintiff's burden is proof by clear and convincing evidence. *Fletcher v. Mathew*, 233 Neb. 853, 859, 448 N.W.2d 576, 581 (1989),

⁶*Ditloff, supra*.

⁷*State v. Kofoed*, 283 Neb. 767, 788–89, 817 N.W.2d 225, 242 (2012).

⁸*Ditloff, supra* (emphasis added).

⁹*Blid v. Chicago & N.W. Ry. Co.*, 89 Neb. 689, 131 N.W. 1027, 1028 (1911), hereinafter cited as *Blid*. G. Michael Fenner, *Circumstantial Evidence In Nebraska*, 19 Creighton L. Rev. 236, 237–39 (1986) hereinafter in this Comment & Authorities cited as *Fenner*.

¹⁰*Fenner* at 239.

¹¹*Fenner* at 240; *In re Estate of Price*, 223 Neb. 12, 25, 388 N.W.2d 72, 81 (1986) (Krivosha, C.J., concurring in the result), hereinafter cited as *Price* (Krivosha, C.J., concurring).

evidence is very strong and some is very weak.¹² (There are, in fact, a number of Nebraska cases that take just that approach to circumstantial evidence. See point 11, below.)

4. There is no burden anywhere in the law greater than the burden of proving that a conclusion "is the only one that can fairly and reasonably be drawn" from the evidence. "Short of outlawing the evidence altogether, it is the least favorable rule possible. It puts on a civil plaintiff a burden of proof greater than, or at best equal to, the burden put on the state in a criminal action."¹³

5. This statement of the value of circumstantial evidence had been made in both civil and criminal cases. In civil cases, it was overruled in 1956,¹⁴ only to reappear eight years later.¹⁵

6. When the cases making this statement are analyzed, it seems that the statement is being used as a substitute for the rule that if the evidence is evenly balanced, the party with the burden of proof loses, the rule that the jury is not allowed to base a verdict on guess, speculation, and conjecture.¹⁶

7. This is not the rule that was stated in NJI 1.31 (1969). That instruction said that circumstantial evidence and the inferences drawn therefrom must "indicate [the conclusion in question] with reasonable certainty." Though still not the modern rule, that is quite different from saying that the conclusion must be "the only one that can fairly and reasonably be drawn therefrom."¹⁷

8. The most recent statements of this "only fair and reasonable conclusion" rule have all been dicta.¹⁸

9. The second paragraph of the lengthy quotation from *Ditloff*, which begins this part of this Comment & Authorities, states that circumstantial evidence will support a conclusion when it "is the only

¹²*Fenner* at 274-77.

¹³*Fenner* at 242. See also *Anderson v. Farm Bureau Ins. Co. of Nebraska*, 219 Neb. 1, 9, 360 N.W.2d 488, 493 (1985) (Krivosha, C.J., concurring in the result).

¹⁴*Davis v. Dennert*, 162 Neb. 65, 75, 75 N.W.2d 112, 119 (1956).

¹⁵*Fenner* at 252-53, 270; *Price* at 25-26, 388 N.W.2d at 81 (Krivosha, C.J., concurring). In criminal cases, it was overruled in *State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981), and it has stayed overruled.

¹⁶*Fenner* at 245-50, 252, 257-59, 269, 270-74. See also *Price* at 27, 388 N.W.2d at 82 (Krivosha, C.J., concurring); NJI2d 1.01. And it is poor substitute, at that. *McCormick on Evidence* § 338, at 511-14 (5th ed. 1999).

¹⁷See *Fenner* at 254, *et seq.*

¹⁸E.g., *Ditloff*, 225 Neb. at 380, 406 N.W.2d at 104; *Ward Cattle Co. v. Farm Bureau Ins. Co. of Nebraska*, 223 Neb. 69, 73, 388 N.W.2d 89, 92 (1986); *In re Estate of Price*, *supra*; *Anderson*, *supra*. (The major opinions critical of the rule are concurring opinions, not dissents.)

one that can fairly and reasonably be drawn therefrom." The third paragraph of that quotation says that circumstantial evidence must be such that it makes the conclusion in question "reasonably probable, not merely possible." As a statement of one rule, these paragraphs are inconsistent.¹⁹

10. There is a wholly separate line of civil cases that say circumstantial evidence is equally competent with direct evidence, cases that directly support the above instruction. These cases, from the first in 1937 and up to 1984, are discussed in G. Michael Fenner, *Circumstantial Evidence In Nebraska*, 19 Creighton L. Rev. 236, 237-39 (1986).

11. *Circumstantial evidence and the problem of directed verdicts.* As mentioned briefly above, *Ditloff* states that circumstantial evidence will not support a verdict unless that verdict "is the only one that can fairly and reasonably be drawn therefrom."²⁰ *Kroeger v. Ford Motor Co.*²¹ states that "[a] directed verdict is required if more than one conclusion can reasonably be drawn from the circumstantial evidence presented."²² This would mean that circumstantial evidence alone will not sustain a claim when there is more than one conclusion that can be drawn therefrom; and in that situation the court would be required to direct a verdict *against the party relying on the circumstantial evidence*. And, of course, when the only evidence is circumstantial and *only one conclusion* can reasonably be drawn from that evidence, then a directed verdict is also required. That would be a directed verdict *in favor of the party relying on the circumstantial evidence*. This would mean that the court must direct a verdict in every case where the only evidence is circumstantial.

Though these "only conclusion" and "directed verdict" statements denigrating circumstantial evidence have been made, overruled, and remade, they have never really been applied so as to require a directed verdict. The Committee has been unable to find any case where the only

¹⁹*Ward Cattle Co.*, 223 Neb. at 74-75, 388 N.W.2d at 93 (Krivosha, C.J., concurring in the result); *Fenner* at 263-69.

²⁰Same quotation: *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 330, 527 N.W.2d 178, 183 (1995); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 872, 509 N.W.2d 618, 625 (1994); *Ditloff*, 225 Neb. at 379, 406 N.W.2d at 104. *See also Fenner* at 245 ("If the plaintiff's [circumstantial-evidence based] contention is the *only* reasonable one, then a verdict should be directed for the plaintiff. If the plaintiff's [circumstantial-evidence based] contention is not the only rea-

sonable one, then [this] rule says that the plaintiff cannot win; therefore, a verdict should be directed for the defendant . . . [This statement] says that circumstantial evidence will not support a verdict unless it supports a directed verdict."); *Price* at 25-26, 388 N.W.2d at 81 (Krivosha, C.J., concurring); *Wolstenholm v. Kaliff*, 176 Neb. 358, 368, 126 N.W.2d 178, 184 (1964) (White, C.J., concurring).

²¹*Kroeger v. Ford Motor Co.*, 247 Neb. 323, 330, 527 N.W.2d 178, 183 (1995).

²²*Id.* (emphasis added).

evidence on an essential element was circumstantial and the Supreme Court or the Court of Appeals reversed on the grounds that more than one conclusion could be drawn from the circumstantial evidence and, therefore, the evidence was erroneously admitted. Neither has the Committee found a case where either appellate court reversed because the only evidence on an essential element was circumstantial evidence, that circumstantial evidence was properly admitted, the trial judge denied a motion for a directed verdict on that element, and the jury found against the circumstantial evidence.

12. *The lack of analysis in the “only conclusion” cases.* Except for the case overruling *Ditloff*, there is not one majority opinion that really analyzes this devaluation of circumstantial evidence. Mostly, the denigrating statements are made in dicta, as a way of trying to say that when circumstantial evidence leaves the affirmative and the negative of a fact equally balanced, then the burden has not been met and the party with the burden loses on that point. Recent statements seeming to devalue circumstantial evidence have all been dicta. Some recognize that the rule has been criticized, but that the posture of the particular case makes it unnecessary to deal with that criticism.

If this “only conclusion” language ever was the rule, it never was a good one, and it does not seem to be the rule today.

After the first publication of this second edition, *i.e.*, NJI2d Civ., the Court has stated: “Negligence, like any other fact, may be proved by circumstantial evidence.”²³

Somewhat similarly, “[c]ivil conspiracy need not be established by direct evidence of acts charged, but may, and generally must, be proved

²³*McVaney v. Baird*, Holm, McEachen, Pedersen, Hamann & Strasheim, 237 Neb. 451, 462, 466 N.W.2d 499, 508 (1991) (quoting Prosser and Keeton on the Law of Torts § 39 at 242-43 (5th ed. 1984)). *Accord* *Carpenter v. Cullan*, 254 Neb. 925, 937, 581 N.W.2d 72, 80 (1998). *See also* *C.E. v. Prairie Fields Family Medicine P.C.*, 287 Neb. 667, 676, 844 N.W.2d 56, 63 (2014) (“A person who alleges negligence of another bears the burden to prove such negligence by direct or circumstantial evidence.”) (citing cases).

Likewise, “A contract . . . can be shown by circumstantial evidence.” *Tilt-Up Concrete, Inc. v. Star*

City/Federal, Inc., 255 Neb. 138, 147, 582 N.W.2d 604, 610 (1998).

“Fraud may be proved by circumstantial evidence.” *In re Estate of Stephenson*, 243 Neb. 890, 900, 503 N.W.2d 540, 548 (1993), *overruled by* *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010) (citations omitted). *Accord* *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 137-38, 570 N.W.2d 813, 816-17 (1997); *Schuelke v. Wilson*, 250 Neb. 334, 342, 549 N.W.2d 176, 182 (1996).

See also the *Brown* case, quoted in part I of this Comment & Authorities, above, which explicitly approves of a use of NJI2d Civ. 1.31.

by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished.”²⁴

Likewise, the following statement, made in the context of assumption of the risk, seems to treat direct and circumstantial evidence as on a par: “What we must determine is whether there was sufficient evidence, either direct or circumstantial,” of the elements of assumption of risk.²⁵

Though it is a criminal case, *State v. Pierce* states that “a fact proven by circumstantial evidence is nonetheless a proven fact. Circumstantial evidence is not inherently less probative than direct evidence.”²⁶ This should be true in all cases, civil or criminal. *Pierce* contains a lengthy discussion of the sufficiency of the evidence when it is circumstantial. Within the universe of criminal cases, the standard is the same, says the court, “regardless of whether the evidence is direct, circumstantial, or a combination thereof.”²⁷ Likewise, within the universe of civil cases, the standard should be the same whether the evidence is direct, circumstantial, or a combination thereof.

Again, after the first publication of this second edition, *i.e.*, NJ12d Civ., the court has stated the following: “An allegation of negligence is insufficient where the finder of fact must guess at the cause of the accident. While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant’s negligence was the proximate cause of the plaintiff’s injury.”²⁸ This is a long way from “only one . . . [conclusion] can fairly and reasonably be drawn therefrom.”

²⁴Four R Cattle Co. v. Mullins, 253 Neb. 133, 140, 570 N.W.2d 813, 818 (1997) (must prove existence of at least an implied agreement).

²⁵Williamson v. Williamson v. Provident Group, Inc., 250 Neb. 553, 556, 550 N.W.2d 338, 340 (1996).

²⁶State v. Pierce, 248 Neb. 536, 547, 537 N.W.2d 323, 330 (1995).

²⁷*Id.* at 548, 537 N.W.2d at 330. See also *In re Interest of Jeffrey K.*, 273 Neb. 239, 244, 728 N.W.2d 606, 611 (2007) (“[A] perpetrator’s state of mind is a question of fact [and] . . . may be proved by circumstantial evidence.”).

²⁸Herrera v. Fleming Companies, Inc., 265 Neb. 118, 123, 655 N.W.2d 378, 383 (2003) (citation omitted). Accord *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 414, 591

N.W.2d 532, 538 (1999); *Swoboda v. Mercer Management Co.*, 251 Neb. 347, 351, 557 N.W.2d 629, 632 (1997).

Among others, the following additional cases stand for the general proposition that questions of fact may be proved by direct or circumstantial evidence. *Houghton v. Nebraska Department of Revenue*, 308 Neb. 188, 198, 953 N.W.2d 237, 244 (2021) (“Intent is a question of fact, which may be determined by circumstantial evidence.”); *Herrera v. Fleming Companies, Inc.*, 265 Neb. 118, 123, 655 N.W.2d 378, 383 (2003); *Carpenter v. Cullan*, 254 Neb. 925, 937, 581 N.W.2d 72, 80 (1998) (negligence, like any other fact); *Beebe v. Sorensen Sand and Gravel Co.*, 209 Neb. 559, 566-68, 308 N.W.2d 829, 833-34 (1981) (causation); *Mustion v. Ealy*, 201 Neb. 139, 144-45, 266 N.W.2d 730, 734 (1978) (causation); *Vietz v. Texaco, Inc.*, 189

For the reasons stated above, and for additional reasons stated in Professor Fenner's article and Chief Justice Krivosha's concurring opinions, the Committee believes that the rule stated in the above instruction is the correct rule: it seems to the Committee that, though there is some confusion in the language the court has used in this area, the rule stated in the above instruction is the current rule in Nebraska; and it seems to the Committee that the rule stated in the above instruction is the one to be preferred.

The Committee stands behind its analysis, but with the warning that, as always, the Committee may be wrong.

V. IN GENERAL

Regarding the doctrine of *res ipsa loquitur*, a form of circumstantial evidence, see *NJI2d Civ. 2.13*.

NJI2d Civ. 1.41

EVALUATION OF TESTIMONY—CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this, you may consider the following:

1. The conduct and demeanor of the witness while testifying;
2. The sources of information, including the opportunity for seeing or knowing the things about which the witness testified;
3. The ability of the witness to remember and to communicate accurately;
4. The reasonableness or unreasonableness of the testimony of the witness;

Neb. 514, 517, 203 N.W.2d 513, 515 (1973) (negligence); *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 576, 198 N.W.2d 329, 334 (1972) (causation); *Watts v. Zadina*, 179 Neb. 548, 552, 139 N.W.2d 290, 292-92 (1966) (employee acting within the scope of employment); *Petracek v. Haas O. K. Rubber Welders, Inc.*, 176 Neb. 438, 444, 126 N.W.2d 466, 469 (1964) (causation). See also *Berg v. State*, 157 Neb. 863, 866, 61 N.W.2d 837, 839 (1954) (assuming but not deciding that

the circumstantial evidence offered was sufficient to prove that the signature in question was not that of the man whose it purported to be); *Wakeley v. State*, 118 Neb. 346, 225 N.W. 42, 44-45 (1929) (discussing the difference between direct and circumstantial evidence and applying that discussion to the subject of handwriting analysis); and *Merritt v. Reed*, 186 Neb. 561, 564, 185 N.W.2d 261, 263 (1971) (regarding circumstantial evidence rendering other evidence unpersuasive).

5. The self-interest or lack of self-interest of the witness in the result of this case;

6. The apparent fairness or bias of the witness, or the witness's relationship to the parties;

7. Any previous statement or conduct of the witness that is consistent or inconsistent with testimony of the witness at this trial; and

8. Any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

COMMENT

"The credibility of a witness" may be attacked by any party, including the party calling him.¹

"[W]here testimony is given by a witness on direct examination and that testimony creates an inference favorable to the party producing the witness, anything within the knowledge of that witness tending to rebut the inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right."²

Trial court instruction that the jurors should proceed on the theory that all witnesses tried to testify truthfully is erroneous as passing upon the credibility of witnesses.³

This court has held that when a party, acting as a witness, changes his testimony without offering a reasonable explanation, the altered testimony is discredited and disregarded as a matter of law. . . . [W]e did not extend the rule to nonparty witnesses, nor will we extend the rule today. An inconsistent statement by a nonparty witness is a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony.⁴

This proposition is discussed further at NJI2d Civ. 1.45.

1.41

¹Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2016); *see also* State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979); Conn v. ITL, Inc., 187 Neb. 112, 187 N.W.2d 641 (1971); State v. Fronning, 186 Neb. 463, 465, 183 N.W.2d 920, 921 (1971).

²Janik v. Gatewood, 233 Neb. 298, 303-04, 444 N.W.2d 900, 904 (1989).

³Ripp v. Riesland, 176 Neb. 233, 239, 125 N.W.2d 699, 703-04 (1964).

⁴Ketteler v. Daniel, 251 Neb. 287, 294-95, 556 N.W.2d 623, 628 (1996).

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“The jurors are the judges of the credibility of the witnesses and the weight to be given to their testimony.”⁵

[T]he “trier of fact,” [in this case it was the judge,] is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court’s resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.⁶

In a nonjury trial, of course, the judge presiding over the trial “is the sole judge of the credibility of witnesses and the weight to be given their testimony. An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error.”⁷

“ ‘A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. It is fundamental in our adversary system that a jury alone is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony.’ ”⁸

⁵*Bentz v. Nebraska Public Power Dist.*, 211 Neb. 844, 851, 320 N.W.2d 763, 768 (1982). *See also, e.g.*, *Orduna v. Total Const. Services, Inc.*, 271 Neb. 557, 569, 713 N.W.2d 471, 482 (2006); *State v. Jackson*, 264 Neb. 420, 429, 648 N.W.2d 282, 290 (2002) (“Witness credibility . . . is not to be reassessed on appellate review.”) (criminal case); *Ketteler v. Daniel*, 251 Neb. 287, 294, 556 N.W.2d 623, 628 (1996); *Wilson v. Misko*, 244 Neb. 526, 538, 508 N.W.2d 238, 248 (1993); *Chadron Energy Corp. v. First Nat. Bank of Omaha*, 236 Neb. 173, 182, 459 N.W.2d 718, 727 (1990); *Maloney v. Kaminski*, 220 Neb. 55, 63, 368 N.W.2d 447, 455 (1985); *Ripp v. Riesland*, 176 Neb. 233, 239, 125 N.W.2d 699, 703-04 (1964); and the Authorities to NJI2d 1.01.

⁶*Lynn v. Metropolitan Utils. Dist.*, 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987).

⁷*McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 169, 816 N.W.2d 728, 735-36 (2012) (citations omitted). *Accord, e.g.*, *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, 289 (2020); *Moreno v. City of Gering*, 293 Neb. 320, 335, 878 N.W.2d 529, 540 (2016). *See also* *Weyh v. Gottsch*, 303 Neb. 280, 298, 929 N.W.2d 40, 54 (2019).

⁸*Macholan v. Wynegar*, 245 Neb. 374, 379, 513 N.W.2d 309, 312 (1994) (internal citations and citation to case quoted omitted). This is true in a jury trial. As noted just above, in a trial to the court, the judge is the trier of fact and “the sole judge of the credibility of

Likewise, jurors are not required to accept stipulated testimony as binding.⁹

On a somewhat related matter *State v. Privat*¹⁰ discusses the court's duty to refrain from commenting on the evidence, including the credibility of the witnesses. "When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury."¹¹

Paragraph 5 of the instruction states that the jury may consider "The self-interest or lack of self-interest of the witness in the result of the case." "The trier of fact has a right to test the credibility of a witness by his self-interest. . . ."¹²

Paragraph 7 of the instruction—Any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial: Regarding impeachment by use of prior inconsistent statement, see Neb. Rev. Stat. § 27-613 (Reissue 2016), Neb. Evid. R. 613.¹³

A witness may be impeached by showing that he or she made statements out of court that are inconsistent with his or her testimony; if such declarations are otherwise inadmissible hearsay, then they are received solely for the purpose of aiding the jury in estimating the cred-

the witnesses and of the weight to be given to their testimony."

⁹*O'Neil v. Behrendt*, 212 Neb. 372, 377, 322 N.W.2d 790, 793 (1982) (stating that a stipulation as to what testimony would be if proper person called as witness no more binding on jury than if witness had testified). See also *Bay v. House*, 226 Neb. 521, 523, 412 N.W.2d 466, 468 (1987) (stating that the jury considers stipulations along with all other evidence); *Schneider v. Chavez-Munoz*, 9 Neb. App. 579, 592-94, 616 N.W.2d 46, 56-57 (2000). See also *NJI2d Civ. 1.42*, Authorities.

¹⁰*State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996) (criminal case).

¹¹*Id.* at 243, 556 N.W.2d at 35.

¹²*In re McCartney's Estate*, 213 Neb. 550, 556, 330 N.W.2d 723, 727 (1983). The fact that testimony is self-serving goes to its credibility, not its admissibility." *Hynes v. Good*

Samaritan Hospital, 291 Neb. 757, 770, 869 N.W.2d 78, 89 (2015).

¹³See also R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-613 (vol. 3, Nebraska Practice Series, West Group); G. Michael Fenner, *Nebraska Rules of Evidence. Article 6: Competency and the Examination of Witnesses* 69, et seq. (NCLE, Inc. 1987) (discussing Rule 613 and digesting Nebraska cases thereunder). See also G. Michael Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules*, 9 Creighton L. Rev. 559, 597-601 (1976), reprinted as Article VI, *The Nebraska Rules of Evidence* (NCLE, Inc. 1977, 1980). Regarding prior inconsistent statements admissible only as impeachment, see *NJI2d Civ. 1.72*. And see G. MICHAEL FENNER, *THE HEARSAY RULE*, passim (3d ed. Carolina Academic Press 2013).

ibility of the witness, and are not substantive evidence of the fact declared.¹⁴ In addition to the footnoted cases, see NJI2d Civ. 1.72.

Whether a person's prior statement and that person's testimony are inconsistent, so the former is nonhearsay to the issue of the person's credibility as a witness, is a decision left to the discretion of the trial judge; absent an abuse of discretion, that decision will be upheld on appeal.¹⁵ (Regarding the "abuse of discretion" standard, see generally NJI2d Civ. 1.42, Comment & Authorities.) If the question is whether a prior statement is inconsistent with a present denial of recollection, see *State v. Caradori*.¹⁶

Rule 613 does not require any foundation for examining a witness concerning his or her own prior inconsistent statements except that upon request, the statement shall be shown or disclosed to opposing counsel. The rule does state that extrinsic evidence of a prior inconsistent statement "is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require."¹⁷ "That foundational requirement may be met either before or after the introduction of the impeaching evidence. See G. Michael Fenner, Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules, 9 Creighton L. Rev. 559, at p. 599."¹⁸

When a witness admits making the prior inconsistent statement, the impeachment of that witness is complete, and, if the statement is only admissible to impeach, extrinsic evidence of the prior statement is inadmissible.¹⁹ Where extrinsic evidence is allowed solely to impeach,

¹⁴*E.g.*, *State v. Williams*, 224 Neb. 114, 123-24, 396 N.W.2d 114, 120-21 (1986); *State v. Marco*, 220 Neb. 96, 99-100, 368 N.W.2d 470, 473 (1985), *disapproved of by* *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015)), and *disapproved of by* *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015)); *State v. Isley*, 195 Neb. 539, 542-54, 239 N.W.2d 262, 265-66 (1976) (citing cases).

¹⁵First Nat. Bank in Mitchell v. Kurtz, 232 Neb. 254, 259, 440 N.W.2d 432, 436 (1989).

¹⁶*State v. Caradori*, 199 Neb. 691, 694-95, 260 N.W.2d 617, 620 (1977). See also *Marco*, 220 Neb. at 99-100, 368 N.W.2d at 473 (1985), *disapproved of by* *State v. Stevens*, and *Dominguez*, above.

¹⁷Neb. Evid. R. 613(2), Neb. Rev. Stat. § 27-613(2) (Reissue 2016).

¹⁸*State v. Price*, 202 Neb. 308, 323, 275 N.W.2d 82, 91 (1979). *Accord*, *e.g.*, *Strudl v. American Family Mut. Ins. Co.*, 536 F.2d 242, 245 (8th Cir. 1976) (interpreting the similar language of the federal rule).

¹⁹*State v. Johnson*, 220 Neb. 392, 401, 370 N.W.2d 136, 142 (1985) (abrogated by, *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996)); *State v. Packett*, 206 Neb. 548, 554-55, 294 N.W.2d 605, 609 (1980) (abrogated by, *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996)); G. Michael Fenner, *The Nebraska Rules of Evidence, 1980: Recent Developments in the Law of Evidence*, 11-12 (NCLE, Inc.).

receipt thereof may be limited to only as much as is necessary to establish the inconsistency.²⁰

If a prior inconsistent statement is a nonhearsay admission by a party opponent²¹ and therefore admissible as substantive evidence, the foundation for impeachment required by Nebraska Evidence Rule 613 is not applicable.²² The same is also true of any other prior inconsistent statement that is admissible as substantive evidence. In that situation, reliance upon Rule 613 is not necessary and, therefore, even its minimal foundational requirements do not apply.

While relevant extrajudicial admissions by a party opponent can be used as substantive evidence or to impeach, they are not conclusive; they may be explained, rebutted, or contradicted, and are to be given such weight as the trier of fact deems them entitled to receive.²³ Regarding extrajudicial admissions, *see also* NJI2d Civ. 1.53. Regarding judicial admissions, *see* NJI2d Civ. 2.01 and 2.08.

Regarding impeachment by cross-examination as to prior inconsistent statements on “collateral” matters *see* the cases and authorities footnoted here.²⁴

A statement constitutionally inadmissible in the prosecution’s “case-in-chief may be used for impeachment purposes to attack the credibility

²⁰State v. Isley, 195 Neb. 539, 543, 239 N.W.2d 262, 265-66 (1976).

²¹Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2016).

²²Neb. Evid. R. 613(2), Neb. Rev. Stat. § 27-613(2) (Reissue 2016); Fortin v. Hike, 205 Neb. 344, 347, 287 N.W.2d 681, 683-84 (1980); Hyde v. Cleveland, 203 Neb. 420, 428-29, 279 N.W.2d 105, 111-12 (1979).

²³Ferlise v. Raznick, 202 Neb. 745, 748, 277 N.W.2d 94, 96 (1979); Aye v. Gartner, 172 Neb. 162, 169-170, 108 N.W.2d 798, 802 (1961) (stating that this is so absent controlling elements of estoppel); Kirchner v. Gast, 169 Neb. 404, 416, 100 N.W.2d 65, 74 (1959); Dorn v. Sturges, 157 Neb. 491, 504, 59 N.W.2d 751, 759 (1953), *holding modified by* Chlopek v. Schmall, 224 Neb. 78, 396 N.W.2d 103 (1986)). *See also* Chism v. Convair Mobile Homes, Inc., 173 Neb. 86, 89-90, 112 N.W.2d

393, 396 (1961), which states the same thing even though it involved a non-party prior statement that was admissible only to impeach. *See also* the Comments to NJI2d Civ. 1.53, 2.01, and 2.06, each of which deals a bit with admissions.

²⁴Bank v. Mickels, 302 Neb. 1009, 1018, 926 N.W.2d 97, 104 (2019) (“A ruling on evidence of a collateral matter intended to affect the credibility of a witness is within the discretion of a trial court.”); State v. Vicars, 207 Neb. 325, 331-32, 299 N.W.2d 421, 426 (1980); Ocander v. B-K Corp., 206 Neb. 287, 290, 292 N.W.2d 567, 569 (1980). *See* the criticism in G. Michael Fenner, *The Nebraska Rules of Evidence, 1980: Recent Developments in the Law of Evidence, 10-11* (NCLE, Inc.). *See also* the thorough discussion of the point at R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-613[D](4) (vol. 3, Nebraska Practice Series, West Group).

of defendant's trial testimony if its trustworthiness meets legal standards."²⁵

"[T]he admission of prior consistent statements, after a witness has been impeached with a prior inconsistent statement, is largely a matter within the discretion of the trial court."²⁶

Regarding a prior inconsistent statement that discredits testimony as a matter of law, *see* NJI2d Civ. 1.45, Comment.

Evidence referenced in paragraph 8 of the instruction—"Any other evidence that affects the credibility of the witnesses or that tends to support or contradict the testimony of the witness"—*could* include evidence of conviction of a crime or evidence of character for truthfulness or untruthfulness. If any such evidence, is admitted as impeachment evidence, but is inadmissible as substantive evidence, then two things should be done: A limited use admonishment should be given at the time the evidence is admitted, *see* NJI2d Civ. 1.70; NJI2d Civ. 1.71, and a limited use instruction should be given at the end of the trial, *see* NJI2d Civ. 1.72. *See* the Comments and Authorities to NJI2d Civ. 1.70, 1.71, and 1.72.

NJI2d Civ. 1.41A

CREDIBILITY OF PARTY'S WITNESS

Recommend no instruction.

COMMENT & AUTHORITIES

The 1975 pocket part to NJI (1969) contained the following instruction: "The fact that a party calls a particular person as a witness does not mean that such party necessarily holds out such witness as worthy of belief in everything he says."¹ That 1975 instruction was a re-

²⁵State v. Harper, 208 Neb. 568, 577, 304 N.W.2d 663, 669 (1981).

²⁶State v. King, 197 Neb. 729, 733, 250 N.W.2d 655, 658 (1977) (dictum). *Accord* Siciunas v. Checker Cab Co., Inc., 191 Neb. 766, 771, 217 N.W.2d 824, 827 (1974), and Anderson v. Evans, 168 Neb. 373, 391, 96 N.W.2d 44, 54 (1959) (not dictum, but predat-

ing the 1975 codification of the Nebraska Evidence Rules).

1.41A

¹State v. Fronning, 186 Neb. 463, 183 N.W.2d 920 (1971) was cited as authority for that instruction. Today one would also cite Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2016) and State v. Joy, 220 Neb. 535, 537,

sponse to *State v. Fronning*,² which changed the preexisting law by doing away with the voucher rule; if that instruction accomplished nothing else, it instructed attorneys about the change.

While the legal principle expressed in the instruction in the 1975 pocket part remains correct, the Committee believes that no such instruction is necessary, and in fact that, as a general rule, no such instruction should be given. The Committee feels that jurors are not likely to believe that one who calls a witness vouches for everything the witness says, and therefore, they need not be instructed to the contrary. Additionally, counsel for any party may argue any witness's credibility, with or without such instruction. If unusual facts call for such instruction, the version quoted above may be given.

A somewhat related statement is found in *Ripp v. Riesland*³ where the Supreme Court held that an instruction that the jurors should proceed on the theory that all witnesses tried to testify truthfully was erroneous as passing upon the credibility of witnesses.⁴

Sometimes a party who is a witness is discredited as a matter of law. See NJI2d Civ. 1.45, Comment.

NJI2d Civ. 1.42

EXPERT TESTIMONY

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. FOUR FOUNDATIONAL QUESTIONS REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY
 - A. IN GENERAL
 - B. DOES THE WITNESS QUALIFY AS AN EXPERT?

371 N.W.2d 113, 114-15 (1985) ("A party no longer 'vouches' for the credibility of its witness.").

²*Fronning*, above.

³*Ripp v. Riesland*. 176 Neb. 233, 125 N.W.2d 699 (1964).

⁴*Id.* at 239-40, 125 N.W.2d at 703-04.

- C. IS THE WITNESS'S TESTIMONY HELPFUL TO THE TRIER OF FACT?
 - 1. QUESTIONS OF FACT
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 - A. *FRYE TO DAUBERT/SCHAFERSMAN*: THE COMMON-LAW TO THE STATUTE.
 - B. *DAUBERT/SCHAFERSMAN*
- V. THE RELATIVE QUALIFICATIONS OF EACH SIDE'S EXPERTS GOES TO THE WEIGHT OF THEIR TESTIMONY, NOT THEIR COMPETENCY
- VI. SELF-CONTRADICTION BY AN EXPERT
- VII. THE UNDERLYING BASIS FOR EXPERT TESTIMONY
- VIII. EXPERT TESTIMONY WHERE LAY PERSONS ARE ALSO COMPETENT
- IX. FOUNDATION OBJECTIONS
- X. EXPERT TESTIMONY TO A REASONABLE DEGREE OF CERTAINTY
- XI. MANDATORY EXPERT TESTIMONY
 - A. IN GENERAL
 - B. PROOF OF PROXIMATE CAUSE
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 - F. EXPERT TESTIMONY REQUIRED BY STATUTE
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 - H. WORKERS' COMPENSATION COURT
 - I. CROSS REFERENCE
- XII. COURT APPOINTED EXPERT FOR AN INDIGENT DEFENDANT
- XIII. EXPERT TESTIMONY AND THE HEARSAY RULE
- XIV. MISCELLANEOUS CASES ON A VARIETY OF KINDS OF EXPERTISE
- XV. CALLING AN OPOPOSING PARTY'S EXPERT TO TESTIFY
- XVI. STANDARD OF REVIEW ON APPEAL
 - A. LACK OF OBJECTION
 - B. DE NOVO REVIEW OF WHETHER THE TRIAL COURT PERFORMED ITS GATEKEEPING FUNCTION

C. ABUSE OF DISCRETION REVIEW ONCE THE
TRIAL COURT HAS PERFORMED ITS GATEKEEP-
ING FUNCTION

XVII. CROSS REFERENCES

I. IN GENERAL

Regarding expert testimony generally, see Article 7 of the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-701 through 27-706 (Reissue 2016); R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII (vol. 3, Nebraska Practice Series, West Group); See also G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939 (1996).

NJI2d Civ. 1.44, Comment & Authorities discusses the use of expert-witness depositions at trial. Please consult that Comment & Authorities if you have questions about the admissibility of an expert's deposition.

Contrary to the instruction appearing in the 1969 version of this same work, this instruction does not refer to the expert's testimony as being in the form of an opinion or conclusion. This is because Nebraska Evidence Rule 702 says that the expert may testify "in the form of an opinion or otherwise."¹ The previous version of this instruction did not seem to allow an expert to give relevant testimony without giving an opinion.²

II. FOUR FOUNDATIONAL QUESTIONS REGARDING THE
ADMISSIBILITY OF EXPERT TESTIMONY

A. IN GENERAL

In determining whether an expert's testimony is admissible pursuant to the Nebraska Evidence Rules, a court considers four preliminary and interrelated questions: (1) Does the witness qualify as an expert pursuant to Neb. Evid. R. 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403?³

More recently, the Court has expressed the four factors as

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¹Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2016) (emphasis added). *Accord* Larsen v. 401 Main Street, 302 Neb. 454, 461, 923 N.W.2d 710, 715 (2019).

²See Comment to Proposed Rule 702, Proposed Nebraska Rules of Evidence, August 1, 1973, at 109 (Neb. Sup. Ct. Comm. on Prac. and Proc.).

³State v. Reynolds, 235 Neb. 662, 679-81, 457 N.W.2d 405, 417 (1990).

(1) whether the witness is qualified to testify as an expert, (2) whether the witness's testimony is supported by scientifically valid and reliable methodology or reasoning, (3) whether the reasoning or methodology has been properly applied to the facts in issue, and (4) whether the testimony's probative value is not substantially outweighed by danger of unfair prejudice.⁴

"[A]n expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination."⁵

"[A] witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert."⁶

The trial court's determination whether a witness qualifies as an

Accord, e.g., *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 225-26, 762 N.W.2d 24, 42-43 (2009); *Rankin v. Stetson*, 275 Neb. 775, 781, 749 N.W.2d 460, 464-65 (2008); *Caguioa v. Fellman*, 275 Neb. 455, 461, 747 N.W.2d 623, 628 (2008); *State v. Kuehn*, 273 Neb. 219, 223, 728 N.W.2d 589, 596 (2007); *Perry Lumber Co., Inc. v. Durable Services, Inc.*, 271 Neb. 303, 309-10, 710 N.W.2d 854, 859-60 (2006) (*Perry Lumber II*); *State v. Mason*, 271 Neb. 16, 33, 709 N.W.2d 638, 653 (2006) (criminal case); *City of Lincoln v. Realty Trust Group, Inc.*, 270 Neb. 587, 594, 705 N.W.2d 432, 439 (2005); *Robb v. Robb*, 268 Neb. 694, 700, 687 N.W.2d 195, 201 (2004); *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 270, 631 N.W.2d 846, 854 (2001), opinion modified on denial of reh'g, *Mondelli v. Kendel Homes Corp.*, 262 Neb. 663, 641 N.W.2d 624 (2001); *Seeber v. Howlette*, 255 Neb. 561, 566, 586 N.W.2d 445, 449 (1998); *State v. Lopez*, 249 Neb. 634, 642-43, 544 N.W.2d 845, 852-53 (1996); *Talle v. Nebraska Dept. of Social Services*, 249 Neb. 20, 25-26, 541 N.W.2d 30, 34-35 (1995) (regarding the four preliminary and interrelated questions in the context of hedonic damages, i.e., value-of-life evidence, this expert's models are fatally flawed and fail to satisfy Neb. Evid. R. 702) (citing *Anderson By and Through Anderson/Couvillon v. Nebraska Dept. of Social Services*, 248

Neb. 651, 669, 538 N.W.2d 732, 743-44 (1995)); *Boren v. Burlington Northern & Santa Fe Ry. Co.*, 10 Neb. App. 766, 637 N.W.2d 910, 921 (2002).

⁴*Gonzales v. Nebraska Pediatric Practice, Inc.*, 308 Neb. 571, 575-76, — N.W.2d —, — (2021).

⁵*Heistand v. Heistand*, 267 Neb. 300, 309-10, 673 N.W.2d 541, 549 (2004) (quoting *Gittins v. Scholl*, 258 Neb. 18, 23, 601 N.W.2d 765, 768 (1999)). *Accord* *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 870-71, 896 N.W.2d 156 (2017), —; *Village of Hallam v. L.G. Barcus & Sons, Inc.*, 281 Neb. 516, 529, 798 N.W.2d 109, 120 (2011); *Rankin v. Stetson*, 275 Neb. 775, 781, 749 N.W.2d 460, 465 (2008); *State v. Mason*, 271 Neb. 16, 33, 709 N.W.2d 638, 653 (2006) (criminal case); *State v. King*, 269 Neb. 326, 331-32, 693 N.W.2d 250, 257 (2005) (criminal case); *Smith v. Colorado Organ Recovery System, Inc.*, 269 Neb. 578, 585, 694 N.W.2d 610, 619 (2005).

In *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008), the Court affirmed the trial court's exclusion of an expert witness' opinion because, when asked on cross-examination, the expert could not state the basis for the opinion. *Id.* at 783, 749 N.W.2d at 466.

⁶Same quotation: *Jackson v. Brotherhood's Relief and Compensation Fund*, 273 Neb. 1013, 1019, 734 N.W.2d 739, 745 (2007); *State v.*

expert is discretionary. The trial court's determination whether an expert's testimony is admissible is discretionary. These points are discussed below, in these Comments & Authorities, under the heading "Standard of Review on Appeal."

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-702 (vol. 3, Nebraska Practice Series, West Group).

B. DOES THE WITNESS QUALIFY AS AN EXPERT?

"Whether a witness is qualified as an expert is a preliminary question for the trial court."⁷ "There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert."⁸

Nebraska Evidence Rule 702⁹ states that an expert witness may be qualified "by knowledge, skill, experience, training or education, [and] may testify . . . in the form of an opinion or otherwise." This instruction is consistent with that rule and with Nebraska case law.¹⁰

Aguilar, 268 Neb. 411, 419, 683 N.W.2d 349, 356 (2004); Carlson v. Okerstrom, 267 Neb. 397, 409, 675 N.W.2d 89, 102 (2004). *Accord* Richardson v. Children's Hosp., 280 Neb. 396, 404, 787 N.W.2d 235, 242 (2010).

⁷Yagodinski v. Sutton, 309 Neb. 179, 189, 959 N.W.2d 541, 549 (2021).

⁸*Id.*

⁹Nebraska Evidence Rule 702, Neb. Rev. Stat. § 27-702 (Reissue 2016).

¹⁰*E.g.*, Larsen v. 401 Main Street, 302 Neb. 454, 461, 923 N.W.2d 710, 715 (2019); Cain v. Custer Cty. Bd. of Equal., 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018) ("A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation[.]"); ACI Worldwide Corp. v. Baldwin Hackett & Meeks, 296 Neb. 818, 871, 896 N.W.2d 156, 192-93 (2017) ("[A] witness may qualify as an expert by virtue of either formal training or actual practical experience in the field."); King v. Burlington Northern Santa Fe Ry. Co., 277 Neb. 203, 225, 762 N.W.2d 24, 42 (2009); Perry Lumber Co., Inc. v.

Durable Services, Inc., 271 Neb. 303, 310, 710 N.W.2d 854, 860 (2006) (*Perry Lumber II*); Main Street Movies, Inc. v. Wellman, 251 Neb. 367, 370-71, 557 N.W.2d 641, 644-45 (1997) (stating that whether one qualifies as expert depends on factual basis or reality underlying witness' title or claim to expertise); Crawford v. Department of Motor Vehicles, 246 Neb. 319, 322, 518 N.W.2d 148, 150 (1994); State v. Chambers, 241 Neb. 66, 71, 486 N.W.2d 481, 484 (1992); Robinson v. Bleicher, 251 Neb. 752, 759-60, 559 N.W.2d 473, 479 (1997) (disapproved of by, Hamilton v. Bares, 267 Neb. 816, 678 N.W.2d 74 (2004)); State v. Stahl, 240 Neb. 501, 506, 482 N.W.2d 829, 835 (1992); Aetna Cas. & Sur. Co. v. Nielsen, 222 Neb. 92, 94, 382 N.W.2d 328, 330 (1986) (noting that it is not possible to establish an exact standard for determining the qualifications of an expert witness); State v. Schenck, 222 Neb. 523, 531, 384 N.W.2d 642, 648 (1986); Priest v. McConnell, 219 Neb. 328, 334, 363 N.W.2d 173, 177 (1985) (quoting Rule 702 and stating: "Expert testimony must meet these requirements in order to be admissible.").

"[E]xperts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value."¹¹

"[A]n expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field. That the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device."¹²

"It is well established in Nebraska that the opinion of a personal property owner is competent evidence of its value, solely because of his or her status as an owner."¹³

C. IS THE WITNESS'S TESTIMONY HELPFUL TO THE TRIER OF FACT?

1. QUESTIONS OF FACT

To be admissible, an expert's opinion must be helpful, must be of assistance, to the trier of fact. "The trial court initially determines whether expert testimony will assist the trier of fact. The soundness of such a decision depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case."¹⁴

Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of the trial court's determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.¹⁵

"[T]he trial court [must] . . . act as a gatekeeper to ensure that

¹¹Carlson v. Okerstrom, 267 Neb. 397, 409, 675 N.W.2d 89, 102 (2004) (quoting Ashby v. First Data Res., Inc., 242 Neb. 529, 535, 497 N.W.2d 330, 335-36 (1993)) (citation omitted). *Accord* ACI Worldwide Corp. v. Baldwin Hackett & Meeks, 296 Neb. 818, 871, 896 N.W.2d 156, 192 (2017).

¹²State v. Aguilar, 268 Neb. 411, 419, 683 N.W.2d 349, 356 (2004).

¹³Pan v. IOC Realty Specialist, 301 Neb. 256, 277-78, 918 N.W.2d 273,

291-92 (2018) (citing Peck v. Masonic Manor Apt. Hotel, 203 Neb. 308, 278 N.W.2d 589 (1979)).

¹⁴Ketteler v. Daniel, 251 Neb. 287, 293, 556 N.W.2d 623, 627 (1996) (citation omitted). *See also, e.g.*, State v. Bauldwin, 283 Neb. 678, 702, 811 N.W.2d 267, 288 (2012).

¹⁵McArthur v. Papio-Missouri River Nat. Res. Dist., 250 Neb. 96, 102, 547 N.W.2d 716, 722 (1996).

expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact.”¹⁶

Expert opinion may be excluded as unhelpful or of no assistance if: (1) it does no more than express “how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact”; or (2) it is superfluous because the jury has all the evidence and the ability it needs to form the opinion itself.¹⁷

The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court’s evaluation of the state of knowledge presently existing about the subject of the proposed expert testimony and (2) the court’s appraisal of the facts of the case.

Under the helpfulness standard, a court may exclude an expert’s opinion which is nothing more than an expression of how the trier of fact should decide a case, and when an expert’s opinion on a disputed issue is a conclusion which may be deduced equally as well by a trier of fact with sufficient evidence on the issue, the expert’s opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.¹⁸

The points made in the preceding paragraphs are the flip sides of these rules: First, expert testimony may be of assistance to the trier of fact, and therefore admissible, even though the jurors have the ability to form the opinion themselves. This is discussed in part VIII of this Comment & Authorities, below. Second, expert testimony “is not objectionable [just] because it embraces an ultimate issue to be decided by the trier of fact.”¹⁹

¹⁶In re Interest of Christopher T., 281 Neb. 1008, 1017, 801 N.W.2d 243, 251 (2011). See also, e.g., *Gonzales v. Nebraska Pediatric Practice, Inc.*, 308 Neb. 571, 575, 955 N.W.2d 696, 701 (2021); *Larsen v. 401 Main Street*, 302 Neb. 454, 461, 923 N.W.2d 710, 715 (2019); *Hemsley v. Langdon*, 299 Neb. 464, 473, 909 N.W.2d 59, 67–68 (2018); *State v. Bauldwin*, *supra*.

¹⁷The quotation is from *State v. Reynolds*, 235 Neb. 662, 688, 457 N.W.2d 405, 421 (1990). In support of both points, see *Schafersman v. Agland Coop*, 262 Neb. 215, 222, 631 N.W.2d 862 (2001) (*Schafersman I*); *State v.*

Buechler, 253 Neb. 727, 737, 572 N.W.2d 65, 72 (1998); *State v. Lowe*, 244 Neb. 173, 184, 505 N.W.2d 662, 670 (1993); *State v. Reynolds*, 235 Neb. at 687–89, 457 N.W.2d at 421–22.

¹⁸*State v. Lopez*, 249 Neb. 634, 642, 544 N.W.2d 845, 852–53 (1996) (citations omitted).

¹⁹*Coppi v. West American Ins. Co.*, 247 Neb. 1, 15, 524 N.W.2d 804, 815 (1994) (quoting Neb. Evid. R. 704, Neb. Rev. Stat. § 27-704 (Reissue 2016)), *overruled on other grounds by D & S Realty, Inc. v. Markel Ins. Co.*, 280 Neb. 567, 587, 789 N.W.2d 1, 17 (2010). *Accord Childers v. Phelps Cty.*, 252

2. QUESTIONS OF LAW

As a general rule expert opinion on the status of the law is unhelpful and inadmissible.²⁰ For example, “[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.”²¹

3. CROSS REFERENCES

Expert testimony is generally required in a legal malpractice action to establish the standard of care and whether the actions under review deviated therefrom. This is discussed below in this Comment & Authorities, in the part dealing with “Mandatory Expert Testimony.”

Neb. 945, 952, 568 N.W.2d 463, 468 (1997) (an opinion is not inadmissible just because it embraces the ultimate issue of the proximate cause of the accident).

²⁰*Woodmen of the World v. Neb. Dept. of Rev.*, 299 Neb. 43, 62, 907 N.W.2d 1, 15 (2018) (“Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or determine a fact in issue, and expert testimony concerning a question of law does not tend to accomplish either of these goals.”); *Harris v. O’Connor*, 287 Neb. 182, 189, 842 N.W.2d 50, 56 (2014); *State v. Merchant*, 285 Neb. 456, 465, 827 N.W.2d 473, 481 (2013); *Heistand v. Heistand*, 267 Neb. 300, 311, 673 N.W.2d 541, 550 (2004); *McWhirt v. Heavey*, 250 Neb. 536, 552, 550 N.W.2d 327, 337 (1996); *Sports Courts of Omaha, Ltd. v. Brower*, 248 Neb. 272, 278, 534 N.W.2d 317, 321 (1995) (“[E]xpert testimony concerning a question of law is generally not admissible in evidence.”) (citing cases and sections of the statute that is the Nebraska Evidence Rules)); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 793, 515 N.W.2d 756, 767 (1994), *abrogated by* *A.W. v. Lancaster Cty. Sch. Dist.* 0001, 280 Neb. 205, 784 N.W.2d 907 (2010)); *Kaiser v. Western R/C Flyers, Inc.*, 239 Neb. 624, 628, 477 N.W.2d 557, 560 (1991).

In a case involving the City of Gretna’s annexation of certain “contiguous or adjacent” land, “the parties’

experts provided conflicting testimony as to how the property should be [classified].” *County of Sarpy v. City of Gretna*, 309 Neb. 320, 327–28, 960 N.W.2d 272, 279 (2021). The trial court granted summary judgment for Sarpy County. The Supreme Court noted that “[t]he issue of whether annexed territory is agricultural land that is rural in character is a question of law,” *id.* at 327, 960 N.W.2d at 279, and that “neither party contend[ed] that there [were] any genuine issues of material fact as to how the area should be classified under the relevant statutory authority . . .,” *id.* at 327–28, 960 N.W.2d at 279. On its own de novo review on the record the Court reversed the trial court’s grant of summary judgment and held that Gretna’s annexation was valid. In the process, the Court stated that “[a] conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment. The key element . . . is whether the experts conflict on a question of fact or a question of law. Two experts coming to different legal conclusions on the same issue does not create a material issue of fact.” *Id.* at 328, 960 N.W.2d at 279 (emphasis added; footnotes omitted).

²¹*Sturzenegger v. Father Flanagan’s Boy’s Home*, 276 Neb. 327, 350, 754 N.W.2d 406, 428 (2008) (alteration in *Sturzenegger*; multiple quotation marks omitted).

Regarding relevance and expert opinion, in addition to this discussion of the “helpfulness” test, *see also* part VII of this Comment & Authorities, on the subject of the “Underlying Basis for Expert Testimony.”

III. EXPERT TESTIMONY IS NOT BINDING ON THE TRIER OF FACT

“Testimony of expert witnesses is not treated any differently in the fact-finding process than that of witnesses generally when it comes to determining the weight and credibility of the testimony.”²² Although the court must initially determine that the expert’s testimony will assist the trier of fact, the expert’s testimony is purely advisory and is not binding on the triers of fact.²³ The finder of fact may credit all, none, or any part of an expert’s testimony.²⁴

²²*Doyle v. Union Ins. Co.*, 202 Neb. 599, 618, 277 N.W.2d 36, 46 (1979). *See also* *Hintz v. Farmers Coop Ass’n*, 297 Neb. 903, 914, 902 N.W.2d 131, 139 (2017); *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 540, 378 N.W.2d 852, 855 (1985); *Penhansky v. Drake Realty Const. Co.*, 109 Neb. 120, 124, 190 N.W. 265, 267 (1922). *See also* NJI2d Civ. 1.41 and 1.41A.

²³*E.g.*, *Benjamin v. Bierman*, 305 Neb. 879, 889, 943 N.W.2d 283, 292 (2020); *Fredericks Peebles & Morgan v. Assam*, 300 Neb. 670, 686–87, 915 N.W.2d 770, 782 (2018) (“The trier of fact is not bound to accept expert testimony. The determination of the weight that should be given expert testimony is uniquely the province of the fact finder. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.” (footnotes omitted)). The jury may accept or reject any part of it.; *Lewison v. Renner*, 298 Neb. 654, 668, 905 N.W.2d 540, 550 (2018) (regarding a defendant’s expert gave testimony more favorable to the plaintiff than did plaintiff’s own expert; on appeal, plaintiff relied on the testimony of the defendant’s expert and not that of her

own; the Supreme Court upheld a verdict for the defendant, stating that the jury reasonably could have given greater weight to plaintiff’s own witness’ damaging testimony than to her opponent’s witness’s more favorable testimony); *Hintz*, 297 Neb. at 912, 902 N.W.2d at 137; *Cingle v. State*, 277 Neb. 957, 971, 766 N.W.2d 381, 391 (2009); *State v. Kuhl*, 276 Neb. 497, 508, 755 N.W.2d 389, 399 (2008) (“[T]he trial court is not bound to accept the conclusion of a particular expert.”); *Eicher v. Mid America Financial Inv. Corp.*, 275 Neb. 462, 469, 748 N.W.2d 1, 9 (2008) (affirming the trier of fact’s acceptance of the testimony of the landowner in a case where both the landowner and an expert witness testified to the value of land); *Hilliard v. Robertson*, 253 Neb. 232, 238, 570 N.W.2d 180, 184 (1997); *McWhirt v. Heavey*, 250 Neb. 536, 550, 550 N.W.2d 327, 336 (1996); *Thilking v. Travelers Ins. Co.*, 240 Neb. 248, 256, 482 N.W.2d 548, 553 (1992) (“A . . . trier of fact may accept or reject an opinion from an expert.”) (citation omitted); *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 168, 84 N.W.2d 151, 168 (1957).

²⁴*Fredericks Peebles & Morgan*, 300 Neb. at 686–688, 915 N.W.2d at 782–83.

Further, jurors are not required to accept stipulated expert testimony as binding.²⁵

As an example, the fact that a plaintiff's experts testify that the plaintiff's injury was proximately caused by the accident under litigation does not entitle the plaintiff to a directed verdict. "Triers of fact are not required to take opinions of experts as binding upon them. Thus, we find that plaintiff was not entitled to a directed verdict, because determining the weight that should be given expert testimony is uniquely the province of the fact finder."²⁶

IV. THE ADMISSIBILITY OF EXPERT TESTIMONY: SCHAFFERSMAN AND DAUBERT

A. FRYE TO DAUBERT/SCHAFFERSMAN: THE COMMON-LAW TO THE STATUTE

For the 70 years from 1923 to 1993, federal courts determined the admissibility of expert testimony using the common-law *Frye* test from *Frye v. United States*.²⁷ In the context of scientific evidence *Frye* stated that scientific testimony was admissible only when the technique on which it is based was "generally accepted" in the relevant scientific community.²⁸ In 1993, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁹ changed that rule of admissibility. *Daubert* held that the subsequently enacted statutory Federal Rules of Evidence superseded the common-law *Frye* test.³⁰ In federal court the federal-rules test is commonly known as the *Daubert* test.

Nebraska's statutory evidence rules are identical in all relevant parts to the federal statute interpreted in *Daubert*. In *Schaffersman v. Agland Coop*, the Nebraska Supreme Court also abandoned *Frye* and adopted the *Daubert* test.³¹ In Nebraska, the test is commonly called the *Daubert/Schaffersman* test.

²⁵*O'Neil v. Behrendt*, 212 Neb. 372, 377, 322 N.W.2d 790, 793 (1982) (stipulation to testimony regarding damages no more binding on jury than if witness actually called, qualified as expert, and testified). See also *NJI2d Civ. 1.41, Authorities*.

²⁶*Vredevelde v. Clark*, 244 Neb. 46, 51, 504 N.W.2d 292, 296 (1993) (citations omitted). Accord *Benjamin v. Bierman*, 305 Neb. 879, 889, 943 N.W.2d 283, — (2020); *Staley v. City of Omaha*, 271 Neb. 543, 549, 713 N.W.2d 457, 466 (2006) (noting that the rule is the same, when trial court is the trier of fact); *Cerny v. Cedar*

Bluffs Junior/Senior Public Sch., 267 Neb. 958, 966, 679 N.W.2d 198, 204 (2004) (stating that the weight to be given to expert testimony is uniquely the province of the fact finder).

²⁷*Frye v. United States*, 54 App. D.C. 46, 293 Fed. 1013 (1923).

²⁸*Id.* at 47, 293 Fed. at 1014.

²⁹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

³⁰*Daubert*, at 586-87, 113 S.Ct. at 2793.

³¹*Schaffersman v. Agland Coop*,

Under *Frye*, expert testimony was not admissible unless experts in the field considered the general theory and the methodology reliable. *Frye* relied on experts in the field to weed out unreliable expert testimony. Experts had to consider the general theory and particular methodology to be reliable.³² Under *Daubert/Schafersman*, expert testimony is not admissible unless the trial judge determines that theory and methodology are reliable and relevant, both in general and as applied in the case at hand. *Daubert/Schafersman* relies on the trial judge to weed out unreliable expert testimony.³³

B. DAUBERT/SCHAFERSMAN

1. In General

After *Daubert*, in federal court, and *Schafersman I*, in Nebraska, the test

is no longer whether the theory, the methodology, and their application to the facts meet a standard of “general acceptance.” Instead, the test is whether the evidence is “scientific knowledge,” whether it will assist the trier of fact, and whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *The trial judge must assess the reliability and the relevance of the theory and methodology.* This involves assessing each of them both in general and as applied by these particular witnesses to this particular case. “General acceptance” is still one factor to consider.³⁴

“The intent of the *Daubert/Schafersman* test was to relax the

262 Neb. 215, 232, 631 N.W.2d 862, 876 (2001) (*Schafersman I*). *Accord*, e.g., *State v. Casillas*, 279 Neb. 820, 833-39, 782 N.W.2d 882, 895-899 (2010); *Epp v. Lauby*, 271 Neb. 640, 646-47, 715 N.W.2d 501, 507-08 (2006); *City of Lincoln v. Realty Trust Group, Inc.*, 270 Neb. 587, 590, 705 N.W.2d 432, 436-37 (2005); *Zimmerman v. Powell*, 268 Neb. 422, 427, 684 N.W.2d 1, 7 (2004).

³²See, e.g., *Casillas*, 279 Neb. at 834-35, 782 N.W.2d at 896 (“The single question that determined admissibility was whether the evidence had become generally accepted in its field.”).

³³E.g., *Larsen v. 401 Main Street*, 302 Neb. 454, 461-62, 923 N.W.2d 710, 715 (2019); *State v. Herrera*, 289 Neb.

575, 589, 856 N.W.2d 310, 325 (2014) (“[The] trial court must determine whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be properly applied to the facts in issue.”); *Casillas*, 279 Neb. at 834-35, 782 N.W.2d at 895-96 (“[T]he court must independently evaluate whether the evidence is based in good science.” *Id.* at 835, 782 N.W.2d at 896.); *Fickle v. State*, 273 Neb. 990, 1004-07, 735 N.W.2d 754, 769-70 (2007), *opinion supplemented on overruling motion for reh’g* at 274 Neb. 267, 759 N.W.2d 113 (2007); *Zimmerman*, 268 Neb. at 428, 684 N.W.2d at 7.

³⁴G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L.Rev. 939, 947-48 (1996)

traditional barriers to expert testimony by permitting courts to receive expert testimony based on ‘good science’ even before that science became generally accepted.”³⁵ “If proffered scientific evidence rests on sound scientific reasoning or methodology and properly can be applied to the facts in issue, it meets the *Daubert* requirements for admissibility, even if the conclusion is novel or controversial.”³⁶

In deciding this issue, the trial judge can of course consider whether experts in the field generally accept the theory and methodology as reliable, but the trial judge is not limited to considering general acceptance. Under *Daubert/Schafersman*, the trial judge can admit reliable expert testimony before experts in the field generally come to accept it.³⁷ Also, the trial judge can keep out unreliable expert testimony even if the relevant community of experts accepts it as reliable.³⁸

The heart of the *Daubert* and the *Daubert/Schafersman* test is, respectively, federal and Nebraska evidence Rule 702.³⁹ Rule 702 allows testimony based on “scientific knowledge.” “‘[S]cientific’ implies a grounding in the methods and procedures of science,” and “‘knowledge’ connotes more than subjective belief or unsupported speculation.”⁴⁰ Rule 702 requires that such testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.” This “goes primarily to relevance” and asks, Is there “a valid scientific connection to” a fact in issue?⁴¹ Extra protection is found in the following rules: Rule 703—expert opinion testimony may rely on inadmissible facts or data only

(emphasis added; footnotes omitted) (discussing, in detail, other factors to consider). *State v. Herrera*, 289 Neb. 575, 588, 856 N.W.2d 310, 325 (2014); *Fickle v. State*, 273 Neb. 990, 1005, 735 N.W.2d 754, 769 (2007), *opinion supplemented on overruling of motion for reh’g* at 274 Neb. 267, 759 N.W.2d 113 (2007); *Smith v. Colorado Organ Recovery System, Inc.*, 269 Neb. 578, 585, 694 N.W.2d 610, 619 (2005); *Zimmerman v. Powell*, 268 Neb. at 427, 684 N.W.2d at 7; *Schafersman II*, 268 Neb. at 147, 681 N.W.2d at 54-55; *Carlson v. Okerstrom*, 267 Neb. 397, 411-13, 675 N.W.2d 89, 103-05 (2004). (While *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008), states that the admissibility of expert testimony “depends on general acceptance of the principle, technique, or process in the relevant scientific community,” citing *Schafersman I*, *Rankin*, 275 Neb. at 780, 749 N.W.2d at 465, it goes on to recognize that general acceptance is only one consideration a trial

court may use, *id.* at 781, 749 N.W.2d at 465).

³⁵*Herrera*, 289 Neb. at 588, 856 N.W.2d at 324.

³⁶*Epp v. Lauby*, 271 Neb. 640, 651, 715 N.W.2d 501, 511 (2006). *Accord Pitts v. Genie Indus.*, 302 Neb. 88, 102-03, 921 N.W.2d 597, 610-11 (2019).

³⁷*Casillas*, 279 Neb. at 835, 782 N.W.2d at 896; *Rankin*, 275 Neb. at 780, 749 N.W.2d at 465.

³⁸*Casillas*, 279 Neb. at 835, 782 N.W.2d at 896 (“[W]hile most science generally accepted in the relevant scientific community will be good science, it is not necessarily so.”).

³⁹*Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795.

⁴⁰*Daubert*, 509 U.S. at 589-90, 113 S.Ct. at 2795.

⁴¹*Daubert*, 509 U.S. at 591-92, 113 S.Ct. at 2795-96.

when such facts or data are reasonably relied upon by experts in the field; and Rule 403—testimony is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice; and, notes *Daubert*, in this regard, expert testimony can be especially difficult for the trier of fact to evaluate.⁴²

Summed up as far as it can be, the rule from *Daubert* is this: “The trial judge must determine whether ‘an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’”⁴³

The *Daubert/Schafersman* “test applies to the admission of expert testimony in both civil and criminal cases.”⁴⁴ “All specialized knowledge generally falls under the rules of *Daubert/Schafersman*.”⁴⁵

2. The Trial Court as Gatekeeper

“Under *Daubert* and *Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert’s opinion.”⁴⁶ “*Daubert/Schafersman* requires the trial court to act

⁴²*Daubert*, 509 U.S. at 595, 113 S.Ct. at 2798. See also *McNeel v. Union Pacific R. Co.*, 276 Neb. 143, 152-53, 753 N.W.2d 321, 330-31 (2008); *State v. Fernando-Granados*, 268 Neb. 290, 308-09, 682 N.W.2d 266, 280-81 (2004); *Schafersman v. Agland Coop*, 268 Neb. 138, 147, 681 N.W.2d 47, 54 (2004) (*Schafersman II*).

⁴³G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L.Rev. 939, 942 (1996) (quoting *Daubert*, 509 U.S. at 597, 113 S.Ct. at 2799). See *Freeman v. Hoffman-Ls Roche, Inc.*, 300 Neb. 47, 52, 911 N.W.2d 591, 596 (2018) (“[Is] the reasoning or methodology underlying the testimony . . . valid (reliable) . . . [and] can [it] be properly applied to the facts in issue[?]”); *Herrera*, 289 Neb. at 588, 856 N.W.2d at 325; *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 225-26, 762 N.W.2d 24, 42-43 (2009); *McNeel*, 276 Neb. at 152-53, 753 N.W.2d at 330-31; *Fickle v. State*, 273 Neb. 990, 1005, 735 N.W.2d 754, 769 (2007), *opinion supplemented on overruling of motion for reh’g* at 274 Neb. 267, 759 N.W.2d 113 (2007); *State v. King*, 269 Neb. 326, 332, 693 N.W.2d 250, 257 (2005);

Smith v. Colorado Organ Recovery System, Inc., 269 Neb. 578, 585-86, 694 N.W.2d 610, 619 (2005); *Robb v. Robb*, 268 Neb. 694, 700-01, 687 N.W.2d 195, 201 (2004); *Zimmerman*, 268 Neb. at 427-28, 684 N.W.2d at 7; *Schafersman II*, 268 Neb. at 147-47, 681 N.W.2d at 54-55; *Carlson v. Okerstrom*, 267 Neb. 397, 411-13, 675 N.W.2d 89, 103-05 (2004).

⁴⁴*State v. Leibhart*, 266 Neb. 133, 141, 662 N.W.2d 618, 626 (2003). See also, e.g., *Casillas*, 279 Neb. at 833-39, 782 N.W.2d at 895-99.

⁴⁵*In re Interest of Christopher T.*, 281 Neb. 1008, 1018, 801 N.W.2d 243, 252 (2011).

⁴⁶*Sturzenegger v. Father Flanagan’s Boy’s Home*, 276 Neb. 327, 349, 754 N.W.2d 406, 428 (2008). Accord, e.g., *Hemsley v. Langdon*, 299 Neb. 464, 473, 909 N.W.2d 59, 68 (2018); *Herrera*, 289 Neb. at 587-90, 856 N.W.2d at 324-25; *Casillas*, 279 Neb. at 835, 782 N.W.2d at 896; *State v. Edwards*, 278 Neb. 55, 73, 767 N.W.2d 784, 800-01 (2009); *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 227, 762 N.W.2d 24, 43 (2009) (“[W]hile the trial court acts as the evidentiary gatekeeper, it is not a goal-keeper.”); *State v. Schreiner*, 276 Neb.

as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact.”⁴⁷ “The purpose of this gatekeeping function is to ensure that the courtroom door remains closed to junk science that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.”⁴⁸

“The trial court does not have the discretion to abdicate its gatekeeping duty.”⁴⁹

3. The Four Steps of the *Daubert*/*Schafersman* Test

“The *Daubert* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion”⁵⁰

■ “First, the court must determine whether the witness is qualified to testify as an expert.”⁵¹

■ Second, if the witness is qualified as an expert, then the court

393, 404, 754 N.W.2d 742, 753 (2008); *Epp v. Lauby*, 271 Neb. 640, 646, 715 N.W.2d 501, 507 (2006) (citing cases); *Zimmerman v. Powell*, 268 Neb. 422, 427-28, 684 N.W.2d 1, 7 (2004).

⁴⁷In re Interest of Christopher T., 281 Neb. 1008, 1017, 801 N.W.2d 243 (2011).

⁴⁸Same quotation: *Hemsley*, 299 Neb. at 473, 909 N.W.2d at 68 (internal quotation marks omitted); *Herrera*, 289 Neb. at 587-90, 856 N.W.2d at 324-25.

⁴⁹*Casillas*, 279 Neb. at 835, 782 N.W.2d at 896.

⁵⁰Same quotation: *State v. Fernando-Granados*, 268 Neb. 290, 308, 682 N.W.2d 266, 280 (2004); *Schafersman I*, 262 Neb. at 225, 631 N.W.2d at 872. *Accord* *Richardson v. Children's Hosp.*, 280 Neb. 396, 407, 787 N.W.2d 235, 244 (2010) (stating that the focus is on the expert's “principles and methodology . . . , and not the conclusions that they generate”); *Rankin v. Stetson*, 275 Neb. 775, 781, 749 N.W.2d 460, 465 (2008) (quoting *Schafersman I*). The court must make “a preliminary assessment to determine whether the reasoning or methodology underlying

the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.” *Fickle v. State*, 273 Neb. 990, 1005, 735 N.W.2d 754, 769 (2007), *opinion supplemented on overruling of motion for reh'g* at 274 Neb. 267, 759 N.W.2d 113 (2007). *Accord* *Edwards*, 278 Neb. at 73, 767 N.W.2d at 800; *Schreiner*, 276 Neb. at 404, 754 N.W.2d at 753; *Sturzenegger*, 276 Neb. at 349, 754 N.W.2d at 428; *Rankin v. Stetson*, 275 Neb. 775, 781, 749 N.W.2d 460, 465 (2008) (quoting *Schafersman I*, 262 Neb. at 225, 631 N.W.2d at 872); *Carlson v. Okerstrom*, 267 Neb. 397, 411-13, 675 N.W.2d 89, 103-05 (2004). *See also* *McNeel*, 276 Neb. at 152-53, 753 N.W.2d at 330-31.

⁵¹*Epp v. Lauby*, 271 Neb. 640, 646, 715 N.W.2d 501, 507 (2006). “[T]he trial court must determine whether the [witness]’s knowledge, skill, experience, training, and education qualify the witness as an expert.” *Casillas*, 279 Neb. at 835-36, 782 N.W.2d at 896-97. *Also see generally* *King v. Burlington Northern Santa Fe Co.*, 277 Neb. 203, 225-26, 762 N.W.2d 24, 42-43 (2009); *McNeel*, 276 Neb. at 152-53, 753 N.W.2d at 330-31.

must decide whether the reasoning and methodology that underlie the expert's testimony are valid and reliable.⁵²

[N]onexclusive criteria which the trial court may consider in evaluating the reliability of a particular theory . . . include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific community. These are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.⁵³

"[W]hen an expert is a licensed health professional offering testimony about a patient, it is entirely appropriate for a court to consider, as a factor affecting qualification, the statutory scope of practice established by the Legislature." *Yagodinski v. Sutton*, 309 Neb. 179, 198, 959 N.W.2d 541, 554 (2021) (" '[A] duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his [or her] knowledge according to his [or her] qualifications in the field of chiropractics . . . ' As such, a licensed chiropractor will generally be qualified to testify as an expert on any matter that is within the scope of chiropractic practice and licensure in Nebraska." *Id.* at 190, 959 N.W.2d at 549. "The legislature has circumscribed the diagnostic and treatment methods available to licensed chiropractors, and courts should not, by judicial interpretation, expand the practice of chiropractic beyond the scope established by the legislature," *Id.* at 195, 959 N.W.2d at 552.) (discussing Nebraska's chiropractor-licensing statute, Neb. Rev. Stat. § 38-805 (Reissue 2016)).

⁵²*Pitts v. Genie Indus.*, 302 Neb. 88, 101, 921 N.W.2d 597, 610 (2019); *Hemsley v. Langdon*, 299 Neb. 464, 473-74, 909 N.W.2d 59, 68 (2018); *Casillas*, 279 Neb. at 836, 782 N.W.2d at 897; *Epp v. Lauby*, 271 Neb. at 646-

47, 715 N.W.2d at 507-08. *Also see generally King*, 277 Neb. at 225-26, 762 N.W.2d at 42-43; *McNeel*, 276 Neb. at 152-53, 753 N.W.2d at 330-31. *See also*, *In re Interest of Christopher T.*, 281 Neb. 1008, 1017, 801 N.W.2d 243, 251 (2011) ("*Daubert/Schafersman* requires the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact.").

See also McGill Restoration, Inc. v. Lion Place Condominium Association, 309 Neb. 202, 238, 959 N.W.2d 251, 277-78 (2021) ("Simply because the facade demonstrated deterioration after McGill performed its work does not mean" that McGill was a proximate cause of the deterioration. "It is well settled that a causation opinion based solely on a temporal relationship is unreliable, because it is not derived from the scientific method. Such an opinion is also unreliable because it is not based upon sufficient facts or data.")

⁵³*Epp v. Lauby*, 271 Neb. 640, 648, 715 N.W.2d 501, 509 (2006) (citations omitted). *Accord, e.g., Freeman v. Hoffman-La Roche, Inc.*, 300 Neb. 47, 52, 911 N.W.2d 591, 596 (2018); *Hemsley v. Langdon*, 299 Neb. 464, 473, 475, 909 N.W.2d 59, 67-69 (2018); *State v. Herrera*, 289 Neb. 575, 589-90, 856 N.W.2d 310, 325 (2014); *State v.*

The proponent of the expert testimony need not necessarily demonstrate each and every one of the criteria listed above.⁵⁴ The stated list does not mean that the trial judge must take each step or that he or she cannot take other steps. The list is neither mandatory nor exclusive. The court is to consider anything and everything that is relevant to the decision it must make: Is the general theory and methodology used by the expert both reliable and relevant to the case at hand? Has the expert properly applied this general theory and methodology to the facts of the case at hand? Is the methodology used by the expert in the case at hand both reliable and relevant? It may—and should—include anything relevant to the decisions it must make about the general theory and methodology used by the expert and the expert's application of same to the facts at hand.⁵⁵

“Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their options by following an accepted method or procedure as it is practiced by others in their field.”⁵⁶

In a *Daubert* challenge to expert testimony that is “not novel and is

Bauldwin, 283 Neb. 678, 702, 811 N.W.2d 267, 288 (2012); *Casillas*, 279 Neb. at 835, 782 N.W.2d at 896; *State v. Daly*, 278 Neb. 903, 913, 775 N.W.2d 47, 59 (2009); *State v. Edwards*, 278 Neb. 55, 74, 767 N.W.2d 784 (2009) (stating that among the factors considered are testing and general acceptance); *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 227-28, 762 N.W.2d 24 (2009); *Rankin v. Stetson*, 275 Neb. 775, 781, 783, 749 N.W.2d 460, 465, (2008); *Schafersman II*, 268 Neb. at 147, 681 N.W.2d at 54-55. *Carlson v. Okerstrom*, 267 Neb. 397, 411-13, 675 N.W.2d 89, 103-04 (2004); *Kirchner v. Wilson*, 262 Neb. 607, 609, 634 N.W.2d 760, 763 (2001); *Schafersman I*, 262 Neb. at 225, 631 N.W.2d at 872; R. Collin Mangrum, *Interpreting Nebraska Rule of Evidence 702 after the Nebraska Supreme Court Adopted the Federal Daubert Standard for the Admissibility of Expert Testimony in Schafersman v. Agland Coop.*, 35 Creighton L. Rev. 31 (2001) (analyzing *Schafersman*'s impact on Nebraska jurisprudence); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L.Rev. 939,

947-48 (1996) (emphasis added; footnotes omitted) (discussing, in detail, other factors to consider).

⁵⁴*Schafersman II*, 268 Neb. at 149-50, 681 N.W.2d at 56.

⁵⁵*Freeman*, 300 Neb. at 52, 911 N.W.2d at 596 (stating that this is a “nonexclusive list” and “additional factors may prove relevant under particular circumstances”); *State v. Daly*, 278 Neb. 903, 913, 775 N.W.2d 47, 59 (2009); *Epp v. Lauby*, 271 Neb. 640, 648, 715 N.W.2d 501, 509 (2006); *State v. Fernando-Granados*, 268 Neb. 290, 309, 682 N.W.2d 266, 281 (2004); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L.Rev. 939, 947-45, 988-1017 (1996).

⁵⁶*Freeman*, 300 Neb. at 53, 911 N.W.2d at 597 (“[T]he weight-of-the-evidence methodology is a generally accepted method of determining causation.” Here the weight of the evidence was established by the witness’ review of “data from different scientific fields, including animal tests, case reports, and epidemiological studies.”).

fairly routine” the *Daubert* analysis will not need not be as extensive as it might have to be when the testimony is “more complicated [and], less routine.”⁵⁷

■ Third, once the court has found that the reasoning and methodology are valid and reliable, the court must determine whether the methodology was properly applied to the facts in issue.⁵⁸

■ Finally, the court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence, as required under Nebraska Evidence Rule 403.⁵⁹

4. Burdens Regarding *Daubert*/*Schafersman* Analysis

“In a *Daubert* challenge, the initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.”⁶⁰ This means that the opponent of the evidence must “object with enough specificity so that the court

⁵⁷*State v. Mason*, 271 Neb. 16, 37, 709 N.W.2d 638, 655 (2006) (finding that the kind of evidence in question is commonly admitted in this state and others; “In a case involving a more novel methodology or a methodology which had been more significantly called into question, a more extensive inquiry and more extensive analysis and reasoning would have been indicated.” *Id.* at 38, 709 N.W.2d at 656.).

⁵⁸*Pitts*, 302 Neb. at 103, 921 N.W.2d at 611; *Herrera*, 289 Neb. at 592-93, 856 N.W.2d at 326 (“This inquiry, sometimes referred to ‘fit,’ assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine the fact in issue by providing a ‘valid scientific connection to the pertinent inquiry as a precondition to admissibility.’ Under the *Daubert*/*Schafersman* analysis, expert testimony lacks ‘fit’ when a large analytical leap must be made between the facts and the opinion.” (footnote omitted)); *Epp*, 271 Neb. at 646-47, 715 N.W.2d at 507-08. Also see generally *King*, 277 Neb. at 225-26, 762 N.W.2d at 42-43; *McNeel*, 276 Neb. at 152-53, 753 N.W.2d at 330-31.

⁵⁹Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2016). See *Epp v. Lauby*, 271 Neb. 640, 646-47, 715

N.W.2d 501, 507-08 (2006) (stating that the evidence must be more probative than prejudicial. Its statement regarding Rule 403 does not include the word “unfair” as a modifier to “prejudice” or the words “substantially outweighs” as a modifier to “probative value.” *Epp*’s statement should be taken to incorporate by reference the entirety of Rule 403 and should not be read to suggest that a straight balancing test is indicated. Rule 403 reads as follows: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation cumulative evidence.” Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016).)

⁶⁰*State v. Kuehn*, 273 Neb. 219, 228, 728 N.W.2d 589, 599 (2007). *Accord Casillas*, 279 Neb. at 837, 782 N.W.2d at 897; *Sturzenegger v. Father Flanagan’s Boy’s Home*, 276 Neb. 327, 350, 754 N.W.2d 406, 428 (2008) (“[I]t is only when a party opposing an expert’s testimony has sufficiently called into question the testimony’s factual basis, data, principles, or methods, or their application, that the trial judge must determine whether the testimony has a reliable basis in the

understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.”⁶¹ The burden to establish the required foundation for admission of the expert testimony is always on the proponent. The burden on the opponent is to make a timely and specific objection. This is nothing new.

[T]o sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding. Assuming that the opponent has been given timely notice of the proposed testimony, the opponent’s challenge to the admissibility of evidence under *Daubert/Schafersman* should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert/Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.⁶²

The *Daubert/Schafersman* motion “should identify, in terms of the *Daubert/Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.”⁶³ And that should be done “with enough specificity as to a particular factor [believed to be missing] that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceedings.”⁶⁴

knowledge and experience of the relevant discipline.”).

⁶¹*Casillas*, 279 Neb. at 837, 782 N.W.2d at 897.

⁶²In re Interest of Christopher T., 281 Neb. 1008, 1018-19, 801 N.W.2d 243, 252-53 (2011) (footnotes omitted) (holding that appellant’s “motion did not meet these requirements” as it “did not state any bases for challenging the admissibility of the evidence,” but rather, “merely stated that he ‘object[ed] to the expert[s] testimony without a *Daubert* Shatesman’s [sic] hearing.”) *Id.* at 1019 [sic] in opinion)). *Accord*, e.g., *Casillas*, 279 Neb. at 837, 782 N.W.2d at 897. *See* *State v. Herrera*, 289 Neb. 575, 588, 856 N.W.2d 310, 324 (2014) (“A challenge

to the admissibility of evidence under *Daubert/Scharersman* test should take the form of a concise pretrial motion.”).

⁶³*Herrera*, 289 Neb. at 588, 856 N.W.2d at 324. *Accord* *Gonzales v. Nebraska Pediatric Practice, Inc.*, 308 Neb. 571, 582, 955 N.W.2d 696, 704 (2021).

⁶⁴*Gonzales v. Nebraska Pediatric Practice, Inc.*, 308 Neb. 571, 583, 955 N.W.2d 696, 705 (2021) (“Because this specificity requirement is necessary to protect judicial economy and resources, a failure to make an adequately specific objection to expert testimony will result in a waiver of the right to challenge that factor.”. *Id.*)

5. Trial Court Discretion Regarding the *Daubert/Schafersman* Hearing

As noted above, “[a] challenge to the admissibility of evidence under *Daubert/Schafersman* test should take the form of a concise pretrial motion.”⁶⁵ As also noted above, it is not always necessary to hold a pre-trial hearing. When the reliability of the expert’s methodology is obvious, a hearing is not necessary.

[O]nce a Nebraska trial court has actually examined and assessed the reliability of a particular scientific wheel under *Daubert*, and its determination has been affirmed on appeal, then other courts may simply take judicial notice and ride behind. In such cases, the proponent establishes a prima facie case of reliability by relying on precedent, and the burden shifts to the opponent to show that recent developments raise doubts about the validity of previously-relied-upon theories or techniques.⁶⁶

“[C]ourts need not reinvent the wheel each time that specialized knowledge is adduced.”⁶⁷

In making the preliminary assessment, the trial judge has the discretion both to avoid unnecessary . . . hearings, where the reliability of an expert’s methods is stipulated to or properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases, where cause for questioning the expert’s reliability arises.⁶⁸

When a *Daubert/Schafersman* hearing is held, “the extensiveness of [the] hearing is left to the discretion of the trial court.”⁶⁹ “[T]rial courts are entitled to broad discretion concerning *Daubert* hearings.”⁷⁰

⁶⁵*State v. Herrera*, 289 Neb. at 588, 856 N.W.2d at 324. *Accord Gonzales*, 308 Neb. at 582, 955 N.W.2d at 705 (noting that “[i]t is the objecting party’s burden to raise an adequately specific objection to expert testimony.” *Id.*)

⁶⁶*Casillas*, 279 Neb. at 838, 782 N.W.2d at 898 (footnote omitted) (holding that the prior “examin[ation] and assess[ment]” must have occurred after the court adopted the *Daubert/Schafersman* test; “a history in this jurisdiction of prior acceptance under Frye does not relieve the trial courts

of their fundamental gatekeeping duties or the proponent of its burden to lay foundation.”) (Regarding judicial notice in Nebraska, see the authorities cited at NJI2d Civ. 1.02, Comment.).

⁶⁷*Casillas*, 279 Neb. at 838, 782 N.W.2d at 898.

⁶⁸*Hemsley v. Langdon*, 299 Neb. 464, 474, 909 N.W.2d 59, 68 (2018).

⁶⁹*In re Interest of Christopher T.*, 281 Neb. 1008, 1018, 801 N.W.2d 243, 252 (2011).

⁷⁰*Aguilar*, 268 Neb. at 416, 683 N.W.2d at 354.

This includes the discretion to hold the Daubert hearing before or during trial.⁷¹

“A trial court may not abdicate its gatekeeping duty under *Daubert* . . . and *Schafersman* . . . in a bench trial, but the court is afforded more flexibility in performing this function.”⁷²

As noted above, however, “[t]he trial court does not have the discretion to abdicate its gatekeeping duty.”⁷³

6. The Trial Court Must Make Specific Findings

When there is a *Daubert*/*Schafersman* hearing the trial court “must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper.”⁷⁴ When, over a *Daubert*/*Schafersman* objection, the trial court determines that expert testimony is admissible, it must state that conclusion and “the reasoning [it] used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.”⁷⁵

7. Admissibility versus Weight

Once the validity of the expert’s reasoning or methodology has been satisfactorily established—both in general and as applied by this expert to the facts of the particular case⁷⁶—any remaining questions regarding the manner in which that methodology was applied in the particular case generally go to the weight of such evidence.⁷⁷

8. *Daubert*/*Schafersman* Applies to all Offers of Specialized Knowledge, Scientific or Otherwise

Many of the cases discussed speak of scientific expertise. That is because the expertise at issue therein was scientific. “The *Daubert* stan-

⁷¹*Id.*

⁷²*Fickle v. State*, 273 Neb. 990, 1006, 735 N.W.2d 754, 770 (2007), *opinion supplemented on overruling of motion for reh’g at 274 Neb. 267, 759 N.W.2d 113* (2007) (citing cases).

⁷³*Casillas*, 279 Neb. at 835, 782 N.W.2d at 896; *Fickle*, 273 Neb. at 1006, 735 N.W.2d at 770.

⁷⁴*Zimmerman v. Powell*, 268 Neb. 422, 430, 684 N.W.2d 1, 9 (2004) (internal quotation marks and citation omitted). *Accord Casillas*, 279 Neb. at 836, 782 N.W.2d at 897. *See also Fickle v. State*, 273 Neb. 990, 1005, 735 N.W.2d 754, 769 (2007), *opinion supplemented*

on overruling of motion for reh’g at 274 Neb. 267, 759 N.W.2d 113 (2007).

⁷⁵*Hemsley v. Langdon*, 299 Neb. 464, 474, 909 N.W.2d 59, 68 (2018); *Zimmerman*, 268 Neb. at 431, 684 N.W.2d at 9. *See also Fickle*, 273 Neb. at 1005, 735 N.W.2d at 769 (2007).

⁷⁶*Carlson v. Okerstrom*, 267 Neb. 397, 411-13, 675 N.W.2d 89, 103-04 (2004).

⁷⁷*Perry Lumber Co., Inc. v. Durable Services, Inc.*, 266 Neb. 517, 524, 667 N.W.2d 194, 200 (2003); *Schafersman I*, 262 Neb. at 232, 632 N.W.2d at 877.

dards apply not only to 'scientific' knowledge, but to all types of expert testimony."⁷⁸ "All specialized knowledge falls generally under the rules of *Daubert/Schafersman*."⁷⁹

9. Not All Testimony by an Expert is Subject of *Daubert/Schafersman* Analysis: Only the Expert's Expert Testimony

It is of course true that not *all* testimony by an expert is subject to *Daubert/Schafersman* analysis, but only his or her *expert* testimony. That is, if a testifying witness who is an expert is not offering opinion testimony, but simply testifying to facts within his or her personal knowledge, *Daubert/Schafersman* analysis is not called for.⁸⁰

10. Additional Resource

In addition to the discussion in this Comment & Authorities, the best authority on expert testimony in Nebraska, including the discussion above, is R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII (vol. 3, Nebraska Practice Series, West Group).

V. THE RELATIVE QUALIFICATIONS OF EACH SIDE'S EXPERTS GOES TO THE WEIGHT OF THEIR TESTIMONY, NOT THEIR COMPETENCY

Once the expert testimony satisfies the *Daubert* standard, the testimony should not be excluded simply because the other party's expert is "more competent." In *Danielsen v. Richards Mfg. Co., Inc.*,⁸¹ the defendant supported an attack on the competency of the plaintiff's expert witness by arguing that the defendant's expert "is better and more competent."⁸² As the court pointed out, qualitative differences are matters of credibility for the jury to decide, not matters of competence

⁷⁸*Perry Lumber Co., Inc. v. Durable Services, Inc.*, 266 Neb. 517, 523, 667 N.W.2d 194, 200 (2003) (citing *Schafersman I*, *supra*).

⁷⁹*Casillas*, 279 Neb. at 836, 782 N.W.2d at 897. *Accord* *In re Interest of Christopher T.*, 281 Neb. 1008, 1018, 801 N.W.2d 243, 252 (2011); *State v. Leibhart*, 266 Neb. 133, 141-42, 662 N.W.2d 618, 626 (2003) (criminal case).

⁸⁰*State v. Schreiner*, 276 Neb. 393, 405, 754 N.W.2d 742, 754 (2008) ("[A]lthough [the witness] was qualified to offer expert testimony, she was testifying to [personal observations of the alleged victim's physical condition], matters within her personal knowledge.").

⁸¹*Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980).

⁸²*Id.* at 684, 294 N.W.2d at 862. *See also* *State v. Daly*, 278 Neb. 903, 913-14, 775 N.W.2d 47, 59-60 (2009) ("[I]f there are good grounds for the expert's conclusion [the expert's testimony should be admitted] even if there could possibly be better grounds for some alternative conclusion"); *State v. Herrera*, 289 Neb. 575, 594, 856 N.W.2d 310, 327 (2014) ("A court . . . should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion."); *State v. Cook*, 236 Neb.

for the judge.⁸³ And, in any event, in the law of evidence “more competent” is an impossibility. Evidence is competent, or it is not. If it is competent and relevant, then it is admissible unless some other rule of evidence, some other statute, or a constitution keeps it out.

Similarly, “a court should not exclude [expert testimony] solely because a disagreement exists between the parties’ qualified experts.”⁸⁴

Unless the conclusions of an expert are based on factors that a court knows are wrong, as a matter of widespread, accepted, public knowledge, a court cannot say that the conclusions of the expert are wrong as a matter of law. The determination of the truthfulness or accuracy of an expert’s conclusions is for the jury.⁸⁵

“Where opinion evidence of experts is in conflict, the resolution of the conflict becomes a question for the jury.”⁸⁶

On a related matter, an expert witness is qualified if the witness possesses “ ‘special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert’s formation of a judgment a fact of probative value.’ ”⁸⁷ This is discussed above in part II(B) of this Comment & Authorities.

636, 643, 463 N.W.2d 573, 578 (1990) (“We know of no rule of law which permits a trial judge to exclude testimony merely because it offends him or her, nor one which permits a court to prohibit one expert from disagreeing with another.”); *Little v. Gillette*, 225 Neb. 70, 74, 402 N.W.2d 852, 854-55 (1987) (Noting that the jury determines weight and credibility of what an expert considers in coming to a conclusion); *Vredevelt v. Gelco Express*, *supra* (stating that the attending physician is not conclusively more credible than other physicians); *In re O’Connor’s Estate*, 101 Neb. 617, 623, 624-25, 164 N.W. 570, 574, (1917) (stating that the value of expert testimony on handwriting depends in great measure on reasons given by expert witness for opinions expressed, and

weight of testimony and credibility of witnesses are jury questions).

⁸³*Id.*

⁸⁴*King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 225, 762 N.W.2d 24, 42 (2009) (“[R]easonable differences in scientific evaluation should not exclude an expert witness’ opinion.” *Id.* at 226, 762 N.W.2d at 43.).

⁸⁵*Palmer v. Forney*, 230 Neb. 1, 7-8, 429 N.W.2d 712, 715-716 (1988).

⁸⁶*Carlson v. Okerstrom*, 267 Neb. 397, 420, 675 N.W.2d 89, 109 (2004).

⁸⁷*Carlson v. Okerstrom*, 267 Neb. 397, 409, 675 N.W.2d 89, 102 (2004) (quoting *Ashby v. First Data Res., Inc.*, 242 Neb. 529, 535, 497 N.W.2d 330, 335-36 (1993)).

VI. SELF-CONTRADICTION BY AN EXPERT

Absent “bad faith motives,” self-contradiction by an expert presents a question for the trier of fact.⁸⁸

“[W]here expert opinion evidence on medical causation is in conflict, the resolution of the conflict is a question for the jury, even if the party that bore the burden of proof on the issue introduced the conflicting testimony.”⁸⁹

See the Comment to N.J.I.2d 1.45 for an example of “bad faith” that discredits testimony as a matter of law.

VII. UNDERLYING BASIS FOR EXPERT TESTIMONY

A. IN GENERAL

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, §§ 27-703, 27-705 (vol. 3, Nebraska Practice Series, West Group).

B. OPINION BASED ON FACTS OR DATA NOT THEMSELVES ADMISSIBLE IN EVIDENCE

1. Admissibility of the Opinion

An expert may be able to testify to an opinion that is based on facts or data not themselves admissible in evidence. Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2016). “‘[R]ule 703 . . . allows experts to rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion.’”⁹⁰

⁸⁸Ketteler v. Daniel, 251 Neb. 287, 294-95, 556 N.W.2d 623, 628 (1996) (inconsistency discredits testimony as matter of law only when witness is party, not when witness is non-party expert); Holman v. Papio-Missouri River Nat. Res. Dist., 246 Neb. 787, 793-94, 523 N.W.2d 510, 516 (1994); Vredevelde v. Gelco Exp., 222 Neb. 363, 369, 383 N.W.2d 780, 783 (1986); Zaleski v. Farmland Foods, Inc., 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985). See also Brandt v. Leon Plastics, Inc., 240 Neb. 517, 520, 483 N.W.2d 523, 525 (1992).

⁸⁹Carlson v. Okerstrom, 267 Neb. 397, 421, 675 N.W.2d 89, 110 (2004).

⁹⁰Brown v. Farmers Mut. Ins. Co. of Nebraska, 237 Neb. 855, 868, 468

N.W.2d 105, 114 (1991) (quoting State v. Hayden, 237 Neb. 286, 293, 466 N.W.2d 66, 70 (1991)). Accord, e.g., Rodriguez v. Surgical Assoc., 298 Neb. 573, 595-96, 905 N.W.2d 247, 263-64 (2018) (“[A] medical expert may express opinion testimony in medical matters based, in part, on reports or statements of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession. While the mere fact that an expert relied on hearsay, however, does not transform it from inadmissible into admissible evidence, we have permitted inadmissible evidence, upon which an expert relies, to be admitted on direct examination if it was offered not to prove the truth of the matter asserted but simply to dem-

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-703 (vol. 3, Nebraska Practice Series, West Group); G. MICHAEL FENNER, *THE HEARSAY RULE*, ch. 8, 337–361 (3d ed. Carolina Academic Press 2013).

2. Credibility Evidence and the Admissibility of the Underlying Data

When an expert witness testifies to an opinion that is based on evidence that, standing alone, is not admissible, does that otherwise inadmissible basis evidence become admissible as credibility evidence? The jury must decide what weight, if any, to give to the expert's opinion. When deciding what weight to give an opinion the reasonable person wants to know what the opinion is based on. Is it, for example, based on information from on a pseudonymous blog, an entry in Wikipedia, or a statement in a recognized medical treatise used in medical schools all over the nation? The credibility of an opinion depends in part sometimes in large part—on the strength of its basis.

The question here is this one: Does otherwise inadmissible basis evidence become admissible as credibility evidence—not as substantive evidence, but as evidence going to the weight the jury might give the expert's opinion? If the evidence is sufficiently reliable for an expert to use, should the jury be allowed to hear that the expert used it? Maybe yes, and maybe no.

This much is clear: “[T]he fact that the out-of-court statements . . . were offered in the guise of forming the bases for the testifying experts’ opinions [does not] alchemically transmute them from inadmissible hearsay into admissible nonhearsay.”⁹¹

“We have emphasized that a testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the basis for the expert’s testimony will advance such a purpose, the trial court has discretion to refuse to admit such evidence.”⁹²

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*,

onstrate that basis for the expert’s testimony.” (footnotes omitted)); Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc., 281 Neb. 281, 295, 799 N.W.2d 249, 261 (2011); State v. Pruett, 263 Neb. 99, 108, 638 N.W.2d 809, 817 (2002); Nebraska Nutrients, Inc. v. Shepherd, 261 Neb. 723, 764, 626 N.W.2d 472, 507 (2001); McArthur v. Papio-Missouri River Nat. Res. Dist., 250 Neb. 96, 104, 547 N.W.2d 716, 723 (1996).

⁹¹Stang-Starr v. Byington, 248 Neb. 103, 110, 532 N.W.2d 26, 31 (1995) (holding that a witness who seeks to summarize the contents of hearsay source is acting as a summary witness, not an expert).

⁹²Koehler v. Farmers Alliance Mut. Ins. Co., 252 Neb. 712, 716, 566 N.W.2d 750, 753 (1997). Accord Stukenholtz v. Brown, 267 Neb. 986, 989, 679 N.W.2d 222, 224–25 (2004). See also Koehler, 252 Neb. at 720–22, 566

Article VII, § 27-703[D] (vol. 3, Nebraska Practice Series, West Group); G. MICHAEL FENNER, *THE HEARSAY RULE*, ch. 8(I)(D)(4) (3d ed. Carolina Academic Press 2013) (admissibility of basis evidence).

See also part XIII of this Comment & Authorities, below

C. OPINION BASED ON FACTS OR DATA MADE KNOWN AT OR BEFORE THE HEARING

“The facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial.”⁹³ For example, an expert witness can rely on “examinations and tests performed by other [experts].”⁹⁴

In *Terry v. Duff*⁹⁵ the plaintiff complained that the defendant’s expert had been allowed to base an opinion on certain specific documents that had been prepared by the defendant. The Supreme Court pointed out that it was the plaintiff himself who had introduced the documents into evidence. (He had done so after his motion in limine had been overruled.) Rule 703 allows an expert to base an opinion on data made known to the expert at the hearing. This data was made known to this expert at the hearing, through the action of plaintiff himself, and, as a result, Rule 703 allows the expert to base his expert opinion on that data.

D. STATING AN OPINION WITHOUT FIRST DISCLOSING THE UNDERLYING DATA

“[U]nder Neb. Rev. Stat. § 27-705 (Reissue 2016), an expert may render an opinion without first disclosing the underlying data upon

N.W.2d at 755-57 (White, C.J., concurring) (discussing cases allowing expert to testify to otherwise inadmissible basis evidence).

⁹³*Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 273, 631 N.W.2d 846, 856 (2001), opinion modified on denial of reh’g, *Mondelli v. Kendel Homes Corp.*, 262 Neb. 663, 641 N.W.2d 624 (2001). *Accord, e.g.*, Rule 703 of the Nebraska Evidence Rules; *Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 295, 799 N.W.2d 249, 261 (2011); *State v. Aguilar*, 268 Neb. 411, 419, 683 N.W.2d 349, 356 (2004); *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 764, 626 N.W.2d 472, 507 (2001); *Gittins v. Scholl*, 258 Neb. 18, 22, 601 N.W.2d

765, 768 (1999). *See generally* R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-703 (vol. 3, Nebraska Practice Series, West Group).

⁹⁴*E.g.*, *Hintz v. Farmers Coop Ass’n*, 297 Neb. 903, 914, 902 N.W.2d 131, 139 (2017). This may not be true in a criminal prosecution where the Confrontation Clause sometimes bars expert testimony based on the work of other experts. Regarding the use of learned treatises as a basis for expert testimony, see the discussion below in this Comment & Authorities, under the heading Expert Testimony and the Hearsay Rule.

⁹⁵*Terry v. Duff*, 246 Neb. 524, 528, 519 N.W.2d 550, 553 (1994).

which that opinion is based.”⁹⁶ It remains true, however, as discussed immediately below, that the value of an expert’s opinion is no stronger than the facts on which it is based and if there is an insufficient basis for the opinion, it either should not be allowed in the first place or should be stricken from the record.

E. EXPERT’S OPINION MUST HAVE AN UNDERLYING BASIS³

Expert testimony is, of course, inadmissible if it is irrelevant:

Expert testimony [is inadmissible] if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess. Without an adequate basis of facts, the witness should not be allowed to give an opinion. . . . [Where an expert states an opinion later shown not to] have a sound and reasonable basis, it should be stricken. . . . [Such an opinion is] unreliable. An unreliable opinion does not tend to alter the probability of a material fact and, hence, is irrelevant.⁹⁷

In this regard, keep in mind the distinction

between the circumstances in which an expert’s opinion on damages is based either upon a misconception of the applicable law or upon factual assumptions shown to be untrue or wholly unsupported by the record and the circumstance where there is a factual weakness in the underpinnings of an opinion. In the former, the opinion is inadmissible, whereas in the latter, the opinion is admissible and the factual weakness goes to the weight and credibility as determined by the trier of fact.⁹⁸

⁹⁶Palmer v. Forney, 230 Neb. 1, 6, 429 N.W.2d 712, 715 (1988). Accord Gittins v. Scholl, 258 Neb. 18, 22, 601 N.W.2d 765, 768 (1999); Boyle v. Welsh, 256 Neb. 118, 128, 589 N.W.2d 118, 126 (1999). See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, §§ 27-703, 27-705 (vol. 3, Nebraska Practice Series, West Group).

⁹⁷Menkens v. Finley, 251 Neb. 84, 93-94, 555 N.W.2d 47, 53-54 (1996) (paragraph breaks omitted). Accord Pitts v. Genie Indus., 302 Neb. 88, 103, 921 N.W.2d 597, 611 (2019); Hynes v. Good Samaritan Hospital, 291 Neb.

757, 766, 869 N.W.2d 78, 87 (2015) (Workers’ Compensation Court); King v. Burlington Northern Santa Fe Ry. Co., 277 Neb. 203, 229, 762 N.W.2d 24, 45 (2009); City of Lincoln v. Realty Trust Group, Inc., 270 Neb. 587, 596, 705 N.W.2d 432, 440 (2005); Scurlocke v. Hansen, 268 Neb. 548, 552, 684 N.W.2d 565, 569 (2004); Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 931, 663 N.W.2d 43, 61 (2003).

⁹⁸Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc., 281 Neb. 281, 296, 799 N.W.2d 249, 261 (2011) (footnotes omitted).

An expert must be “‘prepared to disclose the basis of [his or her] opinion on cross-examination.’”⁹⁹

“[Expert] opinion evidence which is unsupported by appropriate foundation is not admissible.”¹⁰⁰ “Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.”¹⁰¹ “When an expert’s opinion is mere speculation or conjecture, it is irrelevant.”¹⁰²

⁹⁹ *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 871, 896 N.W.2d 156, 192 (2017); *Rankin v. Stetson*, 275 Neb. 775, 783, 749 N.W.2d 460, 466 (2008) (affirming the exclusion of an expert witness’ opinion because, when asked on cross-examination, the expert could not state the basis for the opinion); *Heistand v. Heistand*, 267 Neb. 300, 309-10, 673 N.W.2d 541, 549 (2004) (quoting *Gittins v. Scholl*, 258 Neb. 18, 23, 601 N.W.2d 765, 768 (1999)).

¹⁰⁰ *Stukenholtz v. Brown*, 267 Neb. 986, 989, 679 N.W.2d 222, 225 (2004). *Accord* *Liberty Development Corp. v. Metropolitan Utils. Dist. of Omaha*, 276 Neb. 23, 34, 751 N.W.2d 608, 617 (2008); *Orchard Hill Neighborhood Ass’n v. Orchard Hill Mercantile, LLC*, 274 Neb. 154, 162, 738 N.W.2d 820, 828 (2007); *Jackson v. Brotherhood’s Relief and Compensation Fund*, 273 Neb. 1013, 1019, 734 N.W.2d 739, 745 (2007) (stating, in the context of expert testimony, “Opinion evidence which is not supported by appropriate foundation is not admissible.”); *Scurlocke v. Hansen*, 268 Neb. 548, 552, 684 N.W.2d 565, 569 (2004).

¹⁰¹ *Hike v. State Department of Roads*, 288 Neb. 60, 73, 846 N.W.2d 205, 218 (2014). *Accord, e.g.*, *Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 295, 799 N.W.2d 249, 261 (2011); *King, supra*; *City of Lincoln v. Realty Trust Group, supra*; *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 273, 631 N.W.2d 846, 856 (2001), opinion modified on denial of reh’g, *Mondelli v. Kendel*

Homes Corp., 262 Neb. 663, 641 N.W.2d 624 (2001); *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 764-65, 626 N.W.2d 472, 507 (2001); *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 725, 572 N.W.2d 351, 355 (1998); *Childers v. Phelps Cty*, 252 Neb. 945, 953, 568 N.W.2d 463, 469 (1997); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 922, 473 N.W.2d 94, 101 (1991) (stating that if the assumption on which expert opinion based is not true, then the opinion is irrelevant); *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 325, 431 N.W.2d 617, 620 (1988).

¹⁰² *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 931, 663 N.W.2d 43, 61 (2003). *Accord, e.g.*, *Pitts v. Genie Indus.*, 302 Neb. 88, 101, 921 N.W.2d 597, 610 (2019) (“Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.”); *Hike v. State Department of Roads*, 288 Neb. 60, 73, 846 N.W.2d 205, 218 (2014). *See also* *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 227, 762 N.W.2d 24, 43 (2009). “An objection to an opinion of an expert based upon lack of certainty in the opinion is the objection based upon relevance.” *Richardson v. Children’s Hosp.*, 280 Neb. 396, 405, 787 N.W.2d 235, 243 (2010). *Accord* *Snyder v. Contemporary Obstetrics & Gynecology, P.C.*, 258 Neb. 643, 652, 605 N.W.2d 782, 791 (2000); *McWhirt v. Heavey*, 250 Neb. 536, 549, 550 N.W.2d 327, 336 (1996).

An expert must have “good

Said differently, “[t]he value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true.”¹⁰³ “[I]t is a logical fallacy to assume that temporal correlation equals causation.”¹⁰⁴

“Whether an expert’s opinion is too speculative to be admitted is a question for the trial court’s discretion.”¹⁰⁵ “[W]hether there is sufficient foundation for an expert witness to give his opinion about an issue in question” is a question for the trial court’s discretion.¹⁰⁶ “[W]hen an assumption used by an expert is not proved untrue or to be without any basis in fact, whether the stated grounds for the assumption are credible is a jury question.”¹⁰⁷ “[Furthermore,] an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.”¹⁰⁸

grounds” for his or her belief in every step of the analysis. The term “good grounds” means an inference or assertion derived by scientific method and supported by appropriate validation. Good grounds do not include conclusions based on guess, speculation, conjecture, or a choice of possibilities.

Pitts, above (footnote omitted). See also *id.* at 105, 921 N.W.2d at 610. *Accord* *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 238, 959 N.W.2d 251, 278 (2021).

¹⁰³*McArthur v. Papio-Missouri River Nat. Res. Dist.*, 250 Neb. 96, 105, 547 N.W.2d 716, 724 (1996). *Accord* *Lindsay Mfg. Co. v. Universal Sur. Co.*, 246 Neb. 495, 510, 519 N.W.2d 530, 541 (1994); *Liberty v. Colonial Acres Nursing Home*, 240 Neb. 189, 194, 481 N.W.2d 189, 193 (1992); *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 325, 431 N.W.2d 617, 619 (1988); *Riha v. St. Mary’s Church and Sch., Inc.*, 209 Neb. 539, 545, 308 N.W.2d 734, 738 (1981).

¹⁰⁴*McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 238, 959 N.W.2d 251, 277–78 (2021) (“Simply because the facade demonstrated deterioration after

McGill performed its work does not mean” that *McGill* was a proximate cause of the deterioration. “It is well settled that a causation opinion based solely on a temporal relationship is unreliable, because it is not derived from the scientific method. Such an opinion is also unreliable because it is not based upon sufficient facts or data.”)

¹⁰⁵*Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 931–32, 663 N.W.2d 43, 61 (2003). *Accord, e.g., McGill Restoration*, 309 N.W.2d at 237, 959 N.W.2d at 277.

¹⁰⁶*Liberty Development Corp. v. Metropolitan Utils. Dist. of Omaha*, 276 Neb. 23, 25, 751 N.W.2d 608, 611 (2008). *Accord* *Hynes v. Good Samaritan Hospital*, 291 Neb. 757, 766, 869 N.W.2d 78, 87 (2015) (Workers’ Compensation Court); See also the heading *Standard of Review on Appeal*, below, part XVI of this Comment & Authorities, for a discussion of the standard of review of discretionary decisions.

¹⁰⁷*Gary’s Implement*, 281 Neb. at 297, 799 N.W.2d at 262.

¹⁰⁸*Holman v. Papio-Missouri River Nat. Res. Dist.*, 246 Neb. 787, 792–93, 523 N.W.2d 510, 515–16 (1994). *Accord* *Gary’s Implement*, 281 Neb. at 297, 799

The cases cited above state that the experts must be *able to, prepared to*, state the basis for their opinions. *Hemsley v. Langdon*¹⁰⁹ states that an expert “was not qualified to testify to his opinions” because he “failed to disclose the underlying facts or data for his opinions.”¹¹⁰ For this proposition, the Court cites *Rankin v. Stetson*.¹¹¹ In *Rankin* an expert’s opinions were excluded because, when asked on cross-examination, he could not testify to the basis for his opinions.¹¹² *Hemsley*’s statement that the expert “failed to disclose” the basis for his opinion must mean ‘failed to disclose the basis when asked to do so,’ and not that an experts can never testify to their opinions unless they state their basis.

Regarding relevance and expert opinion, *see also* the discussion in part II(C) of this Comment & Authorities regarding the “helpfulness” test and its relationship to relevancy analysis.

On a related matter, “no witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent person is telling the truth.”¹¹³

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, §§ 27-702, 27-703, 27-705 (vol. 3, Nebraska Practice Series, West Group).

VIII. EXPERT TESTIMONY WHERE LAY PERSONS ARE ALSO COMPETENT

Keep in mind that not all testimony by an expert is expert testimony. Sometimes a testifying witness who is an expert is not offering expert opinion testimony, but simply testifying to facts within his or her personal knowledge or even lay-witness opinion testimony. As to that testimony, the expert witness rules do not apply. The admissibility of such testimony is judged as any lay testimony would be.¹¹⁴

In addition, trial courts can admit expert evidence in areas where

N.W.2d at 262; *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 725, 572 N.W.2d 351, 355 (1998).

¹⁰⁹*Hemsley v. Langdon*, 299 Neb. 464, 909 N.W.2d 59 (2018).

¹¹⁰*Id.* at 469–70, 909 N.W.2d at 65–66 (emphasis added).

¹¹¹*Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

¹¹²*Id.* at 783, 749 N.W.2d at 466.

¹¹³*Sturzenegger v. Father Flanagan’s Boy’s Home*, 276 Neb. 327, 350, 754 N.W.2d 406, 428 (2008) (multiple quotation marks omitted).

¹¹⁴*See State v. Schreiner*, 276 Neb. 393, 405, 754 N.W.2d 742 (2008) (“[A]lthough [the witness] was qualified to offer expert testimony, she was testifying to [personal observations of the alleged victim’s physical condition], matters within her personal knowledge.”); G. MICHAEL FENNER, *THE HEARSAY RULE* 360–61 (3d ed. Carolina Academic Press 2013) (citing authorities); FED. R. EVID. advisory committee’s note (2000 amendment) (“[The Rules] do[] not distinguish between expert and lay witnesses, but rather between expert and lay testimony.”).

lay witnesses are competent “to determine the facts testified to by the expert”; this is so when the trial court “feel[s] the opinion would assist” the trier of fact.¹¹⁵ Recall that the “[a]dmissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”¹¹⁶

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-702 (vol. 3, Nebraska Practice Series, West Group). See also part IV of this Comment & Authorities, above.

IX. FOUNDATION OBJECTIONS

Part VII(E) of this Comment & Authorities discusses the fact that an expert opinion must have a basis; otherwise it is irrelevant. This part of the Comment & Authorities has to do with some Nebraska cases dealing specifically with the foundation objection.

“[A]n objection on the basis of insufficient foundation is a general objection.”¹¹⁷ A general objection, of course, is not a specific objection for purposes of Nebraska Evidence Rule 103, which states that error may not be predicated on a ruling that admits evidence unless the record

¹¹⁵Hegarty v. Campbell Soup Co., 214 Neb. 716, 724, 335 N.W.2d 758, 764 (1983) (quoting Christensen v. City of Tekamah, 201 Neb. 344, 351, 268 N.W.2d 93, 98 (1978)). *Accord*, e.g., Main Street Movies, Inc. v. Wellman, 251 Neb. 367, 370, 557 N.W.2d 641, 644 (1997) (expert testimony on obscenity); Coppi v. West American Ins. Co., 247 Neb. 1, 15, 524 N.W.2d 804, 815 (1994), *overruled by* D & S Realty, Inc. v. Markel Ins. Co., 280 Neb. 567, 789 N.W.2d 1 (2010)) (“Expert testimony which may be of assistance to the trier of fact is admissible even in areas where laypersons have competence to determine the facts.”), *overruled on other grounds by* D & S Realty, Inc. v. Markel Ins. Co., 280 Neb. 567, 587, 789 N.W.2d 1, 17 (2010); State v. Lowe, 244 Neb. 173, 183, 505 N.W.2d 662, 670 (1993) (involving expert testimony on effect of intoxication). See also Eicher v. Mid America Financial Inv. Corp., 275 Neb. 462, 469, 748 N.W.2d 1, 9 (2008) (the landowner and an expert witness were both allowed to testify to the value of the land).

¹¹⁶Nebraska Depository Inst. Guar.

Corp. v. Stastny, 243 Neb. 36, 53, 497 N.W.2d 657, 670 (1993). *Accord* Rankin v. Stetson, 275 Neb. 775, 781, 749 N.W.2d 460 (2008); Schmidt v. Omaha Public Power Dist., 245 Neb. 776, 793, 515 N.W.2d 756, 767 (1994), *abrogated by* A.W. v. Lancaster Cty. Sch. Dist. 0001, 280 Neb. 205, 784 N.W.2d 907 (2010)); Kaiser v. Western R/C Flyers, Inc., 239 Neb. 624, 628, 477 N.W.2d 557, 560 (1991) (“expert testimony concerning the status of the law does not tend to accomplish either of these goals . . . [and] is generally not admissible in evidence”). “While a trial court may admit expert testimony if it believes such may assist the jury, it is not error to exclude such testimony relating to matters which are not complicated and which embrace matters of common knowledge.” Dotzler v. Tuttle, 234 Neb. 176, 184, 449 N.W.2d 774, 780 (1990) (affirming trial court’s exclusion of expert testimony regarding safety rules and usages in informal games of basketball).

¹¹⁷Ford v. Estate of Clinton, 265 Neb. 285, 298, 656 N.W.2d 606, 617 (2003).

reflects a timely and specific objection.¹¹⁸ An objection to an expert's testimony on the grounds of "insufficient foundation" does not raise the issue of the qualifications of the witness as an expert.¹¹⁹ An objection on the grounds of foundation, to an expert's testimony about a conclusion reached by an article in a learned journal, does not preserve a hearsay objection for appeal.¹²⁰

If the court overrules a general objection of "insufficient foundation," the objecting party may not appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.¹²¹

"An objection to an opinion of an expert based upon lack of certainty in the opinion is an objection based upon relevance."¹²²

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-702[D](5) (vol. 3, Nebraska Practice Series, West Group).

X. EXPERT TESTIMONY TO A REASONABLE DEGREE OF CERTAINTY

[W]e reaffirm the standard that expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability . . . That rule flows from the requirement that a decision cannot be based upon guess or speculation. While we reassert that the foregoing language . . . is the preferred formulation of the test, a medical expert's testimony need not be couched in the magic words reasonable degree of medical certainty or reasonable probability.¹²³

Expert testimony need not be couched in the magic words "reasonable certainty" or "reasonable probability," but must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. In short, an expert's opinion is to be judged in

¹¹⁸Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 2016).

¹¹⁹*Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 541, 378 N.W.2d 852, 854-55 (1985). *Accord* *Brown v. Farmers Mut. Ins. Co. of Nebraska*, 237 Neb. 855, 866, 468 N.W.2d 105, 113 (1991).

¹²⁰*Ketteler v. Daniel*, 251 Neb. 287, 295, 556 N.W.2d 623, 628 (1996).

¹²¹*Ford v. Estate of Clinton*, 265 Neb. 285, 298, 656 N.W.2d 606, 617 (2003); *State v. Davlin*, 263 Neb. 283, 306, 639 N.W.2d 631, 651 (2002); *State*

v. Baker, 245 Neb. 153, 511 N.W.2d 757 (1994).

¹²²*McWhirt v. Heavey*, 250 Neb. 536, 549, 550 N.W.2d 327, 336 (1996). See also the discussion above of the point of law that if the assumptions on which an expert opinion is based are not true, the opinion is irrelevant.

¹²³*Hohnstein v. W.C. Frank*, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991) (multiple and internal quotation marks omitted). See also cases in the footnote immediately below this one.

view of the entirety of the opinion, and it is not validated or invalidated solely on the presence or lack of the words “reasonable degree of professional certainty.”¹²⁴

Regarding the rule just stated, “to the extent that [prior cases] hold that a medical expert’s opinion based on a reasonable degree of medical *probability* is not sufficient to establish a causal relationship, they are overruled.”¹²⁵

¹²⁴State v. Edwards, 278 Neb. 55, 80, 767 N.W.2d 784, 804 (2009) (footnotes omitted).

The quotations from *Edwards*, cited above in this footnote and *Hohnstein* cited in the footnote immediately preceding this one, also find support in the following cases, among others: *Larsen v. 401 Main Street*, 302 Neb. 454, 462, 923 N.W.2d 710, 715–16 (2019); *Pitts v. Genie Indus.*, 302 Neb. 88, 105, 921 N.W.2d 597, 612 (2019); *Lewison v. Renner*, 298 Neb. 654, 663, 905 N.W.2d 540, 548 (2018) (adding “that ‘[m]edical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least ‘probable,’ in other words, more likely than not.’” *Id.* at 663–64, 905 N.W.2d at 548; *State v. Johnson*, 290 Neb. 862, 882, 862 N.W.2d 757, 773 (2015) (“‘An [expert] opinion which is equivocal and is based upon such words as ‘could,’ ‘may,’ or ‘possibly’ lacks the certainty required to sustain the burden of proof of causation for which the opinion has been offered’”) (criminal case; DNA evidence); *Damme v. Pike Enterprises, Inc.*, 289 Neb. 620, 630, 856 N.W.2d 422, 432 (2014) (citing cases); *In re Interest of Christopher T.*, 281 Neb. 1008, 1019–20, 801 N.W.2d 243, 252–53 (2011); *Richardson v. Children’s Hosp.*, 280 Neb. 396, 405, 787 N.W.2d 235, 243 (2010); *State v. Kuehn*, 273 Neb. 219, 226, 728 N.W.2d 589, 597 (2007) (“[A]lthough expert medical testimony need not be couched in the magic words ‘reasonable medical certainty’ or ‘reasonable probability,’ it must be sufficient as examined in its entirety to establish a crucial causal link between a victim’s injuries and a defen-

dant’s actions.” Expert opinion is judged by the entirety of the opinion and not solely on the presence or absence “of the words ‘reasonable degree of medical certainty’ or ‘probability.’ . . . Whether an expert’s opinion is too speculative to be admitted is a question for the trial court’s discretion.”); *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 931, 663 N.W.2d 43, 61 (2003); *Neill v. Hemphill*, 258 Neb. 949, 957, 607 N.W.2d 500, 505 (2000) (stating that it is not necessary to use the magic words “reasonable medical certainty” or “reasonable probability,” but the opinion must be stated as being at least “probable,” *i.e.*, more likely than not); *Anderson By and Through Anderson/Couvillon v. Nebraska Dept. of Social Services*, 253 Neb. 813, 822, 572 N.W.2d 362, 369 (1998) (*Anderson/Couvillon II*); *Berggren v. Grand Island Accessories, Inc.*, 249 Neb. 789, 801, 545 N.W.2d 727, 736 (1996) (discussing cases); *Steineke v. Share Health Plan of Nebraska, Inc.*, 246 Neb. 374, 379, 518 N.W.2d 904, 907 (1994); *Edmonds v. IBP, Inc.*, 239 Neb. 899, 905–06, 479 N.W.2d 754, 758 (1992) (stating that magic words not necessary, but “expert medical testimony based on ‘could,’ ‘may,’ or ‘possibly’ lacks the definiteness required to support an award”).

¹²⁵*Berggren v. Grand Island Accessories, Inc.*, 249 Neb. 789, 801, 545 N.W.2d 727, 736 (1996) (emphasis added) (citing *Husted v. Peter Kiewit and Sons Const. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), *overruled by Berggren v. Grand Island Accessories, Inc.*, 249 Neb. 789, 545 N.W.2d 727 (1996)), and *Fuglsang v. Blue Cross of*

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, § 27-702[D](3) (vol. 3, Nebraska Practice Series, West Group).

XI. MANDATORY EXPERT TESTIMONY

A. IN GENERAL

“Findings of fact as to technical matters beyond the scope of ordinary experience are usually not warranted in the absence of expert testimony supporting such findings.”¹²⁶

B. PROOF OF PROXIMATE CAUSE

Sometimes expert testimony is needed to prove proximate cause. “[T]he test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of the fact finders.”¹²⁷

When the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of the physical condition. The pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge, and only the opinions of experts are of value.¹²⁸

Western Iowa and South Dakota, 235 Neb. 552, 456 N.W.2d 281 (1990), *overruled by Berggren*, above. See also *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 931, 663 N.W.2d 43, 61 (2003) (“An expert’s opinion . . . may be expressed with reasonable *probability*.” (Emphasis added)).

¹²⁶*McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 235, 959 N.W.2d 251, 276 (2021) (“Ordinarily, the standard of care for the rendering of services in the practice of a trade is outside the common knowledge and experience of ordinary persons and must, therefore, be established by expert testimony.”). Same quotation minus the word “usually”: *Pitts*, 302 Neb. at 100, 921 N.W.2d at 609 (“This case involves the mechanical functioning of an aerial lift, its component parts, and its elec-

trical circuitry, which are technical matters well outside the scope of ordinary experience. Therefore, to create a material issue of fact, the [plaintiffs] were required to present expert testimony . . .”).

¹²⁷Same quotation: *Pitts v. Genie Indus.*, 302 Neb. 88, 100, 921 N.W.2d 597, 609 (2019); *McVane v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 463, 466 N.W.2d 499, 508 (1991).

¹²⁸*Hohnstein v. W.C. Frank*, 237 Neb. 974, 980-81, 468 N.W.2d 597, 602-03 (1991) (citation omitted). *Accord* *Lewis v. Renner*, 298 Neb. 654, 663, 905 N.W.2d 540, 548 (2018) (“When the character of an alleged injury is subjective rather than objective, a plaintiff must establish the cause and extent of the injury through expert medical testimony.”); *Hintz v. Farmers Coop Ass’n*, 297 Neb. 903,

In the context of a medical malpractice case, the Court has stated, “Expert testimony is almost always required to prove proximate cause.”¹²⁹

C. PROOF OF INJURY

Sometimes expert testimony is needed to prove injury. “‘Unless . . . an injury’s nature and effect are plainly apparent, . . . an opinion by an expert [is required] to establish the causal relationship between an incident and the injury . . . [and] any . . . disability consequent to such injury.’”¹³⁰

D. PROOF OF THE STANDARD OF CARE

Sometimes expert testimony is needed establish the standard of care and whether or not the actions under review deviated therefrom. “When the [allegedly negligent] conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful *or even necessary* to a determination of what the standard of care requires under particular circumstances.”¹³¹ Expert testimony is generally required to establish the standard of care in a legal malpractice action and whether or not the actions under review deviated therefrom.¹³²

912, 902 N.W.2d 131, 138 (2017); McNeel v. Union Pacific R. Co., 276 Neb. 143, 151, 753 N.W.2d 321, 329 (2008) (toxic tort case: “In common-law negligence cases where symptoms of an injury are subjective, Nebraska law requires medical testimony.”); Thilking v. Travelers Ins. Co., 240 Neb. 248, 254, 482 N.W.2d 548, 553 (1992); Hamer v. Henry, 215 Neb. 805, 809, 341 N.W.2d 322, 325 (1983).

¹²⁹Ewers v. Saunders Cty., 298 Neb. 944, 958, 906 N.W.2d 653, 664 (2018).

¹³⁰Fees v. Rivett Lumber Co., 228 Neb. 617, 621, 423 N.W.2d 483, 486 (1988). *Accord* Hintz v. Farmers Coop Ass’n, 297 Neb. 903, 911, 902 N.W.2d 131, 137 (2017); Damme v. Pike Enterprises, Inc., 289 Neb. 620, 630, 856 N.W.2d 422, 432 (2014); Potter v. McCulla, 288 Neb. 741, 746, 851 N.W.2d 94, 99 (2014) (citing cases).

¹³¹Cingle v. State, 277 Neb. 957, 968, 766 N.W.2d 381, 389 (2009) (emphasis added).

¹³²*E.g.*, Rice v. Poppe, 293 Neb. 467, 475-76, 881 N.W.2d 162, 169 (2016); Wolski v. Wandel, 275 Neb. 266, 271-72, 746 N.W.2d 143, 149 (2008) (“[W]hat an attorney’s specific conduct should be in a particular case and whether an attorney’s conduct fell below that specific standard is a question of fact. Expert testimony is generally required to establish [these things].” The exception to this general rule comes into play when these things “may be presumed to be within the comprehension of lay persons . . .”); Bellino v. McGrath North Mullin & Kratz, PC LLO, 274 Neb. 130, 147-48, 738 N.W.2d 434, 448 (2007) (stating that the trier of fact cannot apply the standard of care required of a professional unless it knows what that professional standard of care is; except in the most outrageous cases, then there must be expert testimony as to what constitutes ordinary care in the particular profession.); Boyle v. Welsh, 256 Neb. 118, 124, 589 N.W.2d 118, 124 (1999) (stating that expert testimony

E. PROOF OF NEGLIGENCE

Sometimes expert testimony is needed to prove negligence. “Whether a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.”¹³³

Outside of the context of medical malpractice, anyone practicing a trade must exercise the skill and care normally possessed by members of that trade who are in good standing in the same community. As a general rule, this requires evidence of the skill and care normally possessed by members of the trade in the community in question—evidence of the applicable standard of care. Often this will require expert testimony of the standard for the trade in the community.¹³⁴

F. EXPERT TESTIMONY REQUIRED BY STATUTE

Sometimes expert testimony is required by statute. For example, the Nebraska Hospital-Medical Liability Act,¹³⁵ discussed in the Comment to NJI2d Civ. 12.03, requires expert testimony to prove the standard of care in an informed consent case.

G. THE COMMON-KNOWLEDGE EXCEPTION

“[E]xpert opinion testimony . . . is not required just because the case may concern a matter of science or special knowledge The test is whether . . . the particular issue can be determined from the ev-

is not required where recognition of the alleged negligence is within the comprehension of laypersons). This point is discussed further at NJI2d Civ. 12.01, Comment & Authorities. *See also* Wood v. McGrath, North, Mullin & Kratz, P.C., 256 Neb. 109, 111-12, 589 N.W.2d 103, 105 (1999) (involving attorneys testifying as expert witnesses on the standard of care when advising a client regarding a settlement agreement); Baker v. Fabian, Thielen & Thielen, 254 Neb. 697, 703, 578 N.W.2d 446, 451 (1998) (holding that whether an attorney breaches the “duty of professional care to a client regarding evidentiary issues is a legal matter concerning which judges are required to be their own experts”).

¹³³Medley v. Davis, 247 Neb. 611, 618, 529 N.W.2d 58, 63 (1995). *Accord*, e.g., Rice v. Poppe, 293 Neb. at 475, 881 N.W.2d at 169 (“Expert testimony is generally required to show whether an attorney’s performance conformed to the standard of conduct”; discussing the common-knowledge exception); Roskop Dairy, L.L.C. v. GEA Farm Technologies, Inc., 292 Neb. 148, 171, 871 N.W.2d 776, 794 (2015); For a more complete discussion of this point, *see* NJI2d Civ. 12.01, Comment & Authorities.

¹³⁴*See* Bargmann v. Soll Oil Co., 253 Neb. 1018, 1027, 574 N.W.2d 478, 485 (1998). For a more complete discussion of this point, *see* NJI2d Civ. 12.04, Comment & Authorities.

¹³⁵Neb. Rev. Stat. § 44-2816 (Reissue 2010).

idence presented and the common knowledge and usual experience' of the fact finders."¹³⁶

H. WORKERS' COMPENSATION COURT

"[T]he Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant."¹³⁷

I. CROSS REFERENCE

See NJI2d Civ. 12.01, Comment & Authorities, regarding the general rule that expert testimony is required in case alleging professional malpractice. See also NJI2d Civ. 1.41, Comment.

XII. COURT APPOINTMENT OF AN EXPERT FOR AN INDIGENT DEFENDANT

"[T]he right of an indigent defendant to the appointment of an expert witness at the State's expense generally rests in the discretion of the trial court."¹³⁸

XIII. EXPERT TESTIMONY AND THE HEARSAY RULE

Sometimes opinion evidence, including expert opinion evidence, can provide a way around the hearsay rule.

"[A] testifying expert may not merely act as a conduit for hearsay,

¹³⁶Canas v. Maryland Cas. Co., 236 Neb. 164, 172, 459 N.W.2d 533, 539 (1990) (citation omitted). See also, e.g., *Rice v. Poppe*, 293 Neb. at 475, 881 N.W.2d at 169 ("Expert testimony is generally required to show whether an attorney's performance conformed to the standard of conduct. . . . Under the common-knowledge exception, expert testimony is not needed if the alleged negligence is within the comprehension of laypersons" (paragraph break and footnote omitted)); *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 114, 621 N.W.2d 529, 542 (2001) (regarding expert testimony to prove a product defect in a breach of warranty action, the court held that "[a]lthough expert testimony pointing to a specific defect would be the best means of proving the existence of a defect in some cases, proof that the warranted product is defective may be circumstantial in

nature and may be inferred from the evidence."); *Boyle v. Welsh*, 256 Neb. 118, 124-125, 589 N.W.2d 118, 124 (1999); *Wolski v. Wandel*, 275 Neb. 266, 271-72, 746 N.W.2d 143, 149 (2008); *Boyd v. Chakraborty*, 250 Neb. 575, 581, 550 N.W.2d 44, 48 (1996).

Regarding the common-knowledge exception in the context of professional malpractice, see also NJI2d Civ. 12.01.

¹³⁷*Cords v. City of Lincoln*, 249 Neb. 748, 756, 545 N.W.2d 112, 118 (1996). Accord *Tchikobava v. Albatross Express, LLC*, 293 Neb. 223, 244-45, 876 N.W.2d 610, 625 (2016); *Frauentorfer v. Lindsay Mfg. Co., Inc.*, 263 Neb. 237, 244, 639 N.W.2d 125, 134 (2002).

¹³⁸*State v. Baue*, 258 Neb. 968, 988, 607 N.W.2d 191, 206 (2000) (defendant in criminal case).

and if the trial court in its discretion determines that the introduction of the expert's testimony will merely act as a conduit for hearsay, the trial court has discretion to refuse to admit the evidence."¹³⁹ Sometimes, however, an expert who bases an opinion on otherwise-inadmissible hearsay will be allowed to testify to that otherwise-inadmissible hearsay as evidence of the basis for the opinion, that is, as credibility evidence. The evidence is not offered to its hearsay use—to prove the truth of the matter asserted—but just to show that the expert considered it when forming his or her opinion.¹⁴⁰

In 1999 Nebraska adopted the learned treatise exception to the hearsay rule.¹⁴¹ This exception allows some passages from properly authenticated learned treatises, which are called to the attention of an expert on cross-examination or relied upon by the expert in direct examination, to be read into evidence as substantive evidence of the facts contained therein.¹⁴² Regarding this exception in detail, *see* G. MICHAEL FENNER, *THE HEARSAY RULE* 212–15 (3d ed. Carolina Academic Press 2013).

XIV. MISCELLANEOUS CASES ON A VARIETY OF KINDS OF EXPERTISE

The following are some miscellaneous cases on a variety of kinds of expertise. *See also* cases found in the Comments and Authorities that are cross-referenced in the Cross Reference part of this Comment & Authorities, below.

- Attorney testimony on questions of attorney malpractice.¹⁴³
- Boating safety.¹⁴⁴

¹³⁹ *Stukenholtz v. Brown*, 267 Neb. 986, 989, 679 N.W.2d 222, 225 (2004).

¹⁴⁰ This is discussed at length in Chapter 8 of G. MICHAEL FENNER, *THE HEARSAY RULE* (3d ed. Carolina Academic Press 2013). It is also discussed in part VII (B) (2) of this Comment & Authorities, above. *See also* *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) (holding it did not violate the Confrontation Clause of the United States Constitution when the testifying expert based his opinion on reports prepared by other experts in his lab and then testified to the contents of those reports because the testimony was not offered for its truth, but only as basis evidence, that

is, evidence explaining the basis for the testifying expert's opinion; since the basis testimony was not offered to prove its truth, it did not violate the hearsay rule either).

¹⁴¹ Neb. Evid. R. 803(17), Neb. Rev. Stat. § 27-803(17) (Reissue 2016). *Jackson v. Brotherhood's Relief and Compensation Fund*, 273 Neb. 1013, 1019-20, 734 N.W.2d 739, 745 (2007) (including some discussion of the exception).

¹⁴² Neb. Evid. R. 803(17), above.

¹⁴³ *See* part XI of this Comment & Authorities, above.

¹⁴⁴ *Caguioa v. Fellman*, 275 Neb. 455, 462, 747 N.W.2d 623, 629 (2008).

- Burglary tools.¹⁴⁵
- Chiropractor.¹⁴⁶
- Custom and practice in the industry.¹⁴⁷
- Differential diagnosis.¹⁴⁸
- DNA evidence.¹⁴⁹
- Drug-recognition-expert police officer.¹⁵⁰
- Epidemiological evidence.¹⁵¹
- Fire investigation.¹⁵²

¹⁴⁵State v. Briner, 198 Neb. 766, 769, 255 N.W.2d 422, 423-24 (1977) (admitting the testimony of a burglar qualified as expert on how certain tools found in defendant's possession could be used as burglary tools).

¹⁴⁶See, e.g., Yagodinski v. Sutton, 309 Neb. 179, 190–201, 959 N.W.2d 541, 549–55 (2021) (including a discussion of Neb. Rev. Stat. § 38-805 (Reissue 2016)) (“[A] duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his [or her] knowledge according to his [or her] qualifications in the field of chiropractics’ As such, a licensed chiropractor will generally be qualified to testify as an expert on any matter that is within the scope of chiropractic practice and licensure in Nebraska.” *Id.* at 190, 959 N.W.2d at 549 (footnote citing cases omitted) “In sum, when an expert is a licensed health professional offering testimony about a patient, it is entirely appropriate for a court to consider, as a factor affecting qualification, the statutory scope of practice established by the Legislature.” *Id.* at 198, 959 N.W.2d at 554.); Floyd v. Worobec, 248 Neb. 605, 612-13, 537 N.W.2d 512, 517 (1995) (citing cases).

¹⁴⁷Orduna v. Total Const. Services, Inc., 271 Neb. 557, 567, 713 N.W.2d 471, 480 (2006); Coppi v. West American Ins. Co., 247 Neb. 1, 15, 524

N.W.2d 804, 815 (1994), *overruled on other grounds by* D & S Realty v. Markel Ins. Co., 280 Neb. 567, 587, 789 N.W.2d 1, 17 (2010).

¹⁴⁸Epp v. Lauby, 271 Neb. 640, 647-48, 715 N.W.2d 501, 508-09 (2006).

¹⁴⁹DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Reissue 2016); State v. Tolliver, 268 Neb. 920, 929, 689 N.W.2d 567, 576 (2004); State v. Carter, 255 Neb. 591, 597-98, 586 N.W.2d 818, 826 (1998); State v. Freeman, 253 Neb. 385, 571 N.W.2d 276 (1997) (thorough discussion); State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled in part by Freeman, supra*; State v. Houser, 241 Neb. 525, 490 N.W.2d 168 (1992). See also State v. McDonald, 269 Neb. 604, 608, 694 N.W.2d 204, 207-08 (2005) (“A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court’s determination will not be disturbed.”).

¹⁵⁰State v. Daly 278 Neb. 903, 775 N.W.2d 47 (2009).

¹⁵¹King v. Burlington Northern Santa Fe Ry. Co., 277 Neb. 203, 213-18, 762 N.W.2d 24, 35-38 (2009).

¹⁵²Perry Lumber Co., Inc. v. Durable Services, Inc., 271 Neb. 303, 310-11, 710 N.W.2d 854, 860-61 (2006) (*Perry Lumber II*).

- Handwriting.¹⁵³
- Illustrative experiments.¹⁵⁴
- Law, expert opinion on status of.¹⁵⁵
- Polygraph examination.¹⁵⁶
- Sobriety.¹⁵⁷
- Sound recordings, interpreting contents of.¹⁵⁸
- Statistical probability evidence.¹⁵⁹
- Truth telling.¹⁶⁰
- Valuation of
- Crops.¹⁶¹

¹⁵³*State v. Aguilar*, 268 Neb. 411, 420-21, 683 N.W.2d 349, 357 (2004); *Aetna Cas. & Sur. Co. v. Nielsen*, 222 Neb. 92, 94, 382 N.W.2d 328, 330 (1986).

¹⁵⁴The admissibility of illustrative experiments is discussed in *Perry Lumber Co., Inc. v. Durable Services, Inc.*, 266 Neb. 517, 523-25, 667 N.W.2d 194, 199-201 (2003); *Ford v. Estate of Clinton*, 265 Neb. 285, 290-92, 656 N.W.2d 606, 611-13 (2003).

¹⁵⁵In part II(C) of this Comment & Authorities, above, there is a discussion of Nebraska cases holding that, as a general rule, expert opinion on the status of the law is not helpful to the trier of fact and, therefore, is not admissible.

¹⁵⁶"We have long held that the results of polygraph examinations are not admissible as evidence in criminal cases. . . . [We now] hold that the results of such examinations are inadmissible for the purpose of attempting to show deception in a proceeding before an administrative agency of a municipal government." *Mathes v. City of Omaha*, 254 Neb. 269, 272, 274, 576 N.W.2d 181, 183, (1998) (para-

graph breaks omitted) (finding the scientific foundation needed to meet *Frye* standard was not met; courts must be particularly cautious in admitting evidence that has a truth-seeking function that nearly duplicates that of the proceeding).

¹⁵⁷*E.g.*, *State v. Casillas*, 279 Neb. 820, 836-39, 782 N.W.2d 882, 897-99 (2010); *State v. Daly*, 278 Neb. 903, 909-30, 775 N.W.2d 47, 57-70 (2009).

¹⁵⁸*State v. Loveless*, 209 Neb. 583, 588-89, 308 N.W.2d 842, 846 (1981).

¹⁵⁹*State v. Freeman*, 253 Neb. 385, 401-07, 571 N.W.2d 276, 287-90 (1997) (thorough discussion, in DNA context).

¹⁶⁰"[N]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent person is telling the truth." *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 350, 754 N.W.2d 406, 428 (2008) (multiple quotation marks omitted). See part II of this Comment & Authorities, above.

¹⁶¹*Bristol v. Rasmussen*, 249 Neb. 854, 865-66, 547 N.W.2d 120, 129 (1996).

- Land.¹⁶²
- Pension Rights.¹⁶³
- Stolen Property.¹⁶⁴
- Welding.¹⁶⁵

Regarding expert testimony on the analysis of a substance necessarily consumed in testing, see *State v. Peterson*.¹⁶⁶

XV. CALLING AN OPPOSING PARTY'S EXPERT TO TESTIFY

"As a general rule, a party is not precluded from calling as its own an expert who has been retained and identified by the opposing party."¹⁶⁷ There may be circumstances in which Rule 403 of the Nebraska Evidence Rules¹⁶⁸ would preclude a party from calling an expert witness retained by the opposing party; this is not, however, the general rule.¹⁶⁹

There is a split of authority as to whether the judge or the attorneys may tell the jury that an expert witness called to the stand by one party was originally retained by an opposing party. Some courts say that, as a general rule, such information is not relevant. Others say

¹⁶²*Liberty Development Corp. v. Metropolitan Utils. Dist. of Omaha*, 276 Neb. 23, 32–37, 751 N.W.2d 608, 616–18 (2008); *Eicher v. Mid America Financial Inv. Corp.*, 275 Neb. 462, 469, 748 N.W.2d 1, 9 (2008) ("[A] landowner is qualified to testify to the fair market value of his or her property." When both the landowner and an expert testify, which to accept is a question of credibility); *City of Lincoln v. Realty Trust Group, Inc.*, 270 Neb. 587, 596, 705 N.W.2d 432, 441 (2005) (stating that courts are particularly reluctant to exclude expert opinions regarding damages in condemnation cases); *McArthur v. Papio-Missouri River Nat. Res. Dist.*, 250 Neb. 96, 101–02, 547 N.W.2d 716, 722 (1996) (holding that a member of landowner's family, shown to be familiar with land's characteristics and uses and experienced in farming said land, qualified as "owner" to testify as to land's value even though name not on title); *Nelson v. Metropolitan Utils. Dist.*, 249 Neb. 956, 959, 547 N.W.2d 133, 136 (1996) (holding that a land-

owner, shown to be familiar with value of said land, qualified to estimate its value for use to which then being put).

¹⁶³*Koziol v. Koziol*, 10 Neb. App. 675, 691, 636 N.W.2d 890, 904 (2001).

¹⁶⁴*State v. Gartner*, 263 Neb. 153, 164–65, 638 N.W.2d 849, 860 (2002).

¹⁶⁵*Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 193, 609 N.W.2d 338, 346 (2000).

¹⁶⁶*State v. Peterson*, 242 Neb. 286, 293, 494 N.W.2d 551, 556 (1993).

¹⁶⁷*Seeber v. Howlette*, 255 Neb. 561, 566, 586 N.W.2d 445, 449 (1998) (discussing cases).

¹⁶⁸*Neb. Evid. R. 403*, Neb. Rev. Stat. § 27-403 (Reissue 2016).

¹⁶⁹*Seeber*, 255 Neb. at 568, 586 N.W.2d at 450 (rationale behind discovery Rule 26(b)(4)(B)'s limitations on discovery of facts known or opinions held by expert witnesses, may apply to decision under evidence Rule 403 so as to prevent party from calling opposing party's expert; such circumstances not present here).

that it is relevant to the weight and credibility of the expert's testimony. In *Seeber v. Howlette*,¹⁷⁰ our Supreme Court found that the former is the "reasonable and correct" general rule.¹⁷¹ On the facts of *Seber*, however, the defendant was allowed to bring out that the plaintiff had hired the expert: on cross-examination plaintiff's counsel suggested that the expert's opinion had been influenced by his having been hired by the defendant; on redirect defense counsel was allowed to point out that the plaintiff had hired the expert.¹⁷²

XVI. STANDARD OF REVIEW ON APPEAL

A. LACK OF OBJECTION

If a party does not object at trial to a witness's qualifications to testify as an expert, then that party waives the right to assert on appeal that allowing the witness to testify as an expert was prejudicial error.¹⁷³

B. DE NOVO REVIEW OF WHETHER THE TRIAL COURT PREFORMED ITS GATEKEEPING FUNCTION

As discussed above, the *Daubert/Schafersman* test requires that the trial judge act as the gatekeeper regarding the admission of expert testimony. The trial court does not have any discretion in this regard, that is, it is required to perform this gatekeeping function. When the question is whether the trial court performed its gatekeeping function, the appellate court reviews the record de novo.¹⁷⁴

The trial court commits error if it fails to perform its gatekeeping

¹⁷⁰*Seeber v. Howlette*, 255 Neb. 445, 586 N.W.2d 445 (1998).

¹⁷¹*Id.* at 570, 586 N.W.2d at 451 (finding that information generally irrelevant).

¹⁷²*Id.* at 561, 586 N.W.2d at 451-52.

¹⁷³*Hawkins v. City of Omaha*, 261 Neb. 943, 954, 627 N.W.2d 118, 128 (2001). *See also* *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 350, 754 N.W.2d 406, 428 (2008) ("[I]t is only when a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, or methods, or their application, that the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.").

¹⁷⁴*McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 222, 959 N.W.2d 251, 268 (2021) ("[W]e review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony, and we review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony."); *Yagodinski v. Sutton*, 309 Neb. 179, 189, 959 N.W.2d 541, 549 (2021); *Larsen v. 401 Main Street*, 302 Neb. 454, 460, 923 N.W.2d 710, 715 (2019); *Pitts v. Genie Indus.*, 302 Neb. 88, 98, 921 N.W.2d 597, 608 (2019); *Hemsley v. Langdon*, 299 Neb. 464, 469-70, 909 N.W.2d 59, 65-66 (2018); *Zimmerman v. Powell*, 268 Neb. 422, 431, 684 N.W.2d 1, 9 (2004) (as discussed above, this review looks for whether the trial court stated its

function. As a general rule, this error is prejudicial to the unsuccessful party and, therefore, reversible error.¹⁷⁵ “Only if the admission or exclusion of the expert’s testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court’s abdication of its gatekeeping duty be deemed nonprejudicial.”¹⁷⁶

C. ABUSE OF DISCRETION REVIEW ONCE THE TRIAL COURT HAS PERFORMED ITS GATEKEEPING FUNCTION

Once the trial court has performed its gatekeeping function, then the standard of review is abuse of discretion. “The admission of expert testimony is ordinarily within the trial court’s discretion, and its ruling will be upheld absent an abuse of discretion.”¹⁷⁷ Whether trial judges

reasons for admitting the expert testimony, “specifically noting the factors bearing on reliability that [it] relied on in reaching its determination”; *id.* at 430-31, 684 N.W.2d at 9.). *Accord* State v. Herrera, 289 Neb. 575, 588, 856 N.W.2d 310, 324 (2014); State v. Edwards, 278 Neb. 55, 73-74, 767 N.W.2d 784, 800-01 (2009) (noting that whether the trial court performed its gatekeeping function is reviewed de novo on the record; thereafter, the admissibility of expert testimony is reviewed for abuse of discretion); King v. Burlington Northern Santa Fe Ry. Co., 277 Neb. 203, 211, 762 N.W.2d 24, 33 (2009); Fickle v. State, 273 Neb. 990, 1005, 735 N.W.2d 754, 769 (2007), *opinion supplemented on overruling of motion for reh’g*, 274 Neb. 267, 759 N.W.2d 113 (2007).

¹⁷⁵*Zimmerman*, 268 Neb. at 436, 684 N.W.2d at 13.

¹⁷⁶*Id.*

¹⁷⁷Same quotation: Rankin v. Stetson, 275 Neb. 775, 777, 780, 783, 749 N.W.2d 460, 462-63, 464-65, 466-67 (2008); Ford v. Estate of Clinton, 265 Neb. 285, 290, 656 N.W.2d 606, 611 (2003). *Accord, e.g.*, Eddy v. Builders Supply Co., 304 Neb. 804, 821, 937 N.W.2d 198, 212 (2020) (stating that abuse of discretion is the standard of review when a trial court excludes an expert witness as a discovery sanction and discussing factors to consider when excluding the testimony of an expert “called by a party who has

failed to comply with a request for discovery”); U.S. Pipeline v. Northern Nat. Gas Co, 303 Neb. 444, 464, 930 N.W.2d 460, 474 (2019); Weyh v. Gottsch, 303 Neb. 280, 300, 929 N.W.2d 40, 55 (2019); Bank v. Mickels, 302 Neb. 1009, 1016, 926 N.W.2d 97, 103 (2019); Larsen v. 401 Main Street, 302 Neb. 454, 461, 923 N.W.2d 710, 715 (2019); Pitts v. Genie Indus., 302 Neb. 88, 98, 921 N.W.2d 597, 608 (2019); Hemsley v. Langdon, 299 Neb. 464, 470, 909 N.W.2d 59, 66 (2018); ACI Worldwide Corp. v. Baldwin Hackett & Meeks, 296 Neb. 818, 870, 896 N.W.2d 156, 192 (2017); State v. Herrera, 289 Neb. 575, 587, 856 N.W.2d 310, 323 (2014); Simon v. Drake, 285 Neb. 784, 793, 829 N.W.2d 686, 692-93 (2013) (“But . . . , a trial court does not have discretion to permit a witness who has not been qualified as an expert to testify to issues that require an expert’s opinion.”); Gary’s Implement v. Bridgeport Tractor Parts, 281 Neb. 281, 289, 293, 297, 799 N.W.2d 249, 257, 260, 262 (2011); King v. Burlington Northern Santa Fe Ry. Co., 277 Neb. 203, 211, 762 N.W.2d 24, 34 (2009) (“We review de novo whether the trial court applied the correct legal standards for admitting an expert’s testimony. We review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert’s testimony.” (footnote omitted)); Smith v. Colorado Organ Recovery Sys., Inc., 269 Neb. 578, 583, 694

have performed their gatekeeping function is one thing: de novo review. Whatever decision trial judges make as a result of the performance of their gatekeeping function is another: abuse of discretion review.

This is consistent with the rule that where the Nebraska Evidence Rules apply, they control the admissibility of evidence and the standard of review on appeal; where the rule itself grants the trial judge discretion, then, and only then, the standard of review is abuse of discretion; as a general rule, the Nebraska Evidence Rules grant discretion over the admissibility of expert testimony.¹⁷⁸

"A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition."¹⁷⁹ While the case just quoted¹⁸⁰ states that abuse of discretion occurs when the reasons or rulings "depriv[e] a litigant of a substantial right *and* deny[] just results,"¹⁸¹ at least two earlier definitions state that an abuse of discretion occurs when a litigant is "deprive[d] of a substantial right *or* a just result."¹⁸² This is a difference but it may not be a distinction. Depriving a litigant of a "substantial right" and of a "just result" may be two ways of saying the same thing. The difference in the conjunction may not matter.¹⁸³ More recently, the court has stated that "the admission or exclusion of evidence is not re-

N.W.2d 610, 618 (2005); *Schafersman v. Agland Coop*, 268 Neb. 138, 146, 681 N.W.2d 47, 54 (2004) (*Schafersman II*); *Heistand v. Heistand*, 267 Neb. 300, 305, 673 N.W.2d 541, 546 (2004) (finding in a child custody case that the trial court abused its discretion in admitting opinion testimony of guardian ad litem); *Schafersman I*, 262 Neb. at 219, 631 N.W.2d at 868; *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991) (seminal case).

¹⁷⁸See the cases cited in the above footnote. See particularly *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991) the seminal case on this point. See also *Benzel v. Keller Industries, Inc.*, 253 Neb. 20, 27, 29, 567 N.W.2d 552, 557 (1997) (admission of demonstrative evidence is within discretion of trial court). Accord *Richardson v. Children's Hosp.*, 280 Neb. 396, 409, 787 N.W.2d 235, 245 (2010) ("The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance

will not be reversed absent an abuse of discretion.").

¹⁷⁹Same quotation: *Hartley v. Metropolitan Utils. District of Omaha*, 294 Neb. 870, 889, 885 N.W.2d 675, 691 (2016); *Hill v. Tevogt*, 293 Neb. 429, 433, 879 N.W.2d 369, 373 (2016); *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 289, 799 N.W.2d 249, 257 (2011). Accord *Pitts*, 302 Neb. at 98, 921 N.W.2d at 608 (2019).

¹⁸⁰*Gary's Implement*, above.

¹⁸¹*Id.* (emphasis added). Accord *Pitts*, above.

¹⁸²*Schafersman II*, 268 Neb. at 146-47, 681 N.W.2d at 54 (emphasis added). See also *Carlson v. Okerstrom*, 267 Neb. 397, 403, 675 N.W.2d 89, 98 (2004).

¹⁸³See also *Schwarz v. Schwarz*, 289 Neb. 960, 963, 857 N.W.2d 802, 805 (2015); *State ex rel. Klinke v. Wisconsin Dept. of Health and Social Services*, 87 Wis. 2d 110, 273 N.W.2d 379, 389, (Ct. App. 1978); *Epp v. Lauby*,

versible error unless it unfairly prejudiced a substantial right of the complaining party.”¹⁸⁴

On the other hand, there are cases that hold that the trial court’s factual finding regarding whether a witness qualifies as an expert is reviewed under a clearly-erroneous standard.¹⁸⁵

See generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VII, §§ 27-702[D](5)(v) (vol. 3, Nebraska Practice Series, West Group).

XVII. CROSS REFERENCES

Expert testimony is dealt with in various places in NJI2d Civ. Listed by subject matter, here are other places where this book deals with the subject. The cross-reference will be to a pattern instruction. The instruction itself may have to do with experts or, more likely, the discussion will be in the Comment or Authorities, or both.

■ *Contract interpretation*: A small part of the Comment NJI2d Civ. 15.01 discusses the use of expert witnesses in the interpretation of an ambiguous contract, including the matter of expert testimony as to custom and practice in an industry offered to the issue of the interpretation of ambiguous language in a contract.

■ *Eminent domain*: The use of expert witnesses in eminent domain actions, particularly expert testimony on the value of the Property taken, is discussed at NJI2d Civ. 13.01.

■ *Hypothetical questions*: The use of hypothetical questions in the examination of expert witnesses is discussed at NJI2d Civ. 1.43.

■ *Locality rule*: The locality rule applied to expert testimony is discussed at NJI2d Civ. 12.01 and 12.04.

271 Neb. 640, 645, 715 N.W.2d 501, 507 (2006); *City of Lincoln v. Realty Trust Group, Inc.*, 270 Neb. 587, 593, 705 N.W.2d 432, 438 (2005); *Schafersman II*, 268 Neb. at 146-47, 681 N.W.2d at 54; *Janik v. Gatewood*, 233 Neb. 298, 302, 444 N.W.2d 900, 904 (1989).

¹⁸⁴*Moreno v. City of Gering*, 293 Neb. 320, 330, 878 N.W.2d 529, 537 (2016). *Accord*, e.g., *Weyh v. Gottsch*, 303 Neb. 280, 300, 929 N.W.2d 40, 55 (2019).

¹⁸⁵E.g., *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 871, 896 N.W.2d 156, 192 (2017) (“[T]here is no exact standard

for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court’s finding is clearly erroneous, such a determination will not be disturbed on appeal.”); *Main Street Movies, Inc. v. Wellman*, 251 Neb. 367, 371, 557 N.W.2d 641, 645 (1997); *McArthur v. Papio-Missouri River Nat. Res. Dist.*, 250 Neb. 96, 99, 547 N.W.2d 716, 720 (1996); *State v. Stahl*, 240 Neb. 501, 506, 482 N.W.2d 829, 835 (1992); *Brown v. Farmers Mut. Ins. Co. of Nebraska*, 237 Neb. 855, 866, 468 N.W.2d 105, 113 (1991).

■ *Malpractice:*

Professional malpractice generally: In addition, of course, to, the discussion found throughout this Comment & Authorities to this instruction, the general subject of expert testimony in professional malpractice cases is discussed at NJI2d Civ. 12.04.

Medical malpractice in particular: Expert testimony in medical malpractice actions is part of the subject dealt with in the Comment & Authorities to NJI2d Civ. 12.01.

Informed-consent, medical-malpractice actions: Medical-malpractice actions where the gravamen of the complaint is a lack of informed consent, including expert testimony therein, is the subject of NJI2d Civ. 12.03.

■ *Questions of law:* The general inadmissibility of expert opinion on questions of law, at least outside the area of attorney malpractice, is discussed in this Comment & Authorities, above. Regarding expert testimony in malpractice cases, see the cross-reference above.

NJI2d Civ. 1.43

HYPOTHETICAL QUESTION ANSWERED BY EXPERT

Recommend no instruction.

COMMENT AND AUTHORITIES

Our statutory rules of evidence, particularly Rule 705,¹ greatly reduce the need for the hypothetical question. Weinstein's Evidence agrees.² In fact, the Eighth Circuit Court of Appeals has stated that proposed federal Rules 701 through 705 were "obviously designed to remove stereotyped, long, belabored and nonsensical hypothetical questions from the arena of trial."³ This should tend to reduce instances where the hypothetical question is used and, therefore, instances where any such instruction would be useful.

In a related vein, the Nebraska Supreme Court has said:

It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate

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¹Neb. Rev. Stat. § 27-705 (Reissue 2016).

²3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 705[01] at 705-04 (1987).

³*Twin City Plaza, Inc. v. Central Sur. & Ins. Corp.*, 409 F.2d 1195, 1201 (8th Cir. 1969). See also G. Michael Fenner, *The Nebraska Rules of Evidence, 1980: Article VII—Opinion Evidence*, 23 (NCLE, Inc.).

the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not to be overridden unless it very clearly appears to have been wrongly exercised.⁴

Whether this decline in use is occurring or not, specific instruction on the relationship between facts assumed in a hypothetical question and the expert's answer to the question is not necessary. To the extent that facts assumed in the question constitute the "source" of the expert's information, that is covered by NJI2d Civ. 1.41. To the extent that facts assumed in the question constitute the "reason" for the expert's opinion, that is covered by NJI2d Civ. 1.42.

Specific instruction such as that found in the 1969 version of this work would, in many cases, no longer be a correct statement of the law. Nebraska Evidence Rule 705⁵ provides that unless the judge requires otherwise, the expert witness can state his or her opinion without first disclosing the facts or data upon which the opinion is based. Under Rule 705, the expert is allowed to base "his opinion on data furnished him at second hand or observed by him at first hand."⁶ And the rule does not require that data furnished the expert at second hand be furnished during the trial, by hypothetical question or otherwise.⁷

The Comment to Nebraska Evidence Rule 705 also states the following:

Rule 705 gives value to the expert's opinion based on the foundation that has been laid as to his expertise; this places the burden on the cross-examiner to negate or mitigate the value of the opinion by bringing out the unfavorable facts. Nebraska cases in the past appear to place the burden of establishing value on the side presenting the witness.

It is now assumed that the expert's testimony has value once a sufficient foundation as to his expertise has been established. The source of the facts could then be brought out by the cross-examiner. . . .⁸

⁴State v. Henggeler, 199 Neb. 651, 655, 260 N.W.2d 495, 498 (1977). Kresha Const. Co. v. Kresha, 184 Neb. 188, 193, 166 N.W.2d 589, 592 (1969) (same quotation minus the paragraph indentation). *Accord* Kurz v. Dinklage Feed Yard, Inc., 205 Neb. 125, 129, 286 N.W.2d 257, 260 (1979).

⁵Neb. Evid. R. 705, Neb. Rev. Stat. § 27-705 (Reissue 2016).

⁶Comment, Rule 705, Proposed Nebraska Rules of Evidence, August

1, 1973 (Neb. S. Ct. Comm. on Prac. and Proc.).

⁷See NJI2d Civ. 1.42, Comment & Authorities, for a complete discussion of these matters.

⁸Comment, Rule 705, above.

Further on the subject of hypothetical questions, see generally and compare Neb. Rev. Stat. §§ 27-702 & 27-705 (Reissue 2016), Neb. Evid. R. 702 & 705, with e.g., *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277

NJI2d Civ. 1.44

EVALUATION OF DEPOSITION EVIDENCE

During the trial, testimony was presented to you by deposition. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony.

COMMENT & AUTHORITIES

The instruction is based on the discussion found in *Hershiser v. Chicago, B. & Q. R. Co.*¹

The court may wish to explain deposition evidence at the time the evidence is presented to the jury. Such explanation, however, is not a substitute for giving this instruction.

Two important authorities regarding the use of depositions at trial in Nebraska are Nebraska Court Rule of Discovery § 6-332 and *Walton v. Patil*.² *Walton* involves the deposition of an expert witness, but its holding is in no way limited to the depositions of expert witnesses. It holds that § 6-332 is an independent exception to the hearsay rule.³ Under § 6-332 depositions can be admitted into evidence “where the deponent is either 100 miles from the site of the trial or beyond the trial court’s subpoena power at the time of trial”⁴ without the need to show that the deponent is unavailable to testify in person, that is, “it is unnecessary to show that reasonable efforts were made to procure the at-

N.W.2d 236 (1979); *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 305, 275 N.W.2d 77, 81 (1979) (hypothetical question not required); *Bakhit v. Thomsen*, 193 Neb. 133, 142-43, 225 N.W.2d 860, 866 (1975) (allowing some variance between facts asserted in the question and facts proven); *Hawkins Const. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 558-59, 209 N.W.2d 643, 651 (1973) (disapproved of by, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983)) and (disapproved of by, *Nerud v. Haybuster Mfg., Inc.*, 215 Neb. 604, 340 N.W.2d 369 (1983)) *disapproved on other grounds*, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43-44 (1983); *Johnsen v. Taylor*, 169 Neb. 280, 99 N.W.2d 254 (1959); *Cover v. Platte Val. Public Power and Irr. Dist.*, 167 Neb. 788, 95

N.W.2d 117 (1959); *Pueppka v. Iowa Mut. Ins. Co.*, 165 Neb. 781, 803-15, 87 N.W.2d 410, 422-28 (1958); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Dietz v. State*, 157 Neb. 324, 59 N.W.2d 587 (1953); *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946); *Hamilton v. Huebner*, 146 Neb. 320, 331, 19 N.W.2d 552, 558-59, (1945).

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¹*Hershiser v. Chicago, B. & Q.R. Co.*, 102 Neb. 820, 823-24, 170 N.W. 177, 178-79 (1918).

²*Walton v. Patil*, 279 Neb. 974, 981-85, 783 N.W.2d 438, 444 (2010).

³*Walton*, 279 Neb. at 984, 783 N.W.2d at 446.

⁴*Walton*, 279 Neb. at 982, 783 N.W.2d at 445,

tendance of the witness.”⁵ The contrary holding of *Maresh v. State*⁶ has been abrogated by statute.⁷

There is no distinction

between a deposition taken for use at trial and one taken for discovery purposes. [F]ederal courts have universally rejected a “discovery-use” dichotomy as a criterion for the admissibility of a deposition taken during the discovery phase of a trial. Nothing in the Nebraska rules of evidence or the rules of discovery make such a distinction. Thus, a deposition taken during discovery may be used at trial so long as it is otherwise admissible.⁸

NJI2d Civ. 1.45

FALSE TESTIMONY (*FALSUS IN UNO., FALSUS IN OMNIBUS*)

Recommend no instruction.

COMMENT

I. IN GENERAL

In *Markiewicz v. State*, the Nebraska Supreme Court approved of the following:

“Such instruction is ‘nothing more than an affirmative declaration of power possessed by the jury in determining the credibility of witnesses.’ And it may well be presumed that a jury will not hesitate to exercise that power, if the circumstances warrant it, without being specifically told that they may do so.”¹

In *Knihal v. State*, the Nebraska Supreme Court quoted *Wigmore* as follows:

⁵*Walton*, 279 Neb. at 984, 783 N.W.2d at 446.

⁶*Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 2017 WL 4455257 (2017).

⁷*Walton*, 279 Neb. at 984, 783 N.W.2d at 446. *See also* the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 through 27-1103, and particularly the hearsay rules, §§ 27-801 through

27-806 (Reissue 2016).

⁸*Walton*, 279 Neb. at 984-85, 783 N.W.2d at 446-47.

1.45

¹*Markiewicz v. State*, 109 Neb. 514, 523, 191 N.W. 648, 651 (1922) (quoting Missouri Court of Appeals; Missouri Court of Appeals citation and citation from within quotation omitted).

The maxim “He who speaks falsely on one point will speak falsely upon all,” is in strictness concerned, not with the admissibility, but with the weight of evidence. The jury are told by it what force to give to a falsity after the evidence was shown its existence. It may be said, once for all, that the maxim is in itself worthless;—first in point of validity because in one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the other it is absolutely false as a maxim of life; and secondly, in point of utility, because it merely tells the jury what they may do . . . , and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force, and secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves.²

II. ON A RELATED POINT: PARTIES WHO CHANGE THEIR TESTIMONY

On a related point, “a party who changes his or her testimony during the course of litigation is bound by his or her earlier statements upon proof that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.”³

Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process. The doctrine [does this] by preventing a party from taking a position inconsistent with one successfully and

²*Knihal v. State*, 150 Neb. 771, 777-78, 36 N.W.2d 109, 112 (1949) (quoting 3A Wigmore, *Evidence* § 1008 (3rd ed.)). See generally *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958), reh’g denied and opinion modified, 166 Neb. 450, 89 N.W.2d 265 (1958); *Nelsen v. State*, 159 Neb. 663, 68 N.W.2d 194 (1955); *Franz v. State*, 156 Neb. 587, 57 N.W.2d 139 (1953); *Knihal v. State*, 150 Neb. 771, 36 N.W.2d 109 (1949); *Jennings v. State*, 150 Neb. 828, 36 N.W.2d 268 (1949). See generally 9A Am. Jur. 2d *Evidence* § 1372 (2010); 88 C.J.S., *Trial* §§ 315(c), 364 (1955); 3A Wigmore, *Evidence* § 1008 (Chadbourn rev. 1970).

³*Breeden v. Anesthesia West, P.C.*, 265 Neb. 356, 373, 656 N.W.2d 913, 926 (2003) (citation and internal

quotation marks omitted). *Accord State v. Dalland*, 287 Neb. 231, 238-39, 842 N.W.2d 92, 98 (2014) (In this context, “‘party’ refers only to those who are named in an action.”); *Riggs v. Nickel*, 281 Neb. 249, 253-54, 796 N.W.2d 181, 185-86 (2011); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 811, 678 N.W.2d 82, 92 (2004) (finding that the rule does not apply here because the party’s earlier statements were ambiguous); *State v. Osborn*, 241 Neb. 424, 431, 490 N.W.2d 160, 166 (1992); *Converse v. Morse by Morse*, 232 Neb. 925, 928-31, 442 N.W.2d 872, 875 (1989); *State v. Robertson*, 223 Neb. 825, 828-29, 394 N.W.2d 635, 637 (1986); *Kluender v. Mattea*, 214 Neb. 327, 339-40, 334 N.W.2d 416, 423 (1983).

unequivocally asserted by the same party in a prior proceeding. Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.⁴

This point has also been expressed as follows: the testimony of a party is discredited as a matter of law and should be disregarded when each of the following occurs: the testimony pertains to a vital point; it is clear that the witness materially changed his or her testimony to obviate objections pointed out by the Supreme Court on a former appeal; and there is no rational or sufficient explanation for the change.⁵ “[T]he subsequent and altered testimony from such witness is discredited as a matter of law and should be disregarded.”⁶

“Judicial acceptance does not require that a party prevail in the merits, but only that the first court adopted the position urged by the party, either as a preliminary matter or as part of the final disposition.”⁷

Judicial estoppel “is to be applied with caution so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.”⁸

This rule does not apply “to instances of changed testimony by nonparty witnesses. A nonparty witness’ changed testimony, even if

⁴Hike v. State (Hike II), 297 Neb. 212, 216, 899 N.W.2d 614, 620 760 (2017) (footnotes omitted). See also, e.g., Western Ethanol Co., LLC v. Midwest Renewable Energy, 305 Neb. 1, 16-17, 938 N.W.2d 329, 343 (2020); O’Connor v. Kearny Junction, 295 Neb. 981, 987, 893 N.W.2d 684, 690 (2017) (“When a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party’s inconsistent claim against the same or a different party in a later proceeding. The assertion in the earlier proceeding was made in a motion for summary judgment); deNourie & Yost Homes v. Frost, 295 Neb. 912, 930-31, 893 N.W.2d 669, 683 (2017).

⁵Western Ethanol, 305 Neb. at 19, 938 N.W.2d at 344; Momsen v. Nebraska Methodist Hospital, 210 Neb. 45, 54-55, 313 N.W.2d 208, 212-13 (1981); Peterson v. Omaha & C.B.

Street Ry. Co., 134 Neb. 322, 278 N.W. 561, 562 (1938).

⁶State v. Osborn, 241 Neb. 424, 431, 490 N.W.2d 160, 166 (1992). See also State v. Dandridge, 209 Neb. 885, 894, 312 N.W.2d 286, 293 (1981) (finding that the fact that a witness-accomplice was guilty of willful false swearing on a material matter in the case at hand does not necessarily discredit the witness’ testimony as a matter of law).

⁷Western Ethanol, 305 Neb. at 19, 938 N.W.2d at 344.

⁸Western Ethanol, 305 Neb. at 18-19, 938 N.W.2d at 344. See also O’Connor v. Kearny Junction, 295 Neb. 981, 987, 893 N.W.2d 684, 690 (2017) (regarding a party’s claim that was inconsistent with a position it had unequivocally taken in a motion for summary judgment).

made . . . to meet the exigencies of pending litigation, is a factor to be considered by the jury when determining the weight and credibility to be given to the witness' testimony."⁹

Judicial estoppel is a decision to be made by the court, as a matter of law. It is not a question for the jury.¹⁰

"[A] court's application of judicial estoppel to the facts of a case [is reviewed] for abuse of discretion and . . . its underlying factual findings [are reviewed] for clear error."¹¹

Self-contradiction by an expert witness is discussed at NJI2d Civ. 1.42, Comment & Authorities.

Equitable estoppel is a doctrine that "precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations."¹²

Different aspects of estoppel are discussed at six different places herein: See NJI2d Civ. 1.45, (judicial estoppel: False Testimony (*Falsus in Uno, Falsus in Omnibus*)); NJI2d Civ. 6.26-6.28 ("Partner by Estoppel"); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation; citing equitable estoppel cases); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract). See *generally* the references in the Index, under Equitable Estoppel. Equitable estoppel is discussed at NJI2d Civ. 9.01 and 12.04.

NJI2d Civ. 1.46

WITNESS FEES—NO UNFAVORABLE INFERENCES

Recommend no instruction.

⁹Breeden v. Anesthesia West, P.C., 265 Neb. 356, 373, 656 N.W.2d 913, 926 (2003); (citation and internal quotation marks omitted) (specifically refusing to extend the rule to nonparty witnesses). Accord, e.g., Dalland, 287 Neb. at 238-39, 842 N.W.2d at 98; Ketteler v. Daniel, 251 Neb. 287, 295, 556 N.W.2d 623, 628 (1996); State v. Osborn, 241 Neb. 424, 431, 490 N.W.2d 160, 166 (1992); Converse v. Morse by Morse, 232 Neb. 925, 928-31, 442 N.W.2d 872, 875 (1989). See also Kozlik v. Emelco, Inc., 240 Neb. 525, 534, 483 N.W.2d 114, 120 (1992); Nixon v. Harkins, 220 Neb. 286, 290-91, 369

N.W.2d 625, 629 (1985); Kokes v. Shafer, 215 Neb. 470, 473, 339 N.W.2d 292, 294 (1983).

¹⁰Western Ethanol, 305 Neb. at 19, 938 N.W.2d at 344; See also Hike v. State Dept. of Rds (Hike II), Neb. 297 Neb. 212, 217, 899 N.W.2d 614, 620 (2017).

¹¹Hike II, 297 Neb. at 216, 899 N.W.2d at 620. Accord, e.g., deNourie & Yost Homes v. Frost, 295 Neb. 912, 930-31, 893 N.W.2d 669, 683 (2017).

¹²In re Estate of Fuchs, 297 Neb. 667, 677, 900 N.W.2d 896, 904 (2017).

COMMENT & AUTHORITIES

The question of payment of witness fees is an item that may properly be brought out in the cross-examination of a witness for the purpose of showing bias or interest. The question of possible bias on the part of witnesses who are paid excessive fees is properly a matter for argument of counsel. While it is possible that in a rare case a trial judge might prevent jury misunderstanding by informing the jury of the propriety of the payment of witness fees, to instruct that no unfavorable inference may be drawn would be incorrect. Additionally, to instruct either way on the point, beyond the general instruction in NJI2d Civ. 1.41 and NJI2d Civ. 1.42, would single out one aspect of the evidence and emphasize it as against other aspects of the evidence and would run the risk of passing on the credibility of the witnesses.

NJI2d Civ. 1.51

FAILURE TO PRODUCE EVIDENCE—INFERENCES

Recommend no instruction.

COMMENT & AUTHORITIES

There are no Nebraska decisions approving the giving of an instruction on this subject. The general instruction relating to inferences is sufficient. Several Nebraska decisions have upheld the trial court's refusal to give such an instruction.¹

Certainly an inference may be drawn under proper circumstances: "[T]he unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party."²

1.51

¹See *Carpenter v. Sun Indem. Co.*, 138 Neb. 552, 293 N.W. 400 (1940); *Large v. Johnson*, 124 Neb. 821, 248 N.W. 400 (1933); *Westing v. Chicago, B. & Q.R. Co.*, 87 Neb. 655, 127 N.W. 1076 (1910).

²*Schoch's Estate v. Kail*, 209 Neb. 812, 818, 311 N.W.2d 903, 907 (1981). *Accord* *First Nat. Bank of Omaha v. First Cadco Corp.*, 189 Neb. 553,

572-73, 203 N.W.2d 770, 783-84 (1973); *Watts v. Zadina*, 179 Neb. 548, 139 N.W.2d 290 (1966); *Bickels v. State, Dept. of Roads*, 178 Neb. 825, 135 N.W.2d 872 (1965); *In re Dunbier's Estate*, 170 Neb. 541, 103 N.W.2d 797 (1960); *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328 (1952). *See also* *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957).

Additionally, in a civil case, the trier of fact may draw an adverse inference from a party's refusal to testify on the ground that the evidence may be self-incriminating.³

NJI2d Civ. 1.52

DEAD MAN'S STATUTE

No such instruction is proper.

COMMENT & AUTHORITIES

Nebraska's Dead Man's Statute¹ was long ago repealed.²

NJI2d Civ. 1.53

ADMISSIONS

Recommend no instruction.

COMMENT & AUTHORITIES

Regarding a jury instruction that jurors consider admissions "with caution" and "subject them to a close scrutiny" before "giving them weight" in their deliberations, *Morfeld v. Weidner* states that if the evidence is properly admitted, then the court is not warranted in discrediting it.¹

Also, the court should not instruct the jury that extrajudicial admissions of fact by a party are binding, as, in fact, they are not. " '[They] may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of facts deems them entitled.' "²

Regarding judicial admissions, see NJI2d Civ. 2.01, Comment, and

³*Wilson v. Misko*, 244 Neb. 526, 548, 508 N.W.2d 238, 253 (1993).

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¹Neb. Rev. Stat. § 25-1202 (Cum. Supp. 1972).

²Laws 1975, LB 279, § 75. See also the Comment to Proposed Nebraska Evidence Rule 601, Proposed Nebraska Rules of Evidence, August 1, 1973, at 88-93 (Neb. Sup. Ct. Comm. on Prac. and Proc.); G. Michael Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the*

Nebraska Evidence Rules, 9 Creighton L. Rev. 559, 564-66 (1976), reprinted in Article VI of The Nebraska Rules of Evidence (NCLE, Inc. 1977, 1980).

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¹*Morfeld v. Weidner*, 99 Neb. 49, 52, 154 N.W. 860, 861 (1915).

²*Ferlise v. Raznick*, 202 Neb. 745, 748, 277 N.W.2d 94, 96 (1979) (quoting *Dorn v. Sturges*, 157 Neb. 491, 504, 59 N.W.2d 751, 759 (1953) (holding modified by, *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986))). See also the Comment & Authorities to

2.08, Comment & Authorities. Any instruction on such admissions should be given as part of the general statement-of-the-case instruction.

Regarding the discovery document "Requests for Admission," see Nebraska Court Rule of Discovery § 6-336³ and *Wibbels v. Unick*.⁴

Regarding impeachment by prior inconsistent statement, see NJI2d Civ. 1.72.

NJI2d Civ. 1.61

UNCONTRADICTED OR UNCONTROVERTED EVIDENCE

Recommend no instruction.

COMMENT & AUTHORITIES

It is up to the trial judge to make a decision as to whether or not the evidence under consideration is in fact uncontroverted. "The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend."¹ "It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy."² If evidence is uncontroverted, the trial judge can incorporate some reference to uncontroverted or uncontradicted evidence in the other necessary instructions by referring to the same as facts from which, together with the other facts and circumstances in the case, the jury can conclude the issues. If evidence is controverted, then an issue is formed which the jury must resolve, and the usual instructions relating to credibility, weight of the evidence, et cetera, will present the matter for the jury's consideration.

In this regard, keep in mind that "[e]vidence not directly contradicted is not necessarily binding on the triers of fact, and may be given

NJI2d Civ. 1.61, and *Ripp v. Riesland*, 176 Neb. 233, 239, 125 N.W.2d 699, 703-04 (1964). See also NJI2d Civ. 1.41.

³Neb. Ct. R. Disc. § 6-336 (2008).

⁴*Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988). See also NJI2d Civ. 2.01, Comment.

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¹Same quotation: *Ferlise v.*

Raznick, 202 Neb. 745, 749, 277 N.W.2d 94, 96 (1979), *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.*, 161 Neb. 152, 155, 72 N.W.2d 669, 672 (1955), and *Myers v. Willmeroth*, 151 Neb. 712, 716, 39 N.W.2d 423, 426 (1949) (citing cases).

²*Whittaker v. Omaha & C.B. Street Ry. Co.*, 137 Neb. 800, 808, 291 N.W. 275, 280 (1940).

no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.³

The general rule that testimony may be incredible as a matter of law is discussed at NJI2d Civ. 1.45, Comment & Authorities.

The rule that expert testimony is not binding on the trier of fact is discussed at NJI2d Civ. 1.42, Authorities.

Even if the parties stipulate to what the testimony would be if a witness were called, the stipulated testimony is not binding in the trier of fact. See NJI2d Civ. 1.41, Authorities; NJI2d Civ. 1.42, Comment & Authorities.

NJI2d Civ. 1.70

LIMITED USE—IMPEACHMENT—EVIDENCE OF A CONVICTION OF A CRIME

Evidence that a witness has been convicted of a crime has been received only to aid you in determining whether you believe that witness and, if so, the weight that you give to that witness's testimony. You may consider that evidence for that limited purpose only.

COMMENT

It is recommended that this instruction not be used. If an appropriate limited-use admonition is given at the time limited-use conviction evidence is received into evidence, then this instruction need not be given at the end of the trial. NJI2d Civ. 1.72 can be given instead, avoiding undue emphasis on this essentially collateral issue.

In civil cases, even when this instruction is appropriate and the procedure just discussed is not followed, this instruction should not be given routinely. It should only be given when there is a real danger that the jury will use such evidence improperly. In any case, civil or criminal, it should never be given at the request of impeaching counsel for the purpose of highlighting the evidence.

The danger with this evidence is that, when a witness's credibility is attacked with evidence of conviction of a crime, the jury will take that evidence as proof or disproof of substantive evidence in the case. The

³*Teresi v. Filley*, 146 Neb. 797, 21 Neb. 734, 741, 205 N.W.2d 115, 120 N.W.2d 699 (1946).⁷ *First Nat. Bank of Omaha v. First Cadco Corp.*, 189 Neb. 734, 741, 205 N.W.2d 115, 120 (1973). *Accord*, e.g., *Ferlise v. Raznick*, *supra*.

danger is that the jury will use the evidence as character evidence, in ways forbidden by Nebraska Evidence Rule 404.¹

This pattern instruction is for the case where the evidence *does* include convictions that can be used solely for impeachment purposes and *does not* include convictions that can be used as substantive evidence. This instruction is *never* appropriate when evidence of a conviction of a crime has been admitted as substantive evidence.²

This instruction is drafted in the singular, for the case where there has been one witness impeached with evidence of one crime. If that is not the case, the instruction will have to be changed as appropriate.

This instruction has a relationship to subparagraph 8 of NJI2d Civ. 1.41. *See also* the Authorities to NJI2d Civ. 1.41.

Regarding impeachment with opinion evidence, see NJI2d Civ. 1.71.

AUTHORITIES

I. RULE 609

This general situation is covered by Nebraska Evidence Rule 609.³ Evidence that a witness has been convicted of a crime can be relevant to a substantive issue in the case, it can be relevant to a witness's credibility, or it can be relevant both as substantive evidence and as credibility evidence. When evidence that a witness has been convicted of a crime is relevant to that witness's credibility and is not relevant to any other issue in the case, then Rule 609 controls whether or not that conviction is admissible. For it to be admissible, the following procedural and substantive requirements apply:

■ **Procedural**—the conviction must be elicited from the witness on direct (*see* Rule 607⁴) or cross-examination or proven during cross-examination through the use of the public record of the conviction.⁵

■ **Substantive**—the conviction must have been either (1) for a crime that, under the law under which the witness was convicted, was punishable by death or by imprisonment in excess of one year (the key is the maximum possible sentence, not the sentence the witness received, and it is the maximum possible in the law under which the witness was

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¹Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016). *State v. Kuehn*, 273 Neb. 219, 231, 728 N.W.2d 589, 601 (2007). *See* NJI2d Civ. 1.71, Comment.

²*See* Neb. Evid. R. 404, 405, and 803(20), Neb. Rev. Stat. §§ 27-404, 27-

405, and 27-803(20) (Reissue 2016).

³Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2016).

⁴Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2016).

⁵*See* Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2016).

convicted, not the law in force today); or (2) a crime involving dishonesty or a false statement, regardless of the punishment.⁶

The statute goes on to specify that the following categories of convictions are inadmissible even if both the substantive and the procedural requirements set out above are met:

1. Convictions with regard to which a period of more than ten years has elapsed since either the conviction or the release from confinement, whichever is later.

2. Convictions that are the subject of a pardon, an annulment, or another equivalent procedure based on innocence.

3. Convictions resulting from juvenile adjudications.⁷

4. Convictions on appeal.⁸

The decision as to whether the foundational and procedural requirements of Rule 609 are satisfied is made by the trial judge when the evidence that justifies this part of the instruction is admitted.⁹ The foundational requirements should not be included in the instruction. Once evidence of a conviction is allowed in, the jury may consider it for whatever they think it is worth to the issue of credibility. If any foundational requirements are relevant to the evidence's probative value as impeachment, counsel, of course, is free to incorporate them into his or her argument to the jury.

Regarding the definition of "convicted of a crime," our court has stated that "one has been convicted of a crime only after a finding of guilt, an imposition of a sentence and the expiration of the time for appeal."¹⁰

Regarding the definition of "dishonesty and false statement, our

⁶*Id.*

⁷*Id.* See also, *State v. Caradori*, 199 Neb. 691, 695, 260 N.W.2d 617, 620 (1977); but see *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (holding that this rule may not be applied so as to deny defendant in criminal case his right of confrontation, here his right to cross-examine state's witness regarding possible bias).

⁸Regarding Rule 609, see generally R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-609 (vol. 3, Nebraska Practice Series, West Group); G. Michael Fenner, *Nebraska Rules of Evidence: Article 6:*

Competency and the Examination of Witnesses 46, et seq. (NCLE, Inc. 1987) (discussing this subject and digesting Nebraska cases there under). See also *Ipock v. Union Ins. Co.*, 242 Neb. 448, 495 N.W.2d 905 (1993); *State v. Kramer*, 238 Neb. 252, 258-59, 469 N.W.2d 785, 789-90 (1991); *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988).

⁹Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 2016).

¹⁰*Ipock v. Union Ins. Co.*, 242 Neb. 448, 455, 495 N.W.2d 905, 909 (1993). For the complete discussion see *id.* at 453-55, N.W.2d at 908-09.

court has stated that it “‘means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify honestly.’”¹¹ The key, to the Committee, seems to be this: Was some specific act of deception involved?

Regarding use of the public record to prove the impeaching conviction, our court has stated that where the witness denies the impeaching conviction, it may only be proved through use of the record of the conviction; and it must be a record of just the prior conviction, not a transcript of the sentencing proceeding.¹²

II. THE SCOPE OF THE IMPEACHING EVIDENCE OF A CONVICTION

In a case where the witness in question was a defendant in a criminal case, the Nebraska Supreme Court has stated the following: If, in an attempt to impeach a witness, the witness is asked about such prior convictions as are allowed by Rule 609 and the witness truthfully responds that he or she has had no such convictions, that ends the matter. If the witness truthfully responds that he or she has been so convicted and gives the correct number of such convictions, that ends the matter. If this information is brought out on direct examination, the state should not inquire at all. And, further, “[i]t is inappropriate . . . to elicit or receive any other details.”¹³

On the other hand, if counsel does go further than allowed, the er-

¹¹State v. Ellis, 208 Neb. 379, 396, 303 N.W.2d 741, 752 (1981) (disapproved of by, State v. Riensche, 283 Neb. 820, 812 N.W.2d 293 (2012)) (quoting the notes of the U.S. Congress Conference Committee on the federal rules of evidence, found at House Report No. 93-1597) (“‘[P]etty larceny is not ordinarily a crime involving dishonesty or false statement’” *Ellis*, above (quoting U.S. v. Smith, 551 F.2d 348, 363-64 (D.C. Cir. 1976))). See also State v. Fonville, 197 Neb. 220, 224, 248 N.W.2d 27, 30 (1976) (finding that whether defendant beat his niece not probative of truthfulness); *Weinstein’s Federal Evidence 2d Ed.*, Joseph M. McLaughlin Gen. Ed. § 609.04 (Bender 1997); and 3 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 609[04] (1987) (discussing the similarly worded federal rule). On this point, see generally

R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-609[D] (vol. 3, Nebraska Practice Series, West Group).

¹²State v. Caradori, 199 Neb. 691, 694-95, 260 N.W.2d 617, 619-20 (1977). Cf. State v. Kelly, 212 Neb. 45, 47, 321 N.W.2d 80, 82 (1982) (concerning proof of a prior misdemeanor conviction for use in sentencing).

¹³State v. Pitts, 212 Neb. 295, 297-98, 322 N.W.2d 443, 445 (1982). Accord State v. Schreiner, 276 Neb. 393, 408, 754 N.W.2d 742, 756 (2008); State v. Whiteley, 234 Neb. 693, 700, 452 N.W.2d 290, 295 (1990) (disapproved of by, State v. Pieper, 274 Neb. 768, 743 N.W.2d 360 (2008)); State v. Olsan, 231 Neb. 214, 220-24, 436 N.W.2d 128, 133-36 (1989) (discussing the rule; noting that, unlike Nebraska, the greater number of jurisdictions al-

ror might well be harmless error.¹⁴ Back to the first hand, the court is “reluctan[t] to apply the doctrine of harmless error to a prosecutor’s improper impeachment use of a defendant’s prior conviction.”¹⁵ If the prosecutor does go too far, defendant’s failure to make a timely objection waives the right to assert it as prejudicial error on appeal.¹⁶

In *State v. Olsan*,¹⁷ the court suggests a procedure to be followed by the trial court when the defendant in a criminal case is to be impeached by evidence of a prior conviction. One faced with that situation should refer to this case.

III. THE APPLICATION OF THE RULE 403 WEIGHTED BALANCE TO THE USE OF A CONVICTION TO IMPEACH

Three rules of evidence are particularly relevant here. (1) Relevant evidence may be excluded “if its probative value is *substantially* outweighed by a danger of . . . *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁸ (2) The rules of evidence “should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, *to the end of ascertaining the truth and securing a just determination.*”¹⁹ (3) “The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so

low reference to the particular criminal offense underlying the conviction; noting the court’s reluctance to apply the doctrine of harmless error to a prosecutor’s improper impeachment use of a defendant’s prior conviction); *State v. Daugherty*, 215 Neb. 45, 47, 337 N.W.2d 128, 129 (1983); *State v. Gore*, 212 Neb. 287, 291-92, 322 N.W.2d 438, 440 (1982) (McCowan, J. dissenting); *State v. Caradori*, 199 Neb. 691, 694-95, 260 N.W.2d 617, 619-20 (1977); *Latham v. State*, 152 Neb. 113, 115-16, 40 N.W.2d 522, 524 (1949). *See also* *State v. Kallos*, 193 Neb. 113, 121, 225 N.W.2d 553, 557 (1975), a pre-Rule 609 case, applying the same restriction where the witness is not the person on trial, and *State v. Lingle*, 209 Neb. 492, 499, 308 N.W.2d 531, 536 (1981), a post-Rule 609 case reserving the question of whether *Kallos* still applies. *See also* *State v. Reinert*, 197 Neb. 379, 380, 248 N.W.2d

782, 784 (1977).

¹⁴*State v. Gore*, *supra*; *State v. Lingle*, *supra*; *State v. Kallos*, *supra*; *State v. Reinert*, *supra*. Cf. *State v. Lang*, 197 Neb. 47, 246 N.W.2d 608 (1976).

¹⁵*State v. Olsan*, 231 Neb. 214, 224, 436 N.W.2d 128, 135 (1989).

¹⁶*State v. Whiteley*, 234 Neb. 693, 701, 452 N.W.2d 290, 295 (1990), *overruled in part, on other grounds by* *State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).

¹⁷*State v. Olsan*, 231 Neb. 214, 228-31, 436 N.W.2d 128, 137-39 (1989).

¹⁸Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016) (emphasis added).

¹⁹Neb. Evid. R. 102, Neb. Rev. Stat. § 27-102 (Reissue 2016) (emphasis added).

as to . . . protect witnesses from harassment or undue embarrassment.”²⁰

Under both the federal and Nebraska rules, there had been some question as to whether these rules can be invoked to exclude impeaching evidence of convictions.²¹ Regarding the federal rule, that question has been answered. Regarding the Nebraska rule, there may still be room for interpretation.

Prior to its amendment in 1990, federal rule 609 stated that for purposes of impeaching a witness evidence of certain kinds of criminal convictions “shall be admitted” if the court determines its probative value outweighs its prejudice to the defendant. The United States Supreme Court interpreted this statute as follows:

- “shall be admitted” is mandatory, removing the judge’s Rule 403 discretion;
- “defendant” means “criminal defendant;” and
- the Rule 403-like discretion added back by the rule applies only to evidence potentially prejudicial to a defendant in a criminal case and not to evidence potentially prejudicial to the prosecution or to either party in a civil case.²²

In 1990, as a response to the case just discussed, federal Rule 609 was amended. It now states that for purposes of impeaching “a witness *other than the accused*,” evidence of certain kinds of convictions “shall be admitted, subject to Rule 403” and, for purposes of impeaching an accused, evidence of the same kinds of convictions “shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

Under the amended federal rule, the Rule 403 balance applies to the prior-conviction impeachment of witnesses other than the accused in a criminal case, and a balance similar to, but significantly different from, that in Rule 403 applies to the prior-conviction impeachment of the accused in a criminal case. The difference is that Rule 403 requires that the danger of *unfair* prejudice *substantially* outweigh probative value; Rule 609, as it applies to the accused, removes the words “unfair” and “substantially” from the balance, thereby making it harder to use the conviction against the accused.

But, what about the Nebraska rule? Nebraska Rule 609 states that

²⁰Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 2016) (formatting breaks omitted).

²¹See 3 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 609[04] at

609-75 (1987).

²²Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511-14, 109 S. Ct. 1981, 1985-87, 104 L. Ed. 2d 557 (1989).

for purposes of impeaching a witness, evidence that the witness has been convicted of certain kinds of crimes “shall be admitted.” Does the Rule 403 balance apply to the judge’s decision in this regard or is admission mandatory regardless of prejudice—so long, of course, as the prejudice is not so great as to violate due process? At least one writer has argued that the Nebraska rule does allow judges to apply the Rule 403 balance to offers of impeaching convictions.²³

There are differences between the version of the federal rule interpreted in *Green* and the Nebraska rule, differences that may allow different interpretations: the federal rule interpreted in *Green* made the admission of impeaching convictions mandatory but with a “but only if” clause that required a balance of prejudice and probative value where the witness was the defendant in a criminal case; since the Nebraska rule does not contain the “but only if” language, if “shall be admitted” is read to require admission without regard to Rule 403 considerations, then that requirement applies across the board, including mandatory admission without regard to prejudice to a defendant in a criminal case. Unlike the Nebraska rule, the “but only if” language of the old version of the federal rule applies a limitation to one particular situation, thereby excluding its application to other situations. The old version of federal Rule 609 had behind it a strong legislative history indicating a conscious effort to restrict discretion.²⁴ There is no comparable legislative history to the Nebraska rule.

On the other hand, there are significant similarities. Former federal Rule 609 and Nebraska Rule 609 are both specific and direct, while each Rule 403 is broad and general. Former federal Rule 609 and Nebraska Rule 609 both state that the evidence “shall be admitted,” not “may be admitted,” and each proposed rule was changed from “is admissible” to “shall be admitted.”

Some jurisdictions allow inquiry into various details of the convictions. In Nebraska, at least where the witness is the defendant in a criminal trial, and probably in any event, counsel may not go into any details other than the number of the convictions. See Part II of these Authorities, *supra*. For this reason, the question of unfair prejudice is less important here than in some other jurisdictions.

²³Krivosha, *The Nebraska Rules of Evidence, 1980. Article VI—Impeachment of Witnesses*, 5 (NCLE, Inc.).

²⁴*Green v. Bock Laundry Machine Co.*, *supra*.

IV. MOTIONS IN LIMINE

"A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not . . . a final ruling upon the ultimate admissibility of the evidence."²⁵

Though basically a way to keep prejudicial evidence from reaching the jury, the motion in limine may be used in a non-jury trial to the judge.²⁶ "The overruling of a motion *in limine* is not reviewable on appeal. When a court overrules a motion *in limine* to exclude evidence, the movant must object when the particular evidence which was previously sought to be excluded by the motion is offered during trial. . . . Failure to make a timely objection [when the evidence is offered] waives the right to assert prejudicial error on appeal."²⁷

Regarding *in limine* rulings on the use of convictions to impeach the defendant in a criminal case, the reader's attention is called to *United States v. Burkhead*.²⁸ Defendant's conviction was reversed because, under the circumstances, the trial court abused its discretion when it refused to rule on defendant's motion *in limine* on the use of his convictions.

²⁵O'Brien v. Cessna Aircraft Co., 298 Neb. 109, 132, 903 N.W.2d 432, 455 (2017).

²⁶Phipps v. Skyview Farms, 259 Neb. 492, 507, 610 N.W.2d 723, 735 (2000).

²⁷Hemsley v. Langdon, 299 Neb. 464, 471, 909 N.W.2d 59, 66 (2018); O'Brien, 298 Neb. at 132-33, 903 N.W.2d at 454-55; Benzel v. Keller Industries, Inc., 253 Neb. 20, 26, 567 N.W.2d 552, 557 (1997) (citations omitted). Accord Smith v. Colorado Organ Recovery System, Inc., 269 Neb. 578, 587, 694 N.W.2d 610, 620 (2005) (denying a *Daubert/Schafersman*-based motion in limine to exclude expert testimony because no objection was made when the evidence admitted during the trial; overruling this motion is not reviewable on appeal as failure to object during trial waived the *Daubert/Schafersman* argument).

See also, e.g., Huber v. Rohrig, 280 Neb. 868, 887, 791 N.W.2d 590, 606 (2010); State v. Davlin, 263 Neb. 283, 297-98, 639 N.W.2d 631, 646 (2002) (stating that a motion in limine is a

procedural step to prevent the display of prejudicial matter to the jury, not to obtain a final ruling; to preserve the issue for appeal, objection must be made during trial); Nebraska Nutrients, Inc. v. Shepherd, 261 Neb. 723, 772, 626 N.W.2d 472, 512 (2001); Allphin v. Ward, 253 Neb. 302, 309, 570 N.W.2d 360, 365 (1997); Molt v. Lindsay Mfg. Co., 248 Neb. 81, 82-83, 532 N.W.2d 11, 13 (1995); Marple v. Sears, Roebuck and Co., 244 Neb. 274, 280, 505 N.W.2d 715, 719 (1993); State v. Navrkal, 242 Neb. 861, 865, 496 N.W.2d 532, 535 (1993); Behm v. Northwestern Bell Telephone Co., 241 Neb. 838, 8456, 491 N.W.2d 334, 341 (1992); State v. Coleman, 239 Neb. 800, 809-11, 478 N.W.2d 349, 355-56 (1992); McCune v. Neitzel, 235 Neb. 754, 761, 457 N.W.2d 803, 809 (1990); Frerichs v. Nebraska Harvestore Systems, Inc., 226 Neb. 220, 228, 410 N.W.2d 487, 493 (1987) (quoting State v. Tomrdle, 214 Neb. 580, 585, 335 N.W.2d 279, 283 (1983)).

²⁸United States v. Burkhead, 646 F.2d 1283 (8th Cir. 1981).

NJI2d Civ. 1.71**LIMITED USE—IMPEACHMENT—OPINION
EVIDENCE OF A WITNESS' CHARACTER, OR
GENERAL REPUTATION, OR BOTH, REGARDING
TRUTHFULNESS OR UNTRUTHFULNESS**

You have heard testimony from some witnesses as to [their opinions of the character] [and] [the general reputation] of other witnesses, regarding truthfulness. This testimony has been received only to aid you in determining whether you believe the other witnesses and, if so, the weight that you give to their testimony. You may consider it for that limited purpose only.

COMMENT

It is recommended that this instruction not be used. If appropriate limited-use admonition is given at the time limited-use opinion evidence is received into evidence, then, this instruction need not be given at the end of the trial. NJI2d Civ. 1.72 can be given instead, avoiding undue emphasis on this essentially collateral issue.

Even when this instruction is appropriate and the procedure just discussed is not followed, this instruction should not be given routinely. It should be given only when there is a real danger that such evidence will be used improperly by the jury.

The danger is that when a witness's credibility is attacked with opinion or reputation evidence, the jury will take that evidence as proof or disproof of substantive issues in the case. The danger is that the jury will use this evidence as character evidence, in ways forbidden by Nebraska Evidence Rule 404.¹

In a criminal case, for example, where this sort of evidence is used to impeach or to rehabilitate a testifying defendant, there is a danger that the jury will use the evidence as an indication that the defendant is generally either a good or a bad person, and, therefore, more or less likely to be guilty. Or, continuing with the example of a criminal case, if the defense is entrapment and a government witness who had been assisting in the investigation of the defendant is impeached under Rule 608,² there may be a real danger that the jury will use that impeaching evidence as substantive evidence that the witness, as a person of bad character, likely entrapped the defendant. Though this Rule 608

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¹Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016).

²Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2016).

impeachment can be used to impeach the witness's nonentrapment testimony, it cannot be used as substantive evidence of entrapment. Rule 404(a).

Similarly, in a civil case, Rule 608 impeachment or rehabilitation cannot be used as substantive character evidence tending to show that the impeached party's character is such that he is more or less likely to have breached a contract, more or less likely to have intentionally inflicted mental distress, or more or less likely to have been driving while drunk, all likely violations of Rule 404.

Further, this instruction must not be used when evidence of the above-described sort has been admitted as substantive evidence. This instruction is never appropriate regarding character evidence that has been admitted as substantive evidence.³ It is only appropriate when the following kinds of evidence have been received, and all of it was received solely for the limited purpose of impeachment: personal opinion regarding character for truthfulness, and general reputation in the community regarding character for truthfulness. If there is only evidence of the former kind, then use only the material in the first of the three sets of brackets. If there is only evidence of the latter kind, then use only the material in the third of the three sets of brackets. If there is evidence of both kinds, then use all of the bracketed materials.

This instruction is drafted in the plural. Make the appropriate changes if there is only one impeaching witness or only one witness being impeached.

This instruction is related to subparagraph 8 of NJI2d Civ. 1.41. See also the Authorities to NJI2d Civ. 1.41.

Regarding impeachment with evidence that a witness has been convicted of a crime, see NJI2d Civ. 1.70.

AUTHORITIES

I. RULE 608

The general rule in Nebraska is that character evidence is not admissible to prove that a person acted in conformity therewith.⁴

One of the exceptions to this general rule concerns the use of

³See Neb. Evid. R. 404, 405, Neb. Rev. Stat. §§ 27-404, 27-405 (Reissue 2016).

⁴Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016); see generally, R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-608 (vol. 3, Nebraska Practice Series,

West Group); Krivosha, *The Nebraska Rules of Evidence, 1980: Article VI—Impeachment of Witnesses*, 2 (NCLE, Inc.). Regarding the accused in a criminal case, see Krivosha, Lansworth & Pirsch, *Relevancy. The Necessary Elements in Using Evidence of Other Crimes, Wrongs, or Bad Acts*

character evidence to test the credibility of a witness. *See* Nebraska Evidence Rule 608.⁵ Rule 608 provides that character evidence, in the form of reputation or opinion, may be used to attack or support the credibility of a witness so long as the evidence refers only to the witness's character for truthfulness or untruthfulness and so long as the witness's character for truthfulness is not accredited until it has been discredited. It further provides that the trial court has the discretion to allow cross-examination regarding specific instances of conduct, under two conditions: the specific instances must be probative of truthfulness or untruthfulness; and the specific instances must concern either the character for truthfulness or untruthfulness of the testifying witness or the character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified. The rule goes on to state that except as provided in Nebraska Evidence Rule 609, specific instances of conduct used to impeach or to rehabilitate a witness may not be proved by extrinsic evidence. Rule 608 also provides that testifying to matters that relate only to credibility does not waive a witness's privilege against self-incrimination.⁶

[T]he application of rule 608(2) to exclude extrinsic evidence of a witness' conduct is limited to instances where the evidence is introduced to show a witness' general character for truthfulness. Evidence relevant to a material issue is not rendered inadmissible because it happens to include references to specific bad acts of a witness, and such evidence should be admitted where it is introduced to disprove a specific fact material to the case. Rule 608(2) does not bar evidence introduced to contradict . . . a witness' testimony as to a material issue of the case.

[T]he self-interest of a witness, as opposed to his general character, is not a collateral issue. Evidence that happens to include prior misconduct may still be admissible when offered to show the witness' possible bias or self-interest in testifying.⁷

"[B]ecause rule 608(2) affects only evidence of prior instances of conduct when properly relevant solely for the purpose of attacking or supporting a witness's credibility, it in no way affects the admission of evidence of such prior acts for other purposes under rule 404(2)."⁸

to Convict, 60 Neb.L.Rev. 657 (1981).

⁵Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2016).

⁶*See generally* R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VI, § 27-608 (vol. 3, Nebraska Practice Series, West Group); G. Michael Fenner, *Nebraska Rules of Evidence*, Article 6:

Competency and the Examination of Witnesses 41, *et seq.* (NCLE, Inc. 1987) (discussing Rule 608 and digesting Nebraska cases thereunder).

⁷*Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 347, 754 N.W.2d 406, 426 (2008) (footnotes omitted).

⁸*Id.*

*State v. Schreiner*⁹ discusses the distinction between general credibility, to which Rule 609 applies, and specific bias, to which the rule does not apply.

This statute broadens the form this sort of evidence may take in Nebraska. Prior to the passage of Rule 608, the impeaching witness could only testify to another witness's reputation for truth and veracity. The witness was "not entitled to give [an] opinion of the defendant's truth and veracity."¹⁰ Rule 608 allows opinion evidence and, in the process, "overrules" those cases.¹¹

II. PROBATIVE VALUE AND THE RULE 403 BALANCE

What evidence is evidence of a witness's character for truthfulness?

The Nebraska Supreme Court has variously held that questions of whether the witness had ever beaten his niece, served as a prostitute, hauled drugs in interstate commerce, . . . or previously used drugs were all beyond the scope of Rule 608's cross-examination on prior bad acts relevant to truthfulness. An offense which does not substantially impugn the credibility of the actor may not be used for impeachment purposes under Rule 608.¹²

Even if evidence is probative of truthfulness, and qualifies under Rule 608, it may still be inadmissible under Nebraska Evidence Rule 403 (exclusion where probative value substantially outweighed by the danger of unfair prejudice, confusion of issues, et cetera), Rule 102 (these rules "shall be construed to secure fairness in administration . . . of the law of evidence to the end that truth may be ascertained and proceedings justly determined"), and Rule 611 (barring harassment and undue embarrassment of witnesses) would still have to be considered.¹³

III. REHABILITATION OF AN IMPEACHED WITNESS

"[E]vidence of truthful character is admissible only after the

⁹*State v. Schreiner*, 276 Neb. 393, 410, 754 N.W.2d 742, 757 (2008).

¹⁰*Lee v. State*, 147 Neb. 333, 23 N.W.2d 316 (1946), *overruled in part* by *Knihal v. State*, 150 Neb. 771, 36 N.W.2d 109 (1949)). *State v. Craig*, 192 Neb. 347, 353, 220 N.W.2d 241, 245 (1974).

¹¹*Krivosha, The Nebraska Rules of Evidence, 1980: Article VI—Impeachment of Witnesses*, 2 (NCLE, Inc.).

¹²*R. Collin Mangrum, Mangrum on Nebraska Evidence, Article VI, § 27-608[D](2)*, at 373 (vol. 3, Nebraska Practice Series, West Group) (footnotes

citing cases omitted). *See also* 3 Jack Weinstein & Margaret Berger, *Weinstein's Evidence* ¶ 608[05] (1987).

¹³*See Ocander v. B-K Corp.*, 206 Neb. 287, 291, 292 N.W.2d 567, 569 (1980) (affirming trial court's exclusion of testimony regarding a witness' bad reputation for truthfulness; the testimony to be impeached was cumulative; relies on Rules 401 and 403 and does not mention Rule 608); *Krivosha, The Nebraska Rules of Evidence, 1980: Article VI—Impeachment of Witnesses*, 4 (NCLE, Inc.). *See also State v. Fonville*, 197 Neb. 220, 224, 248 N.W.2d 27, 30 (1976).

character of the witness for truthfulness has been attacked . . .”¹⁴ Whether impeachment through the use of prior inconsistent statements constitutes an attack on the witness’s character for truthfulness, as contemplated by Rule 608, and thus justifies the introduction of evidence of the witness’ truthful character, is a matter for the sound discretion of the trial court.¹⁵

See generally, R. Collin Mangrum, Mangrum on Nebraska Evidence, Article VI, § 27-608[D](2) (vol. 3, Nebraska Practice Series, West Group).

NJI2d Civ. 1.72

EVIDENCE ADMITTED FOR A LIMITED PURPOSE

[During this trial, I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other.]

[During this trial I called your attention to certain out-of-court statements that were received in evidence only to aid you in deciding the credibility of the witnesses. You must not consider those statements with regard to any issue other than the credibility of the witnesses; you are not to consider them as evidence of the facts declared therein.]

COMMENT & AUTHORITIES

I. THE USE OF THIS INSTRUCTION

This instruction contemplates and depends upon a limited-use instruction having been given during the trial, at the time of the introduction of the evidence referred to in the instruction.

The following is an example of such a during-trial limited-use instruction in the context of a prior inconsistent statement admitted solely for impeachment purposes:

“Members of the jury, this evidence (is being, has been) admitted solely for impeachment purposes. You may use it when you are assessing the reliability of the evidence in this case, and you may use it for that purpose only. You may not use it as evidence of the facts (contained, declared) therein.”

¹⁴Neb. Evid. R. 608(1)(b), Neb. Rev. Stat. § 27-608(1)(b) (Reissue 2016). *Accord* State v. Hortman, 207 Neb. 393, 398-99, 299 N.W.2d 187, 190 (1980); State v. King, 197 Neb. 729, 731, 250 N.W.2d 655, 657 (1977);

Proposed Nebraska Rules of Evidence, August 1, 1973, at 99 (Neb. Sup. Ct. Comm. on Prac. and Proc.).

¹⁵State v. King, 197 Neb. at 733, 250 N.W.2d at 658.

A descriptive phrase more specifically identifying the prior statement or other limited-purpose evidence in question may be substituted for the word “evidence.” This instruction would be given at the time of the receipt into evidence of any statement that is admissible solely for impeachment or rehabilitation purposes; it is not appropriate with regard to any statement that is admissible as substantive evidence of the facts declared therein.

This approach puts on counsel the burden of asking for a limiting instruction at the time the limited-use evidence is received.¹

Nebraska’s statutory requirement regarding reducing instructions to writing² does not require that the court reduce to writing all admonitions given to the jury during the progress of a trial.³

Only one of the bracketed paragraphs should be used. The second paragraph is appropriate when the only evidence admitted for a limited purpose consists of prior inconsistent statements admissible only to impeach; this paragraph does not deal with any prior *consistent* statements that may have been admitted solely to the issue of credibility. The first of the bracketed paragraphs is more general and is appropriate in the situation just described and when there is other evidence admitted for other limited purposes. (For example, by Nebraska statute⁴ evidence an injured party was not wearing a seat belt is not admissible “to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.”)

II. THE REASON FOR TAKING THIS APPROACH

This instruction deals with all kinds of limited-use evidence. Its most common use, however, will have to do with evidence of prior inconsistent statements. The approach taken in this instruction can be described and explained in terms of evidence of prior inconsistent statements.

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¹See *State v. Jackson*, 217 Neb. 363, 368-69, 348 N.W.2d 876, 879 (1984) (holding that absent a request, the trial court is not required to give this sort of cautionary instruction immediately after the evidence is received).

²Neb. Rev. Stat. § 25-1111 (Reissue 2016),

³*Grandsinger v. State*, 161 Neb. 419, 438-39, 73 N.W.2d 632, 646 (1955). See also *State v. Grant*, 242

Neb. 364, 369-70, 495 N.W.2d 253, 256-57 (1993), *overruled on other grounds by State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) (“[A]lthough § 25-1111 directs that a requested instruction be written, when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court’s refusal to give the orally requested instruction.”).

⁴Neb. Rev. Stat. § 60-6,273 (Reissue 2010).

In terms of prior inconsistent statements, there are two kinds of cases where it is appropriate not to give any limited-use instruction because limited use is not a problem: (1) those where no prior inconsistent statement is received into evidence; and (2) those where every prior inconsistent statement received into evidence is admissible as substantive evidence of the facts declared. In the other two kinds of cases, (1) where the use of every prior inconsistent statement in evidence is limited to impeachment and (2) where some such statements are received as substantive evidence and some for the limited use of impeachment, this instruction is appropriate.

The approach taken in this instruction is designed to deal with the situation just described: some prior inconsistent statements have been received as substantive evidence of the facts declared therein and some have been admitted for the limited purpose of impeachment.

And trial lawyers and judges find themselves in this situation all the time. The hearsay rule has a great many definitional exclusions and exceptions.⁵ They render a great many prior statements admissible as substantive evidence of the facts declared therein. It is impossible to prepare a pattern instruction for use at the end of the trial that separates the prior statements admissible as substantive evidence from those admissible only as impeachment evidence. The only way to separate the one from the other is with limiting instructions given at the time the evidence is admitted.

The 1969 version of NJI 1.72 did not deal with this problem; it simply said that every prior inconsistent statement in the case was admitted only as impeachment and not as evidence of the facts declared therein. In a case where prior inconsistent statements were admitted and every one was admitted only to the issue of credibility and not as substantive evidence of the facts declared, the 1969 instruction would work except for the fact that it is impossible to predict in advance that this will be the status of the case after the close of the evidence.

The current pattern instruction, the one above, deals with this problem by requiring a limiting instruction at the time the evidence is admitted. When the first limited-use prior statement comes into evidence, if counsel wants a limiting instruction, counsel will have to ask for it and the judge will have to give it right then because it will be

⁵See particularly G. MICHAEL FENNER, *THE HEARSAY RULE* (3d. ed. Carolina Academic Press 2013); Neb. Evid. R. 801(4), 803, 804, 807, 702, 703; Neb. Ct. R. Disc. § 6-332 (re § 6-332, see NJI2d Civ. 1.44 Comment & Authorities, above). See also R. Collin Mangrum, *Mangrum on Nebraska*

Evidence, Article VIII (vol. 3, Nebraska Practice Series, West Group); G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. Rev. 1 (1993); R. Collin Mangrum, *The Law of Hearsay in Nebraska*, 25 Creighton L.Rev. 499 (1992).

impossible to predict whether this kind of prior statement will be the only kind received in evidence.

III. THE PLACEMENT OF THIS INSTRUCTION

When this instruction is given, more often than not it may be advisable to insert it as the final paragraph of part (5) of NJI2d Civ. 1.01.

IV. MISCELLANEOUS

Evidence of prior bad acts evidence can be admitted for some purposes, but, as a general rule, not to prove the character of the actor.⁶

⁶*E.g.*, *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 344-46, 754 N.W.2d 406, 425-26 (2008). Regarding this situation, and the limiting instruction and the party's right to such instruction (at least in a criminal case), see *State v. Carter*, 246

Neb. 953, 959-67, 524 N.W.2d 763, 770-74 (1994), *overruled by State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997)). See also NJI2d Civ. 1.70, Authorities; NJI2d Civ. 1.71, Authorities.

CHAPTER 2

NEGLIGENCE: STATEMENT OF THE CASE; AFFIRMATIVE DEFENSES; BURDENS OF PROOF; RES IPSA LOQUITUR; PRESUMPTIONS; NUMBER AND NATURE OF PARTIES

TABLE OF INSTRUCTIONS

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Instruction Number

- A. STATEMENT OF THE CASE AND AFFIRMATIVE DEFENSES
 - 2.01 Statement of the Case—Negligence
 - 2.01A Statement of the Case—Negligence—Effect of Findings—
Tort Action of a Kind to Which Contributory Negligence *Is*
an Allowable Defense but in Which it *Is* not Submitted to
the Jury and Where Joint and Several Liability *Is* an
Issue
 - 2.02A Contributory and Comparative Negligence
 - 2.02A-1 Statement of the Case—Contributory Negligence—Effect of
Findings—Tort Action Where Contributory Negligence *is*
Submitted to the Jury and Joint and Several Liability *Is*
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B. BURDENS OF PROOF

- 2.12A Burden of Proof—Greater Weight of the Evidence Defined

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C. RES IPSA LOQUITUR

2.13 Res ipsa Loquitur

D. PRESUMPTIONS

2.14A Presumptions—Basic Facts Not Contested; Presumed Fact Not Contested

2.14B Presumptions—Basic Fact(s) Contested; Presumed Fact Not Contested

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2.14D Presumptions—Basic Facts Not Contested; Presumed Fact Contested

E. THE NUMBER AND NATURE OF THE PARTIES

2.20 Multiple Plaintiffs

2.21 Multiple Defendants

2.22 Party Suing or Being Sued in a Representative Capacity

2.23 Corporate Party

**A. STATEMENT OF THE CASE AND
AFFIRMATIVE DEFENSES****NJI2d Civ. 2.01****STATEMENT OF THE CASE—NEGLIGENCE****I. Plaintiff's Claims****A. ISSUES**

This case involves (here state date, place, and nature of occurrence).

The plaintiff[, insert name,] claims that the defendant[, insert name,] was negligent in one or more of the following ways:

(Insert a list of statements of the negligence claimed by the plaintiff, against the defendant.)

The plaintiff also claims that (he, she, it was injured, [and] his, her, its property was damaged) as a result of that negligence, and seeks a judgment against the defendant for (his, her, its) damage.

The defendant admits (here state what defendant admits, by pleading or otherwise, if anything).

The defendant denies (here state what defendant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state any facts so determined).]

B. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant was negligent in one or more of the ways claimed by the plaintiff;
2. That this negligence was a proximate cause of the (insert descriptive word such as occurrence, accident, collision, fall, et cetera);
3. That the (occurrence, accident, collision, fall, et cetera) was a proximate cause of some damage to the plaintiff; and
4. The nature and extent of that damage.

C. EFFECT OF FINDINGS

(If there will not be any affirmative defense instructions, then the following two paragraphs constitute Part C of this instruction:)

If the plaintiff has *not* met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff *has* met this burden of proof, then your verdict must be for the plaintiff.

(If there will be affirmative defense instructions, then the following two paragraphs constitute Part C of this instruction:)

If the plaintiff has *not* met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff *has* met this burden of proof, then you must consider the defendant's (here insert a statement of defendant's affirmative defenses).

II. Defendant's Defenses

(At this point insert such instruction on defendant's defenses as is appropriate under the pleadings and the evidence. For contributory and comparative negligence, insert NJI2d Civ. 2.02,A; for assumption

of risk, insert NJI2d Civ. 2.02B; for an extraordinary force of nature, insert NJI2d Civ. 2.02C; for other defenses, use NJI2d Civ. 2.02D as a model.)

SPECIAL NOTE

Part C of this instruction, Effect of Findings, applies to causes of action that accrue before February 8, 1992. Neb. Rev. Stat. § 25-21,185 (Reissue 2008). It also applies to causes of action that accrue on or after February 8, 1992, if there is only one defendant in the case when it goes to the jury and, there is no issue of joint and several liability because all liability, if there is any, is attributed to the one defendant.¹ That is to say, this does not apply when there is only one defendant in the case when submitted, but there are other liable entities that were either never named in the lawsuit or dismissed therefrom by “a release, a covenant not to sue, or a similar agreement,” entered into by a claimant and a person liable.²

All of this is discussed further at NJI2d Civ. 5.04, Comment. Part C of this instruction does not apply to causes of action that accrue on or after February 8, 1992, if there are any left. *City of Wahoo*, above. For causes of action that accrue on or after February 8, 1992, see NJI2d Civ. 2.01A, NJI2d Civ. 2.02A-1, NJI2d Civ. 2.02A-2, NJI2d Civ. 5.02, NJI2d Civ. 5.03 and NJI2d Civ. 5.04. For causes of action that accrue on or after January 1, 1992 but before February 7, 1992, see the discussion in the Comment to NJI2d Civ. 5.04. For a complete explanation of these changes, see the Comment to NJI2d Civ. 5.04.

COMMENT

- I. IN GENERAL
- II. ADMISSIONS
 - A. JUDICIAL ADMISSIONS
 - B. ADMISSIONS PURSUANT TO RULE 36 OF THE NEBRASKA RULES OF DISCOVERY
 - C. MISCELLANEA
- III. AFFIRMATIVE DEFENSES

2.01

¹Maxwell v. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001) (Section § 25-21,185.10 does not operate until the finder of fact has determined liability and is apportioning damages. “Because the statute’s effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in deter-

mining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact”. *Id.* at 168-69, 631 N.W.2d at 462.).

²See Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008), as discussed in *City of Wahoo v. NIFCO Mechanical Systems, Inc.*, 306 Neb. 203, 210-11, 944 N.W.2d 757, 762-63 (2020).

I. IN GENERAL

At the discretion of the trial court, this instruction may be broken down into separate instructions. The bracketed material in the second paragraph of this instruction is meant as a reminder that while these instructions refer to the participants in the lawsuit by status, it may be advisable to substitute names. Pattern instructions formerly numbered NJI 2.06 through 2.08 (1969) have been incorporated into NJI2d Civ. 2.01.

Regarding the rule that negligence is never presumed, and the impropriety of instructing the jury on that point, *see* the Authorities to this instruction, below.

This instruction contemplates a case in which there is only one cause of action. If more than one claim is made against the same defendant, each should be stated separately. If there is more than one plaintiff or more than one defendant, *see* NJI2d Civ. 2.20 and 2.21, and adapt this instruction, NJI2d Civ. 2.01, to the appropriate plural.

This instruction contemplates a case in which the burden is proof by the greater weight of the evidence, defined in NJI2d Civ. 2.12A. While this is the most common burden of proof in civil cases, it is not the only one. In some, the burden is proof by clear and convincing evidence, defined in NJI2d Civ. 2.12B. Where that is so, this instruction will have to be modified accordingly.

Appropriate definitional instructions should follow this instruction. *See*, for example, NJI2d Civ. 2.12A, defining greater weight of the evidence, NJI2d Civ. 3.02, defining negligence, NJI2d Civ. 3.41, defining proximate cause, and so forth.

"[A] negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual and 'to recover . . . a claimant must prove the four basic elements of negligence.'"³ Regarding that Act and its fraternal twin, the State Tort Claims Act, *see generally* NJI2d Civ. 8.72.

Negligence is discussed in various places throughout this work. In that regard, *see particularly* NJI2d Civ. 3.02, Comment & Authorities and the cross references therein. For a discussion of the four elements of negligence, *see* part V(C) of the Authorities to this instruction, below.

II. ADMISSIONS

A. JUDICIAL ADMISSIONS

A judicial admission is a formal act [*but see* *Alford v. Neal*,

³*Millman v. County of Butler*, many cases saying the same thing. *See* 235 Neb. 915, 928, 458 N.W.2d 207, NJI2d Civ. 8.72. 216 (1990). *Millman* is but one of

quoted below, where the judicial admission was testimonial done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.⁴

“An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.”⁵ “A party may not subsequently take a position contradictory of, or inconsistent with, his pleadings.”⁶

This applies not just to admissions in a petition, but also those in the opposing party's answer.⁷

This applies only to admissions of fact. “A party cannot judicially admit conclusions of law in the pleadings—pleadings admit only facts.”⁸

⁴Same quotation: *Jacobs Engineering Group Inc. v. ConAgra Foods, Inc.*, 301 Neb. 38, 58-59, 917 N.W.2d 435, 453-54 (2018); *O'Brien v. Cessna Aircraft Company*, 298 Neb. 109, 134-35, 903 N.W.2d 432, 456 (2017); *Keating By and Through Keating v. Klemish*, 214 Neb. 458, 463, 334 N.W.2d 440, 443 (1983) (citation and multiple quotation marks omitted; brackets added). *Accord* *State v. Hernandez*, 309 Neb. 299, 305, 959 N.W.2d 769, 774 (2021) (criminal case involving claimed violation of the Speedy Trial Act); *In re Estate of Radford*, 297 Neb. 748, 755, 901 N.W.2d 261, 268 (2017); *Anderson v. Cumpston*, 258 Neb. 891, 897-98, 606 N.W.2d 817, 823 (2000); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 239, 583 N.W.2d 320, 330 (1998) (italicizing “fact” and noting, as discussed below, that party cannot judicially admit proposition of law); *Robison v. Madsen*, 246 Neb. 22, 28, 516 N.W.2d 594, 598 (1994); *Lange Bldg. and Farm Supply, Inc. v. Open Circle R, Inc.*, 210 Neb. 201, 204-05, 313 N.W.2d 645, 648 (1981) (citing cases and other authorities).

⁵*Radecki*, 255 Neb. at 239, 583 N.W.2d at 330. *Accord* *Nathan v. McDermott*, 306 Neb. 216, 242, 945 N.W.2d 92, 113 (2020); *TNT Cattle Company, Inc. v. Fife*, 304 Neb. 890, 914, 937 N.W.2d 811, 831 (2020); *City of Ashland v. Ashland Salvage, Inc.*, 271 Neb. 362, 369, 711 N.W.2d 861, 868 (2006); *Saberzadeh v. Shaw*, 266 Neb. 196, 199, 663 N.W.2d 612, 615 (2003).

⁶*Ryder Truck Rental, Inc. v. Transportation Equipment Co., Inc.*, 215 Neb. 458, 461, 339 N.W.2d 283, 286 (1983).

⁷*Schmid v. Malcolm School Dist.*, 233 Neb. 580, 582, 447 N.W.2d 20, 21 (1989) (stating that admission in defendant's answer are judicial admissions “‘and waive all controversy concerning the matter.’”). *Also see generally, Nathan*, 306 Neb. at 242, 945 N.W.2d at 112.

⁸*Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 243-44, 583 N.W.2d 331, 333-34 (1998). *Accord, e.g., Radecki*, 255 Neb. at 239, 583 N.W.2d at 330.

"[D]efendant's tortious conduct is a question of fact that a defendant can judicially admit."⁹

" '[J]udicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.' "¹⁰

Judicial admissions are not means of evidence and cannot be offered into evidence in the normal manner but opposing counsel may invoke their language at any time. When so invoked, the language constitutes a waiver of all controversy; it renders indisputable the facts admitted; it constitutes a limitation of the issues.¹¹

"[A] party is bound to its admission absent the court's relieving it, in the exercise of the court's judicial discretion, from that consequence."¹²

"Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where, as here, the parties so testifying made no effort to retract, qualify, or otherwise explain the positive force of their own evidence."¹³

"[S]tatements made by a party or his or her attorney during the course of a trial may be judicial admissions."¹⁴

Pleadings are judicial admissions. "It is an elementary rule of pleading that matters admitted by the pleadings need not be proved."¹⁵ In a case where one party tried to use statements in the pleadings as admis-

⁹*Golnick v. Callender*, 290 Neb. 395, 401, 860 N.W.2d 180, 188 (2015) (footnote omitted) (defendant admitted to negligently causing the accident but denied causing plaintiff's injuries; evidence of the collision still admissible to the issue of the nature and extent of plaintiff's damages).

¹⁰Same quotation: *Wisner v. Vandelay Investments, L.L.C.*, 300 Neb. 825, 839, 916 N.W.2d 698, 713 (2018); *Estate of Radford*, 297 Neb. at 755, 901 N.W.2d at 269 ("[A]n admission does not extend beyond the intentment of the admission as clearly disclosed by its context." *Id.* at 755-56, 901 N.W.2d at 269); *City of Ashland*, 271 Neb. at 369, 711 N.W.2d at 868 (quoting *U.S. West Communications, Inc. v. Taborski*, 253 Neb. 770, 784, 572 N.W.2d 81, 91 (1998)). *Accord Robison*, 246 Neb. at 28, 516 N.W.2d at 598-99.

See also *State v. Hernandez*, above (criminal case). In this regard, it is important to consider the context in which the alleged judicial admission was made. *City of Ashland*, 271 Neb., at 370, 711 N.W.2d, at 869; *Robison*, 246 Neb., at 28, 516 N.W.2d, at 598.

¹¹*Lange Bldg. and Farm Supply, Inc. v. Open Circle R, Inc.*, 210 Neb. 201, 204-05, 313 N.W.2d 645, 648 (1981) (citing cases and other authorities).

¹²*Wisner*, 300 Neb. at 841, 916 N.W.2d at 714.

¹³*Alford v. Neal*, 229 Neb. 67, 73, 425 N.W.2d 325, 328-29 (1988) (quoting *Southwestern Truck Sales & Rental Co. v. Johnson*, 165 Neb. 407, 417, 85 N.W.2d 705, 711 (1957)).

¹⁴*State v. Hernandez*, above (criminal case).

¹⁵*Wisner*, 300 Neb. at 839, 916

sions against a non-party, the court stated that “matters contained in pleadings are judicial admissions only insofar as the adversary is concerned.”¹⁶ In context, this seems to be just a statement of the general rule that one’s statement (in pleadings or otherwise) is only an admission against oneself. It is not an admission against an unrelated other.

“[A] superseded pleading is no longer a judicial admission.”¹⁷ “[I]t is[, however,] admissible as evidence of the facts alleged therein, and may be introduced and considered the same as any other evidence.”¹⁸

And, “a party may waive its right to rely on an opponent’s admission by failing to object to the opponent’s offer of contrary evidence or introducing contrary evidence itself.”¹⁹

Regarding extrajudicial admissions, see N.J.2d Civ. 1.41 and 1.53.

B. ADMISSIONS PURSUANT TO RULE 36 OF THE NEBRASKA RULES OF DISCOVERY

Facts determined by the court can include those determined as a sanction for refusal to comply with a discovery order. See Section 6-336 of the Nebraska Court Rules of Discovery (Rule 36).²⁰

Rule 36 deals with the discovery tool “Requests for Admission.” “[M]atters admitted pursuant to Rule 36 are ‘conclusively and unequivocally established.’ ”²¹

[A] party’s failure to make a timely and appropriate response to a request for admission constitutes an admission by

N.W.2d at 713 (“Generally, an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission.”).

¹⁶Marting v. Nebraska Liquor Control Com’n, 250 Neb. 134, 145, 548 N.W.2d 326, 332 (1996).

¹⁷Sturzenegger v. Father Flanagan’s Boy’s Home, 276 Neb. 327, 349, 754 N.W.2d 406, 427-28 (2008).

¹⁸Id. Accord TNT Cattle Company, Inc. v. Fife, 304 Neb. 890, 914-15, 937 N.W.2d 811, 831 (2020).

Statements in pleadings remain binding only until the pleading is amended. Matters contained in superseded pleadings are simple admissions that are admissible as evidence of the facts alleged therein and may be introduced and considered the same as any other evidence. Such original

pleading is not conclusive evidence, but competent, as any other admission of a party against interest, and should be given such weight as the trier of fact deems it entitled in the light of the pleader’s explanation, if any, of the circumstances under which the admissions were made.

Id. (footnotes omitted).

¹⁹Wisner, 300 Neb. at 841, 916 N.W.2d at 714.

²⁰Rule 36 was the designation of the predecessor to what is now Neb. Ct. R. Disc. § 6-336; the latter is still popularly called Rule 36.

²¹Wibbels v. Unick, 229 Neb. 184, 190, 426 N.W.2d 244, 248 (1988) (quoting Macklem v. Valley Bank of Union County, Elk Point, S.D., 221 Neb. 227, 229, 375 N.W.2d 907, 909 (1985)).

that party of the subject matter of the request, unless, on motion, the court permits withdrawal of the admission. We have recognized that Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer to object to a request for admission. We have noted, however, that Rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. If necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Rule 36 which require that the matter be deemed admitted.²²

"[T]he language of Rule 36 contemplates that, if the request for admission seeks information that is permissible under Rule 26, the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case."²³ It is, however, "improper to request the admission of an issue that is purely a matter of law."²⁴ Once the requests are admitted (and no motion is sustained to withdraw) it is improper for the court to admit or consider evidence offered to refute the admission.²⁵

Taking a broader view of Supreme Court rules, "For purposes of construction, Nebraska Supreme Court rules are treated like statutes."²⁶

C. MISCELLANEA

Though not the sort of "admission" that the court will instruct on as a matter of law, *Ficke v. Wolken* says this about party admissions.

The admissions by a party to an action upon a material matter are admissible against him or her as original evidence. And an admission may be made by conduct as well as orally or in writing. Thus, as a general rule, any act or conduct on the part of a party which may fairly be interpreted as an admission

²²*Tymar, LLC v. Two Men and a Truck*, 282 Neb. 692, 702-03, 805 N.W.2d 648, 657 (2011) (citations omitted). *Accord*, e.g., cases cited in *Tymar*; *Thomsen v. Farmers Mut. United Ins. Co., Inc.*, 240 Neb. 886, 887-88, 485 N.W.2d 179, 179-80 (1992); *Wibbels v. Unick*, 229 Neb. 184, 189, 426 N.W.2d 244, 248 (1988).

²³*Tymar*, 282 Neb. at 705-06, 805 N.W.2d at 659.

²⁴*Tymar*, 282 Neb. at 704, 805 N.W.2d at 658.

²⁵*Tymar*, 282 Neb. at 709, 805 N.W.2d at 662.

²⁶*Hotz v. Hotz*, 301 Neb. 102, 110, 917 N.W.2d 467, 475 (2018).

- against interest on a material issue may be shown in evidence against him or her.²⁷

Facts determined by the court could include facts judicially noticed. *See* Nebraska's statute on judicial notice, Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 2016). *See also* the Comment to NJI2d Civ. 1.02. And they could include testimony discredited as a matter of law. *See* the Comment to NJI2d Civ. 1.45.

Regarding instructing the jury on defendant's admissions, that paragraph of the instruction refers to defendant's admission of ultimate issues or essential matters. If the court has found any essential facts as a matter of law, they should also be stated by including the bracketed paragraph at the end of Part I, A of this instruction.

Logically, it might be proper to omit any specific reference to admitted facts or to facts found by the court as a matter of law. The Committee feels, however, that it might be confusing to jurors if the reason for removing ultimate issues from their consideration is not explained, particularly to jurors who have experience with similar cases.

III. AFFIRMATIVE DEFENSES

The various sub-parts of part II of this instruction, Defendant's Defenses, are to be given singly or in combination as appropriate under the pleadings and evidence of each particular case. Regarding combining the instructions on defendant's defenses, *see* the Comment to NJI2d Civ. 2.02A.

Care should be taken not to include among the affirmative defenses the argument that the sole proximate cause of the accident was the conduct of a third person. This is no more than a special facet of the denial of negligence or proximate cause. *See* NJI2d Civ. 3.44 and the Authorities thereto.

It is worth note that in the context of an affirmative defense the court has held that an inadvertent impropriety in the phrasing of an affirmative defense instruction "is not necessarily prejudicial error. The meaning of an instruction and not its phraseology is the important consideration."²⁸

Regarding affirmative defenses in tort actions, *see particularly* NJI2d Civ. 2.02D, Comment & Authorities. *See also* NJI2d Civ. 2.02A, 2.02B, 2.02C and the Comments and Authorities to each. Regarding the affirmative defense of mitigation of damages, *see* NJI2d Civ. 4.70. Regarding contract actions, *see* Part C of Chapter 15, *infra*.

²⁷Ficke v. Wolken, 291 Neb. 482, 493, 868 N.W.2d 305, 313 (2015) (footnotes omitted).

²⁸Leonhardt v. Harimon, 185 Neb. 224, 226, 174 N.W.2d 926, 927 (1970).

AUTHORITIES

- I. IN GENERAL
- II. THE TRIAL COURT'S DUTY TO INSTRUCT
- III. PRESENTING THE CASE TO THE JURY
- IV. FACTS ADMITTED AND FACTS DETERMINED BY THE COURT
- V. BURDEN OF PROOF
 - A. IN GENERAL
 - B. NEGLIGENCE IS NOT PRESUMED FROM THE EXISTENCE OF AN INJURY OR THE HAPPENING OF AN ACCIDENT
 - C. FOUR ESSENTIAL ELEMENTS

I. IN GENERAL

The Nebraska Supreme Court has often stated the rule that the trial judge must define the issues of the lawsuit.²⁹

II. THE TRIAL COURT'S DUTY TO INSTRUCT

The trial court has the duty to instruct the jury correctly on all issues that are both raised by the pleadings and supported by the evidence and only on issues that are both raised by the pleadings and supported by the evidence. Failure to do so constitutes prejudicial error. This duty applies whether or not the parties request proper jury instruction. All of this is discussed in the Introductory Comment & Authorities to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above.

III. PRESENTING THE CASE TO THE JURY

The trial court has the duty "to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions.³⁰ it is error to submit to the jury a general allegation of negligence.³¹ Copying the pleadings into instructions or reading the pleadings to the jury as a way of stating the issues has been "consis-

²⁹Many cases supporting this statement are cited in part II of the Introductory Comment & Authorities to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above. See also *e.g.*, many of the cases cited below.

³⁰*Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 220, 266 N.W.2d 902, 906 (1978) (quoting *Marquardt v. Nehawka Farmers Co-op. Co.*, 186 Neb. 494, 498, 184 N.W.2d 617, 621 (1971)).

³¹*Enyeart v. Swartz*, 213 Neb. 732, 734-35, 331 N.W.2d 513, 515 (1983); *Graham v. Simplex Motor*

tently condemned." Substantially copying the pleadings is sufficient grounds for reversal if it results in prejudice to the complaining party.³²

IV. FACTS ADMITTED AND FACTS DETERMINED BY THE COURT

Matters that have been admitted should be so stated.³³ Moreover, one has a right to have the jury instructed on admissions of essential matters.³⁴ Regarding judicial admissions, *see* the discussion in the Comment, *supra*.

Regarding facts determined by the court, *see* the Comment, *supra*.

V. BURDEN OF PROOF

A. IN GENERAL

"It is axiomatic that the burden of proving negligence is on the party alleging it."³⁵

B. NEGLIGENCE IS NOT PRESUMED FROM THE EXISTENCE OF AN INJURY OR THE HAPPENING OF AN ACCIDENT

The general rule is that negligence is not presumed from the exis-

Rebuilders, Inc., 189 Neb. 507, 511, 203 N.W.2d 494, 497 (1973) (citing cases), *appeal after remand*, 191 Neb. 320, 215 N.W.2d 641 (1974). *See also* Herman v. Midland AG Service, Inc., 200 Neb. 356, 367, 264 N.W.2d 161, 168 (1978); Pool v. Romatzke, 177 Neb. 870, 876, 131 N.W.2d 593, 597 (1964); Ripp v. Riesland, 176 Neb. 233, 236, 125 N.W.2d 699, 702 (1964); Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 730-31, 83 N.W.2d 523, 541 (1957); Styskal v. Brickey, 158 Neb. 208, 214, 62 N.W.2d 854, 859 (1954) (citing authorities). *See also* Chmelka v. Continental Western Ins. Co., 218 Neb. 186, 191, 352 N.W.2d 613, 617 (1984).

³²*See* part V of the Introductory Comment & Authorities to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above, for more discussion of this general issue and the cases supporting these points.

³³Hughes v. Coniglio, 147 Neb.

829, 830-31, 25 N.W.2d 405, 407 (1946).

³⁴Wright v. Lincoln City Lines, 160 Neb. 714, 718, 71 N.W.2d 182, 184 (1955).

³⁵Kliwer v. Wall Const. Co., 229 Neb. 867, 871, 429 N.W.2d 373, 377 (1988). *Accord, e.g.,* C.E. v. Prairie Fields Family Medicine P.C., 287 Neb. 667, 676, 844 N.W.2d 56, 63 (2014); Robinson v. Dustrol, Inc., 281 Neb. 45, 55, 793 N.W.2d 338, 346 (2011); Rasmussen v. State Farm Mut. Auto. Ins. Co., 278 Neb. 289, 303, 770 N.W.2d 619, 631 (2009); Burns v. Veterans of Foreign Wars, 231 Neb. 844, 851, 438 N.W.2d 485, 490 (1989); Tiede v. Loup Power Dist., 226 Neb. 295, 299, 411 N.W.2d 312, 316 (1987); Empire State Bldg. Co. v. Bryde, 211 Neb. 184, 191, 318 N.W.2d 65, 69 (1982); Bishop Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 176, 274 N.W.2d 530, 533 (1979) (stating that the burden of proof is ordinarily on the party who suffers if no evidence introduced). *See also* the Comment, *supra*; NJI2d Civ. 2.12A; NJI2d Civ. 2.12B.

tence of an injury or the happening of an accident. Rather, the party alleging negligence must prove the negligence alleged.³⁶ That notwithstanding, "Proof that an accident happened and that the plaintiff was injured is not enough unless the standard of liability to be applied to the defendant is that of an insurer."³⁷

Though it is true that negligence is not presumed from the happening of an accident, the Nebraska Supreme Court has disapproved of instructing the jury that the happening of an accident neither makes the defendant liable nor raises a presumption that the defendant was negligent, and that accidents frequently occur through no one's fault.³⁸ Commenting on *Gilbert v. Archbishop Bergan Mercy Hosp.*,³⁹ Dean Harvey Perlman stated:

The court correctly recognized that instructions which tell the jury that an injury or an accident alone does not prove negligence is merely part of establishing the burden of proof. The court finds the instruction in this case redundant because a clear burden of proof instruction was given. The court also recognizes that in some cases giving the redundant instruction might be prejudicial if it unduly emphasizes the burden of proof. It would seem wise not to give the instruction.⁴⁰

Res ipsa loquitur has been called a qualification of or an exception

³⁶*E.g.*, *Pantano v. American Blue Ribbon Holdings, LLC*, 303 Neb. 156, 165, 927 N.W.2d 357, — (2019) ("Negligence is not presumed and must be proved by evidence, direct or circumstantial."); *Robinson*, 281 Neb. at 55, 793 N.W.2d at 346; *Rasmussen*, 278 Neb. at 303, 770 N.W.2d at 631; *Herrera v. Fleming Companies, Inc.*, 265 Neb. 118, 123, 655 N.W.2d 378, 383 (2003) ("The mere fact that an injury or accident occurred does not raise a presumption of negligence."); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1025-26, 574 N.W.2d 478, 484-85 (1998); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 567, 558 N.W.2d 540, 546 (1997) (stating that "negligence is never presumed" and that the happening of accident does not prove negligence); *Burrows v. Jacobsen*, 209 Neb. 778, 781, 311 N.W.2d 880, 883-84 (1981).

Likewise, one is not liable to another just because one has been negligent; it must also be shown that the injuries complained of were proximately caused by that negligence. *E.g.*,

Shelton v. Board of Regents of University of Nebraska, 211 Neb. 820, 824, 320 N.W.2d 748, 752 (1982). *See generally* NJ12d Civ. 3.41, Authorities.

³⁷*Fynbu v. Strain*, 190 Neb. 719, 721, 211 N.W.2d 917, 919 (1973).

³⁸*Hoover v. Burlington Northern R. Co.*, 251 Neb. 689, 695-96, 559 N.W.2d 729, 734 (1997) (stating that so instructing is not reversible error where the jury was properly instructed on burden of proving negligence).

³⁹*Gilbert v. Archbishop Bergan Mercy Hosp.*, 228 Neb. 148, 421 N.W.2d 760 (1988).

⁴⁰Harvey Perlman, Annual Institute on the Annual Survey of Nebraska Law, Nebraska Tort Law 1987-88, Review and Comments 10 (1988). Regarding redundant instructions *see also* part VIII (B) of the Introductory Comment & Authorities to Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1 of this book.

to the general rule that negligence is not to be presumed.⁴¹ *Res ipsa loquitur* is discussed in full at NJI2d Civ. 2.13.

C. FOUR ESSENTIAL ELEMENTS

The essential elements of any negligence action are a legal duty, breach of that duty, proximate cause, and damages. To prevail, the plaintiff must plead and prove those four things.⁴² These same four elements apply to negligence actions under both the State Tort Claims Act and the Political Subdivision Tort Claims Act. *See* NJI2d Civ. 8.72, Comment. Professional negligence, a.k.a. malpractice, is the subject of Chapter 12, below.

“The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.”⁴³ This is discussed at

⁴¹A qualification: *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 607, 667 N.W.2d 244, 252 (2003); *Bargmann*, 253 Neb. at 1026, 574 N.W.2d at 485. An exception: *Chism v. Campbell*, 250 Neb. 921, 927, 553 N.W.2d 741, 746 (1996).

⁴²*E.g.*, *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 546, — N.W.2d —, — (2021) (combining the third and fourth elements as follows, “owed a duty, breached the duty, and caused damages as a result”); *Sundermann v. Hy-Vee, Inc.*, 306 Neb. 749, 764, 947 N.W.2d 492, 503 (2020); *Rutledge v. City of Kimball*, 304 Neb. 593, 600, 935 N.W.2d 746, 752 (2019) (Political Subdivision Tort Claims Act); *Reiber v. County of Gage*, 303 Neb. 325, 336, 928 N.W.2d 916, 925 (2019); *Ecker v. E & A Consulting Group, Inc.*, 302 Neb. 578, 584, 924 N.W.2d 671, 676 (2019); *Cruz as Next Friend of Cruz v. Lopez*, 301 Neb. 531, 541, 919 N.W.2d 479, 489 (2018); *Lewison v. Renner*, 298 Neb. 654, 663, 905 N.W.2d 540, 548 (2018) (citing NJI2d Civ. 2.01); *Thomas v. Board of Trustees of Nebraska State Colleges*, 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017) (State Tort Claims Act); *Pittman v. Rivera*, 293 Neb. 569, 573, 879 N.W.2d 12, 15 (2016) (“To warrant summary judgment in their favor, the appellees had to submit evidenced showing the

absence of at least one of these elements.” *Id.*); *Hall v. County of Lancaster*, 287 Neb. 969, 983, 846 N.W.2d 107, 118 (2014) (overruled on other grounds by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1033, 809 N.W.2d 487, 492 (2012) (Political Subdivision Tort Claims Act); *A.W. v. Lancaster County School Dist.* 0001, 280 Neb. 205, 210, 784 N.W.2d 907, 913 (2010); *Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754 (2007); *Keys v. Guthmann*, 267 Neb. 649, 653, 676 N.W.2d 354, 358 (2004) (involving malpractice and *res ipsa loquitur*); *Rodriguez v. Nielsen*, 259 Neb. 264, 271, 609 N.W.2d 368, 373 (2000) (regarding attorney malpractice in a civil case, a plaintiff must prove employment (duty), negligence, proximate cause, and damage; regarding attorney malpractice in a criminal case, a plaintiff must also prove actual innocence); *Dolberg v. Paltani*, 250 Neb. 297, 301, 549 N.W.2d 635, 638 (1996) (finding negligence as matter of law equates to finding first two elements established, and not second two; *see* NJI2d Civ. 3.02, Comment & Authorities).

⁴³Same quotation: *E.g.*, *Rutledge*, 304 Neb. at 600, 935 N.W.2d at 752; *Bell*, 299 Neb. at 146, 907 N.W.2d at 713. *Accord, e.g.*, *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 546,

length below at NJI2d Civ. 3.02, Comment & Authorities, under the heading “Duty.”

In *Lewison v. Renner*⁴⁴ the Supreme Court noticed that the trial court’s instruction combined the proximate cause and the nature and extent of any damage “into a single statement by instructing that [the plaintiff] had to prove the nature and extent of her damages proximately caused by [the defendant’s] negligence.”⁴⁵ This was not an issue on appeal because the parties did not object and did not assign this as error on appeal. Nonetheless, the Court “pause[d] briefly to observe that . . . the better practice is to separate out for the jury each element of the party’s burden of proof”

A railroad company’s liability for damages under the Federal Employer’s Liability Act (FELA), 45 U.S.C. §§ 51 through 60 (2000), is discussed in, among others, the cases footnoted here.⁴⁶

Negligence is not actionable unless it results in an injury to another. In other words, in a negligence action nominal damages may not be recovered where the evidence indicates a legal wrong, a negligent act, but there is no proof of actual damages.⁴⁷

Negligence is defined and discussed at NJI2d Civ. 3.02. Duty is defined and discussed at NJI2d Civ. 3.02. Regarding duty in specific situations, *see* the instructions referenced in the Index, under the heading “Duty of Care.” Proximate cause is defined and discussed at NJI2d Civ. 3.41. Regarding damages, *see generally* NJI2d Civ. chapter 4.

955 N.W.2d 707, 714-15 (2021).

⁴⁴*Lewison v. Renner*, 298 Neb. 654, 905 N.W.2d 540 (2018).

⁴⁵*Id.* at 666, 905 N.W.2d at 550.

⁴⁶*Kaiser v. Union Pacific Railroad Company*, 303 Neb. 193, 927 N.W.2d 808 (2019) (discussing railroad negligence; holding that damages for negligent infliction of emotional distress are cognizable under FELA and the zone of danger test; noting that “[s]ubstantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing it.”); *Ballard v. Union Pacific R. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010) (discussing which procedural rules apply, the elements of the cause of action, FELA’s coverage of some intentional torts, and the railroad’s negligent hiring); *Holsapple v. Union Pacific R. Co.*, 279 Neb. 18, 776 N.W.2d 11 (2009) (discussing “scope of employ-

ment” in the context of the FELA); *McNeel v. Union Pacific R. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008) (discussing the elements of a cause of action, expert testimony, and spoliation of evidence). *See also* *Hoover v. Burlington Northern R. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997) (regarding FELA and contributory negligence).

⁴⁷*Beavers v. Christensen*, 176 Neb. 162, 166, 125 N.W.2d 551, 554 (1963). *See also* *Ewers v. Saunders County*, 298 Neb. 944, 956, 906 N.W.2d 653, 663 (2018) (“[A] defendant’s negligence is not actionable unless it is a proximate cause of the plaintiff’s injuries or is a cause that proximately contributed to them.”); *Bittner v. Miller*, 226 Neb. 206, 212, 410 N.W.2d 478, 482 (1987) (“[N]egligence is actionable only when it results in damages.”). This is discussed in more detail in the Introduction to Chapter 4, Damages.

NJI2d Civ. 2.01A

STATEMENT OF THE CASE—NEGLIGENCE— EFFECT OF FINDINGS—TORT ACTION OF A KIND TO WHICH CONTRIBUTORY NEGLIGENCE IS AN ALLOWABLE DEFENSE BUT IN WHICH IT IS NOT SUBMITTED TO THE JURY AND WHERE JOINT AND SEVERAL LIABILITY IS AN ISSUE

C. EFFECT OF FINDINGS

If the plaintiff has *not* met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff has met this burden of proof, your verdict must be for the plaintiff and you must decide how much money will fairly compensate the plaintiff for (his, her, its) injury. To do that you must complete Verdict Form No. —, which I will read to you at the end of these instructions.

SPECIAL NOTE

This instruction, NJI2d Civ. 2.01A is incomplete. Additional instruction must be drafted telling the jury of the effect of their allocation of negligence.

Nebraska's comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07 *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence.¹

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska's comparative negligence statute.²

2.01A

¹Russell v. Stricker, 262 Neb. 853, 858, 635 N.W.2d 734, 738-39 (2001); Wheeler v. Bagley, 254 Neb. 232, 238-39, 575 N.W.2d 616, 620 (1998).

²Russell, 262 Neb. at 861, 635 N.W.2d at 740-41; Wheeler, 254 Neb. at 236, 575 N.W.2d at 619. *See also* City of Wahoo v. NIFCO Mechanical Systems, Inc., 306 Neb. 203, 944 N.W.2d 757 (2020).

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in *Wheeler v. Bagley*³ and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02–5.05. Regarding this whole problem in general and a discussion of the relevant parts of *Wheeler* in particular, see the discussion at NJI2d Civ. 5.05, Comment.

COMMENT

See NJI2d Civ. 5.02, Comment; NJI2d Civ. 5.04, Comment; and NJI2d Civ. 5.05, Comment and Authorities.

This instruction applies to negligence causes of action that accrue on or after February 8, 1992, where contributory negligence is not submitted to the jury and joint and several liability is an issue. Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016).⁴ It does not apply to causes of action (if somehow there are any) that accrue before February 8, 1992, or for causes of action that accrue on or after February 8, 1992, where there is only one defendant in the case when it goes to the jury and, no other liable entity that was either never named in the lawsuit or discharged from the lawsuit by a release, a covenant not to sue, or a similar agreement entered into by a claimant and the other liable entity.⁵ This is discussed at some length in the Comment to NJI2d 5.04. For such causes of action, see NJI2d Civ. 2.01 and its Comment and Authorities.

This instruction is to be inserted into Part C of NJI2d Civ. 2.01. It is the Effect of Findings part of the Statement of the Case instruction in a tort action of a kind of tort to which contributory negligence is an allowable defense, whether it could have been asserted as a defense on the facts of the case at hand or not, but in which contributory negligence is not submitted to the jury. See Part II(B) of the Comment to NJI2d Civ. 5.04 for further discussion of this point.

This instruction is written to be used in combination with NJI2d Civ. 5.02. The verdict form referred to herein is NJI2d Civ. 5.02.

Use only those parts of this instruction as are applicable in the case under instruction.

AUTHORITIES

Neb. Rev. Stat. §§ 25-21,185.07, *et seq.* (Reissue 2016), quoted in part and discussed extensively at NJI2d Civ. 5.04, Comment and Authorities; NJI2d Civ. 5.05, Authorities.

³See above.

⁴See *City of Wahoo v. NIFCO Mechanical Systems, Inc.*, 306 Neb. 203, 210-11, 944 N.W.2d 757, 762-63 (2020) and *Maxwell v. Montey*, 262

Neb. 160, 631 N.W.2d 455 (2001), both discussed at NJI2d Civ. 15.04, Comment).

⁵*City of Wahoo*, above.

NJ12d Civ. 2.02A

CONTRIBUTORY AND COMPARATIVE
NEGLIGENCE

A. ISSUES

In defense to the plaintiff's claim, the defendant claims that the plaintiff (himself, herself, itself) was negligent in one or more of the following ways:

(Insert a list of statements of the negligence claimed by the defendant, against the plaintiff.)

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with (his, her, its) claim that the plaintiff was negligent, the burden is on the defendant to prove by the greater weight of the evidence both of the following:

1. That the plaintiff was negligent in one or more of the ways claimed by the defendant; and

2. That this negligence on the part of the plaintiff was a proximate cause of (his, her, its) own (injury, damage).

C. EFFECT OF FINDINGS

1. If the plaintiff *has* met (his, her, its) burden of proof and the defendant *has not* met (his, her, its) burden of proof, then your verdict must be for the plaintiff.

2. If both the plaintiff and the defendant have met their burdens of proof, then you must compare the negligence of each with that of the other.

a. If upon comparison you decide that the plaintiff's negligence was more than slight, or that the defendant's was less than gross, then your verdict must be for the defendant.

b. If, however, upon comparison, you decide that the plaintiff's negligence was slight and that the defendant's was gross, then your verdict must be for the plaintiff. To compute the amount of that verdict you shall determine the amount of the plaintiff's damage in accor-

dance with Instruction No. _____. You must then decide what percent of the total negligence was attributable to the plaintiff and reduce the amount of (his, her, its) total damages by that same percent, returning a verdict for the balance only.

The words “slight” and “gross” as used here are comparative words. The negligence of a party is not to be evaluated as slight or gross standing alone but only when compared with that of the other party.

SPECIAL NOTE

This instruction, NJI2d Civ. 2.02A, “applies to what must be an ever-shrinking category of cases that accrued before February 8, 1992.”¹ This is discussed extensively at NJI2d Civ. 5.04, in both the Comment and the Authorities.

Regarding cases accruing on or after February 8, 1992, see Chapter 5, below. See *particularly* the Comment to NJI2d 5.04.

COMMENT

See NJI2d Civ. 2.01, Comment. As stated in the Special Note above, this instruction only applies to cases (if there still are any) that accrued before February 8, 1992.

The theory behind the comparative negligence part of Nebraska’s former comparative negligence statute, Neb. Rev. Stat. § 25-21,185 (Reissue 2016), was that the “slight negligence of the plaintiff is no longer a defense but goes only to mitigation of damages.”²

Contributory negligence jury instructions are subject to the harmless error rule. In *Hoover v. Burlington N. R.R. Co.*,³ the jury was given a special verdict form that required the following two step process: First, the jury was instructed to determine whether the defendant’s negligence was a proximate cause of injury to the plaintiff; second, if, and only if, the jury answered the first question in the affirmative, then they were required to determine whether the plaintiff was contributor-

2.02A

¹*City of Wahoo v. NIFCO Mechanical Systems, Inc.*, 306 Neb. 203, 210, 944 N.W.2d 757, 762 (2020) (analyzing Nebraska’s comparative negligence statutes, Neb. Rev. Stat. § 25-21,185, et seq (Reissue 2016) and concluding that “there is nothing in those statutes . . . suggesting that the ‘slight’ and ‘gross’ formulation is to be used in any cases accruing on or after

February 8, 1992.” *Id.* at 211, 944 N.W.2d at 763. See § 25-21,185, et seq. and *City of Wahoo*, 306 Neb. at 210-11, 944 N.W.2d at 763.

²*Holley v. Omaha & C.B. Street Ry. Co.*, 110 Neb. 541, 543, 193 N.W. 710, 710 (1923) (referring to predecessor to modern statute).

³*Hoover v. Burlington Northern R. Co.*, 251 Neb. 689, 695, 559 N.W.2d 729, 733 (1997).

ily negligent. The jury answered the first question in the negative and returned a verdict for the defendant on the negligence issue. In this situation, since the jury never reached the issue of contributory negligence, any error in the contributory negligence instruction is harmless error.⁴ Regarding the general matter of jury instruction and the harmless error rule, see part VIII (C) of the Introductory Comment to the Rule Adopted by the Supreme Court of Nebraska with Reference to the Nebraska Jury Instructions, Second Edition, which precedes Chapter 1 of this work.

In *Keating v. Klemish*⁵ the Court said,

A series of acts of ordinary negligence combined may, under certain circumstances, operate to produce gross negligence.

It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of the accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence ⁶

Crewdson v. Burlington N. R.R. Co. involved a railroad crossing collision between a car and a train. The court affirmed the jury's verdict on liability and reversed its damage award as excessive. The jury's finding on liability necessarily determined that decedent was *not* guilty of more-than-slight contributory negligence. Therefore, the remand directed the trial court to instruct the jury that if they find decedent was contributorily negligent, that shall be considered "only in mitigation of damages and in proportion to the amount of contributory negligence which it may attribute to the decedent."⁷

For a somewhat unusual case involving comparative negligence, in *Hiner v. Nelson*, the court affirmed the use in jury instructions of a

⁴*Id.* at 695, 559 N.W.2d at 734.

⁵*Keating By and Through Keating v. Klemish*, 214 Neb. 458, 334 N.W.2d 440 (1983).

⁶*Keating By and Through Keating v. Klemish*, 214 Neb. 458,

461-62, 334 N.W.2d 440, 442-43 (1983) (citations and quotation marks omitted).

⁷*Crewdson v. Burlington Northern R. Co.*, 234 Neb. 631, 645-46, 452 N.W.2d 270, 281 (1990), (citing NJ12d Civ. 2.02A).

chart listing the possible combinations of slight and more than slight, and gross and less than gross negligence, and the resulting verdicts.⁸

Regarding the affirmative defense instructions, NJI2d Civ. 2.02A through NJI2d Civ. 2.02D, if the court will be instructing on more than one affirmative defense, it can give each instruction seriatim, as drafted. Alternatively, the instructions can be partly combined as follows: the issues and burden of proof instruction for each such defense can be set apart as separately numbered propositions within the same instruction; except as to NJI2d Civ. 2.02A, the effect of findings part of the affirmative defense instruction can be reworded as follows, and given only once, as the final part of this same instruction:

“If the defendant *has* met (his, her, its) burden of proof against the plaintiff regarding (either, any) of these defenses, then your verdict must be in favor of the defendant and against the plaintiff, and this is true even if you find that the defendant was negligent and that (his, her, its) negligence was also a proximate cause of the plaintiff’s (injuries, damages).

“You must disregard any of these defenses for which the defendant has not met (his, her, its) burden of proof.”

This instruction deals with gross negligence under Nebraska’s former comparative negligence statute, Neb. Rev. Stat. § 25-21,185 (Reissue 2016).

Contributory negligence is not a defense to an intentional tort.⁹ This is discussed further, including cross references, at NJI2d Civ. 5.04, Comment.

Contributory negligence “does not apply when a patient’s conduct provides the occasion for medical action which later is the subject of a medical malpractice claim.”¹⁰

Regarding contributory negligence and strict liability actions, *see* the Comment to NJI2d Civ. 5.04 and 11.20.

Regarding contributory negligence on the part of a driver approaching a railroad crossing, *see* these Comments and Authorities, and *see also* the authorities cited in the Comment to NJI2d Civ. 7.03A.

Regarding contributory negligence in a medical malpractice action, *see* the Comment to NJI2d Civ. 12.01.

⁸Hiner v. Nelson, 174 Neb. 725, 728-30, 119 N.W.2d 288, 290 (1963). Brandon v. County of Richardson, 261 Neb. 636, 654-55, 624 N.W.2d 604, 619-20 (2001).

⁹Shipler v. General Motors Corp., 271 Neb. 194, 210, 710 N.W.2d 807, 825 (2006); Brandon ex rel. Estate of

¹⁰Shipler, 271 Neb. at 210, 710 N.W.2d at 825.

Regarding contributory negligence and the Federal Employers' Liability Act (FELA), see *Hoover v. Burlington N. R.R. Co.*¹¹

Regarding "gross negligence" as those words are used and defined in other contexts, see NJI2d Civ. 7.51.

Though it is not an issue that arises in civil cases, in the interest of completeness, the Committee notes that contributory negligence is not a defense to the charge of motor vehicle homicide.¹²

AUTHORITIES

I. IN GENERAL

See Authorities to NJI2d Civ. 2.01 and Neb. Rev. Stat. § 25-21,185 (Reissue 1989) (Nebraska's former statute on contributory and comparative negligence), and the annotation thereto.¹³

Plaintiffs are contributorily negligent if they fail to protect themselves from injury and their "conduct concurs and cooperates with" defendants' negligence and is a proximate cause of their own injuries.¹⁴ "Contributory negligence is an affirmative defense which must be proved by the party asserting such defense."¹⁵ "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone."¹⁶ "[I]f the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm,

¹¹*Hoover v. Burlington Northern R. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997).

¹²*State v. Ring*, 233 Neb. 720, 727, 447 N.W.2d 908, 912 (1989).

¹³Regarding contributory negligence, see also *Utsumi v. City of Grand Island*, 221 Neb. 783, 786-88, 381 N.W.2d 102, 105 (1986); *Stephen v. City of Lincoln*, 209 Neb. 792, 797-98, 311 N.W.2d 889, 893 (1981), and the authorities cited therein.

¹⁴*Bray v. Kate, Inc.*, 235 Neb. 315, 318, 454 N.W.2d 698, 701 (1990). *Accord* *Connelly v. City of Omaha*, 284 Neb. 131, 145, 816 N.W.2d 742, 756 (2012); *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 816, 774 N.W.2d 370, 383 (2009) (case speaks of conduct that "occurs and cooperates with the defen-

dant's actionable negligence," rather than "concurs and cooperates"; "concurs" seems to be the proper word here, as the plaintiff's conduct need not "occur" with defendant's, but "concur"; Wilke's use of "occurs" may be in the nature of a typographical error). See also, e.g., *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 653, 502 N.W.2d 80, 92 (1993).

¹⁵*Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 126, 403 N.W.2d 335, 339 (1987). See also, e.g., *Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754, 768 (2007); *Lemke*, 243 Neb. at 653, 502 N.W.2d at 92.

¹⁶*First Nat. Bank, Stromsburg v. Benedict Consol. Industries, Inc.*, 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987).

the plaintiff is not guilty of contributory negligence in so doing unless he acts *unreasonably*.¹⁷

II. THE TRIAL COURT'S DUTY

The specifications of contributory negligence relied upon by the defendant and supported by the evidence—defendant's evidence or plaintiff's evidence¹⁸—must be included in the instructions, whether requested or not.¹⁹ In other words, whether requested to do so or not, it is the trial court's duty to instruct on all issues properly pled and evidenced, and only on issues properly pled and evidenced, and This rule applies to the defense of contributory negligence as well as to the claims of the plaintiff.²⁰

Where there is no "evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence."²¹

See also the discussion and the many cases cited in the Introductory Comment & Authorities to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above.

Regarding the trial court's duty in negligence actions that accrue on or after February 8, 1992, see *additionally* NJI2d Civ. 5.04, Comment.

¹⁷*Fiscel v. Beach*, 254 Neb. 678, 682-83, 578 N.W.2d 52, 56 (1998) (emphasis supplied in *Fiscel*; citations and multiple quotation marks omitted) (acceptance of risk involuntary if, while plaintiff is exercising a right or privilege of which defendant has no right to deprive plaintiff, defendant's conduct left plaintiff with no reasonable alternative but to encounter a risk).

¹⁸*Price v. King*, 161 Neb. 123, 129, 72 N.W.2d 603, 607 (1955).

¹⁹The trial court's duty regarding jury instruction is discussed at length in the Introductory Comment & Authorities to the Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above.

²⁰See the Authorities to NJI2d Civ. 2.01, *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 405, 423 N.W.2d 115, 123 (1988); *Ripp v.*

Riesland, 170 Neb. 631, 654-55, 104 N.W.2d 246, 261-62 (1960); *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 730, 83 N.W.2d 523, 541 (1957); *Krepcik v. Interstate Transit Lines*, 153 Neb. 98, 115, 43 N.W.2d 609, 620 (1950).

²¹*Fangmeyer v. Reinwald*, 200 Neb. 120, 125, 263 N.W.2d 428, 431 (1978) (citing cases). *Accord* *Gustafson v. Burlington Northern R. Co.*, 252 Neb. 226, 229, 561 N.W.2d 212, 216 (1997); *Nickell v. Russell*, 247 Neb. 112, 123, 525 N.W.2d 203, 210 (1995); *Grote v. Meyers Land and Cattle Co.*, 240 Neb. 959, 970, 485 N.W.2d 748, 757 (1992); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 9, 459 N.W.2d 178, 183 (1990); *Gehre v. Coleman*, 233 Neb. 32, 37, 443 N.W.2d 606, 610 (1989); *Center State Bank v. Dana, Larson, Roubal & Associates, Inc.*, 226 Neb. 408, 415, 411 N.W.2d 635, 639 (1987).

III. JURY QUESTION

Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.²²

“Contributory negligence must always be examined in the light of the particular facts in each case. The duty to make this examination and determination concerning contributory negligence properly belongs to the fact finder unless the evidence compels only one conclusion about which reasonable [persons] cannot disagree.”²³

While this point is emphasized by the language of the comparative negligence statute—“ ‘all questions of negligence and contributory negligence shall be for the jury’ ”—that statute does not affect the court’s right to decide a case as a matter of law.²⁴

For actions that accrue on or after February 8, 1992, *see additionally* N.J.I2d Civ. 5.04, Comment.

IV. CONTRIBUTORY NEGLIGENCE DEFINED

Parties are contributorily negligent when (1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant’s actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.²⁵

“Contributory negligence is conduct for which the plaintiff is

²²*E.g.*, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 449-50, 412 N.W.2d 56, 74 (1987); *Holly v. Mitchell*, 213 Neb. 203, 209, 328 N.W.2d 750, 754 (1982) (citing cases); *Koerner v. Perrella*, 213 Neb. 189, 191, 328 N.W.2d 473, 475 (1982); *Burrows v. Jacobsen*, 209 Neb. 778, 779-80, 311 N.W.2d 880, 882 (1981); *Fangmeyer v. Reinwald*, 200 Neb. 120, 124-25, 263 N.W.2d 428, 431 (1978) (citing cases); *Rogers v. Shepherd*, 159 Neb. 292, 296-97, 66 N.W.2d 815, 818 (1954); *Sandberg v. Peter Kiewit Sons Co.*, 364 F.2d 206, 209 (8th Cir. 1966). *See also* *Davis v. Phillips*, 215 Neb. 184, 188-89, 337 N.W.2d 754, 756 (1983) (finding that defendant was negligent as a matter of law but there could be no directed verdict on liability because the jury still must decide plaintiff’s

contributory negligence and, if any is found, the question of comparative negligence).

²³*Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 653, 502 N.W.2d 80, 92 (1993) (quoting *Ditloff v. Otto*, 239 Neb. 377, 385, 476 N.W.2d 675, 680 (1991)).

²⁴*Koerner v. Perrella*, 213 Neb. 189, 191, 328 N.W.2d 473, 475 (1982) (citing *C. C. Natvig’s Sons, Inc. v. Summers*, 198 Neb. 741, 747-48, 255 N.W.2d 272, 277 (1977)).

²⁵*E.g.*, *Gonzalez v. Union Pacific Railroad Company*, 292 Neb. 281, 287-88, 872 N.W.2d 579, 584 (2015) (13-year-old boy); *Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754 (2007); *Springer v. Bohling*, 263 Neb. 802, 807, 643 N.W.2d 386, 392 (2002); *Brandon ex rel. Estate of Brandon v. County of*

responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury."²⁶

For a general discussion of the topic, see Prosser and Keeton *On the Law of Torts* § 65 (W. Keeton gen. ed. 5th ed. 1984).

V. COMPARATIVE NEGLIGENCE DEFINED

This part of these Authorities regarded the elements of comparative negligence, under the statute that applied in Nebraska for causes of action accruing before February 9, 1992. It has been deleted from post 2015-2016 editions of this book. See NJI2d Civ. 5.04 and particularly the Comment thereto.

NJI2d Civ. 2.02A-1

STATEMENT OF THE CASE—CONTRIBUTORY NEGLIGENCE—EFFECT OF FINDINGS—TORT ACTION WHERE CONTRIBUTORY NEGLIGENCE IS SUBMITTED TO THE JURY AND JOINT AND SEVERAL LIABILITY IS AN ISSUE

C. EFFECT OF FINDINGS

1. If the plaintiff *has not* met (his, her, its) burden of proof, then your verdict must be for the defendants.

2. If the plaintiff *has* met (his, her, its) burden of proof and the defendant *has not* met (his, her, its) burden of proof, then your verdict must be for the plaintiff and you must decide how much money will

Richardson, 261 Neb. 636, 666, 624 N.W.2d 604, 626-27 (2001); Nickell v. Russell, 260 Neb. 1, 11, 614 N.W.2d 349, 357 (2000); Baldwin v. City of Omaha, 259 Neb. 1, 12, 607 N.W.2d 841, 850 (2000) (involving a mentally ill plaintiff) (citing cases); Hill v. City of Lincoln, 249 Neb. 88, 97, 541 N.W.2d 655, 661 (1996); Nickell v. Russell, 247 Neb. 112, 123, 525 N.W.2d 203, 210 (1995) (involving a pedestrian sleeping on side of road); Lemke v. Metropolitan Utilities Dist., 243 Neb. 633, 653, 502 N.W.2d 80, 92 (1993) (citing cases); Haselhorst v. State, 240 Neb. 891, 901-02, 485 N.W.2d 180, 189 (1992);

Horst v. Johnson, 237 Neb. 155, 160-61, 465 N.W.2d 461, 464-65 (1991) (citing cases); Cassio v. Creighton University, 233 Neb. 160, 170, 446 N.W.2d 704, 711 (1989) (citing cases); Circo v. Transit Authority of City of Omaha, 217 Neb. 497, 500, 348 N.W.2d 908, 910 (1984).

²⁶Corcoran v. Lovercheck, 256 Neb. 936, 940, 594 N.W.2d 615, 619 (1999). *Accord Gonzales*, 292 Neb. at 287, 872 N.W.2d at 584; Skinner v. Ogallala Public School Dist. No. 1, 262 Neb. 387, 404, 631 N.W.2d 510, 526 (2001).

fairly compensate the plaintiff for (his, her, its) injury. To do that, you must complete Verdict Form No. —, which I will read to you at the end of these instructions.

3. If *both* the plaintiff and the defendant *have* met their burdens of proof, then you must compare their negligence and you do that by completing Verdict Form No. —, which I will read to you at the end of these instructions.

SPECIAL NOTE

This instruction, NJI2d Civ. 2.02A-1 is incomplete. Additional instruction must be drafted telling the jury of the effect of their allocation of negligence.

Nebraska's comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07 *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence.¹

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska's comparative negligence statute.²

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in *Wheeler*³ and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02–5.05. Regarding this whole problem in general and a discussion of the relevant parts of *Wheeler* in particular, see the discussion at NJI2d Civ. 5.05, Comment & Authorities.

COMMENT

See NJI2d Civ. 2.02A, Comment and Authorities; NJI2d Civ. 5.03, 5.04, and 5.05.

This instruction applies to causes of action that accrue on or after February 8, 1992, where there is more than one defendant in the case as it is submitted to the jury. For causes of action that accrue before

2.02A-1

(1998).

¹Russell v. Stricker, 262 Neb. 853, 858, 635 N.W.2d 734, 738-39 (2001); Wheeler v. Bagley, 254 Neb. 232, 238-39, 575 N.W.2d 616, 620

²Russell, 262 Neb. at 857, 635 N.W.2d at 738; Wheeler, 254 Neb. at 239, 575 N.W.2d at 620.

³Wheeler, above.

February 8, 1992 or causes of action that accrue on or after February 8, 1992, but where there is only one defendant in the case when it is submitted to the trier of fact, *see* NJI2d Civ. 2.01 and 2.02A. This is discussed at length at NJI2d Civ. 5.04, Comment.

This instruction is to be inserted into Part C of NJI2d Civ. 2.02A. It is the Effect of Findings part of the Statement of the Case instruction for the affirmative defense of contributory negligence. Where joint and several liability is an issue.

This instruction is written to be used in combination with NJI2d Civ. 5.03 and NJI2d Civ. 5.04. The verdict form referred to in paragraph two of this instruction is NJI2d Civ. 5.03. The verdict form referred to in paragraph three is NJI2d Civ. 5.04.

Use only those parts of this instruction as are applicable in the case under instruction.

AUTHORITIES

Neb. Rev. Stat. §§ 25-21,185.07 et seq. (Reissue 2016). This statute is quoted in part and discussed extensively at NJI2d Civ. 5.04, Comment.

NJI2d Civ. 2.02A-2

STATEMENT OF THE CASE—CONTRIBUTORY NEGLIGENCE—EFFECT OF FINDINGS—TORT ACTION WHERE CONTRIBUTORY NEGLIGENCE IS SUBMITTED TO THE JURY AND JOINT AND SEVERAL LIABILITY IS *NOT* AN ISSUE

C. EFFECT OF FINDINGS

1. If the plaintiff *has not* met (his, her, its) burden of proof then your verdict must be for the defendants.
2. If the plaintiff *has* met (his, her, its) burden of proof and the defendant *has not* met (his, her, its) burden of proof, then your verdict must be for the plaintiff and, using Instruction No. —, you must determine the amount of damage suffered by the plaintiff.
3. If *both* the plaintiff and the defendant *have* met their burdens of proof, then you must compare their negligence and you do that by completing Verdict Form No. —, which I will read to you at the end of these instructions.

COMMENT

See the Comment to NJI2d Civ. 5.04 and NJI2d Civ. 5.05. *See also* NJI2d Civ. 2.02A, Comment.

This instruction applies to causes of action that accrue on or after February 8, 1992. It does not apply to causes of action that accrue before February 8, 1992. *See* NJI2d Civ. 2.01 and 2.02A. *See particularly* part II of the Comment to NJI2d Civ. 5.04.

This instruction is to be inserted into Part C of NJI2d Civ. 2.02A. It is the Effect of Findings part of the Statement of the Case instruction for the affirmative defense of contributory negligence where joint and several liability is not an issue.

This instruction is written to be used in combination with NJI2d Civ. 4.01 and NJI2d Civ. 5.05: the instruction referred to in paragraph two of this instruction is NJI2d Civ. 4.01 and the verdict form referred to in paragraph three is NJI2d Civ. 5.05.

Use only those parts of this instruction as are applicable in the case under instruction.

AUTHORITIES

Neb. Rev. Stat. §§ 25-21,185.07 et seq. (Reissue 2016). *See particularly City of Wahoo v. NIFCO Mech. Sys.*,¹ which is discussed at length in the Comment to NJI2d Civ. 5.04. *See also* NJI2d Civ. 2.02A, Authorities.

NJI2d Civ. 2.02B

ASSUMPTION OF RISK

A. ISSUES

In defense to the plaintiff's claim, the defendant claims that the plaintiff assumed the risk of any (injury, damage) (he, she, it) suffered.

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with the defense of "assumption of risk" the burden is upon the defendant to prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff knew of and understood the specific danger;

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¹City of Wahoo v. NIFCO

Mechanical Systems, Inc., 306 Neb. 203, 944 N.W.2d 757 (2020).

2. That the plaintiff voluntarily exposed (himself, herself, itself) to that danger; and

3. That the plaintiff's (injury, damage) occurred as a result of (his, her, its) exposure to that danger.

C. EFFECT OF FINDINGS

If the defendant *has* met (his, her, its) burden of proving that the plaintiff assumed the risk, then your verdict must be for the defendant, and this is true even if you find that the defendant was negligent and that (his, her, its) negligence was also a proximate cause of the plaintiff's (injury, damage).

If the defendant *has not* met this burden of proof, you must disregard the defense of assumption of risk.

COMMENT

See the Comment to NJI2d Civ. 2.01 and NJI2d Civ. 2.02A.

Regarding misuse in a products liability action, see NJI2d Civ. 11.25. Regarding known defects as a defense in a products liability action, see NJI2d Civ. 11.26.

AUTHORITIES

I. IN GENERAL

See the Authorities to NJI2d Civ. 2.01.¹

The court has approved of the substantially identical predecessor to this instruction.²

"[W]here assumption of risk is not made an issue by the pleadings or the evidence, such an instruction should not be given."³

2.02B

¹From among those authorities, see particularly *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988); Chapter 17A of the Restatement (Second) of Torts §§ 496A through 496B (1965); Prosser and Keeton On the Law of Torts § 68 (W.

Keeton gen. ed. 5th ed. 1984).

²See *Tank v. Peterson*, 228 Neb. 491, 496, 423 N.W.2d 752, 756 (1988); *Schmidt v. Johnson*, 184 Neb. 643, 648, 171 N.W.2d 64, 67 (1969).

³*Plambeck v. Union Pacific R. Co.*, 232 Neb. 590, 597, 441 N.W.2d 614, 619 (1989).

"[A] defendant may assert the assumption of risk defense only when the facts indicate that the plaintiff has knowingly assumed the risk of a dangerous situation created by the negligence of the *defendant*."⁴

Assumption of risk as a defense to a strict liability theory of recovery is discussed at NJI2d Civ. 11.20, Comment.

II. ANTICIPATION OF THE "SPECIFIC" DANGER

In 1992, Subpart 1 of Part B of this instruction was amended to add the word "specific." Here is the reason for that amendment. Nebraska's comparative negligence statute was changed in 1992. Neb. Rev. Stat. §§ 25-21,185.07 et seq. (Reissue 2016). One section of this statute reads as follows:

25-21,185.12. Civil actions to which contributory negligence is a defense; assumption of risk, defined; affirmative defense.

Assumption of risk is an affirmative defense. Assumption of risk shall mean that (1) the person knew of and understood the *specific* danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger. [Emphasis added.]

This echoes the preexisting jury instruction, but for the insertion of the word "specific."

The word "specific" was not in the original version of NJI2d Civ. 2.02B because the Nebraska Supreme Court had not used the word "specific" to modify "danger." Since the word "specific" was added to the

⁴*Winslow v. Hammer*, 247 Neb. 418, 428, 527 N.W.2d 631, 637 (1995) (emphasis in original) (citing and quoting authorities). In *Winslow* the plaintiff was headed home as a passenger in a minivan that struck a deer, rendering one headlight inoperative. After dealing with that situation, the driver and the plaintiff continued towards home and were involved in a head-on collision with the defendant's car, which had crossed into their lane of traffic to pass a third vehicle. The defendant argued that the plaintiff had assumed the risk of his own injury when he voluntarily continued riding in the minivan after it lost one headlight. The Court held that it is not proper to instruct on assumption of risk in this situation. First, it is inappropriate as regards the risk of one

headlight because that was not a risk created by the defendant. "[A] defendant may assert the assumption of risk defense only when the facts indicate that the plaintiff has knowingly assumed the risk of a dangerous situation created by the negligence of the *defendant*." *Id* at 428, 527 N.W.2d at 637 (emphasis in original) (citing and quoting authorities). This defendant did not break the headlight on the minivan in which the plaintiff was riding. Second, it is inappropriate as regards the risk that the defendant would cross into plaintiff's driver's lane and there would be a head-on collision because this danger was unknown to the plaintiff. "One does not assume the risk of unknown or hidden dangers." *Winslow*, 247 Neb. at 429, 527 N.W.2d at 638.

statute, the Committee believed it should be added to the pattern instruction, and, in 1992, did add it. More recently, the Nebraska Supreme Court has added the word "specific" to modify the word "danger" in its statement of the elements of assumption of the risk.⁵

This addition makes sense because part of the difference between assumption of risk and contributory negligence is this kind of specificity.⁶ "The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts."⁷

For an extensive discussion of Neb. Rev. Stat. §§ 25-21,185.07 et seq. (Reissue 2016), see NJI2d Civ. 5.04, Comment.

III. AFFIRMATIVE DEFENSE

Assumption of risk, when imposed to defeat recovery, is an affirmative defense. "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone."⁸

IV. ELEMENTS

As currently codified, "assumption of risk" as an affirmative defense means that "(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger."⁹

⁵*Pachunka v. Rogers Const., Inc.*, 271 Neb. 950, 953, 716 N.W.2d 728, 731 (2006) ("[T]he evidence must show that the plaintiff . . . knew of the specific danger . . ."); *Pleiss v. Barnes*, 260 Neb. 770, 775, 619 N.W.2d 825, 829 (2000) (same quotation).

⁶*Schmidt v. Omaha Public Power Dist.*, 245 Neb. 776, 792, 515 N.W.2d 756, 766 (1994) (contributory negligence does not require that plaintiff "have anticipated the exact risk which occurred . . .").

⁷*Pleiss v. Barnes*, 260 Neb. 770, 775, 619 N.W.2d 825, 829 (2000).

⁸*First Nat. Bank, Stromsburg v. Benedict Consol. Industries, Inc.*, 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987). *Accord, e.g., Pachunka v. Rogers Const., Inc.*, 271 Neb. 950, 954,

716 N.W.2d 728, 731 (2006); *Jay v. Moog Automotive, Inc.*, 264 Neb. 875, 883, 652 N.W.2d 872, 881 (2002); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 499, 618 N.W.2d 637, 646 (2000) (holding that an affirmative defense must be specifically pleaded to be considered); *Talle v. Nebraska Dept. of Social Services*, 249 Neb. 20, 23-24, 541 N.W.2d 30, 33-34 (1995) (citing cases); *Winslow v. Hammer*, 247 Neb. 418, 427, 527 N.W.2d 631, 637 (1995); *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 398, 423 N.W.2d 115, 120 (1988); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 449, 412 N.W.2d 56, 74 (1987); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 485, 283 N.W.2d 25, 37 (1979).

⁹*Burke v. McKay*, 268 Neb. 14, 21, 679 N.W.2d 418, 424 (2004), (quot-

The doctrine of assumption of risk applies only when the danger is known and the risk therefrom is appreciated and voluntarily accepted.¹⁰ "The assumption of risk doctrine is predicated upon an implied consent to be treated negligently, and generally relates to one voluntarily undertaking a known risk even though he is otherwise in the exercise of due care."¹¹ "[I]t applies a subjective standard geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts."¹²

"If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom."¹³ This is so even if the defendant took no care to avert the risk to the plaintiff.¹⁴ "One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury."¹⁵

Assumption of risk "applies to *known dangers* and not to those

ing Neb. Rev. Stat. § 25-21,185.12 (Reissue (1995) [now Reissue 2016])). *Accord, e.g., Hughes v. Omaha Public Power Dist.*, 274 Neb. 13, 31, 735 N.W.2d 793, 807 (2007); *Pachunka v. Rogers Const., Inc.*, 271 Neb. 950, 953, 716 N.W.2d 728, 731 (2006); *Jay v. Moog Automotive, Inc.*, 264 Neb. 875, 883, 652 N.W.2d 872, 881 (2002); *Pleiss v. Barnes*, 260 Neb. 770, 775, 619 N.W.2d 825, 829 (2000); *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 157, 595 N.W.2d 911, 916 (1999); *Dukat v. Leiserv, Inc.*, 255 Neb. 750, 754, 587 N.W.2d 96, 99 (1998) (noting that this defense requires voluntary exposure to a known danger caused by defendant's negligence).

¹⁰*E.g., Hughes v. Omaha Public Power Dist.*, 274 Neb. 13, 31-33, 735 N.W.2d 793, 807-08 (2007); *Pleiss* 260 Neb. at 775, 619 N.W.2d at 829; *Hill v. City of Lincoln*, 249 Neb. 88, 98, 541 N.W.2d 655, 662 (1996) (containing a list of elements that includes the word "specific"); *Talle v. Nebraska Dept. of Social Services*, 249 Neb. 20, 24, 541 N.W.2d 30, 34 (1995); *Winslow v. Hammer*, 247 Neb. 418, 427-28, 527 N.W.2d 631, 637 (1995) (stating that the defense only applies when plaintiff assumes risk of dangerous situation created by defendant; regarding discussion in part II of these Authorities,

this case's list of elements does not include the word "specific," but this case predated L.B. 262); *Moore By and Through Moore v. State*, 245 Neb. 735, 743-44, 515 N.W.2d 423, 429-30 (1994); *Haselhorst v. State*, 240 Neb. 891, 901, 485 N.W.2d 180, 188 (1992); *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 197, 450 N.W.2d 199, 204 (1990); *Vanek v. Prohaska*, 233 Neb. 848, 850-52, 448 N.W.2d 573, 575-76 (1989); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 450, 412 N.W.2d 56, 74 (1987); *Utsumi v. City of Grand Island*, 221 Neb. 783, 787-88, 381 N.W.2d 102, 105 (1986); *McCullough v. Omaha Coliseum Corp.*, 144 Neb. 92, 98, 12 N.W.2d 639, 643 (1944).

¹¹*Lincoln Grain, Inc. v. Coopers & Lybrand*, 216 Neb. 433, 440, 345 N.W.2d 300, 306 (1984) (dictum).

¹²*Burke v. McKay*, 268 Neb. at 21, 679 N.W.2d at 424

¹³*Munson v. Bishop Clarkson Memorial Hospital*, 186 Neb. 778, 780, 186 N.W.2d 492, 494 (1971).

¹⁴*Jeffrey v. Retzlaff*, 187 Neb. 372, 375, 191 N.W.2d 436, 437 (1971) (citing cases).

¹⁵*O'Brien v. Anderson*, 177 Neb. 635, 647, 130 N.W.2d 560, 567 (1964).

things from which, in possibility, danger may flow.”¹⁶ “One does not assume the risk of unknown or hidden dangers.”¹⁷ “[T]he standard to apply is subjective—what the particular plaintiff in fact sees, knows, understands, and appreciates.”¹⁸ In one case, the Court applied assumption of the risk where, for first time that spring, an experienced diver dove from a familiar dock, into a lake the depth of which he knew was not constant; he did so with no more than a visual check of the depth of the murky water. There was an obvious risk to the diver, even though the agent of the eventual injury was hidden.¹⁹

The doctrine may apply to minors.²⁰

V. INJURED PARTY DEPRIVED OF CHOICE

If a person “is deprived of a choice in the matter, the risk is not assumed, although it may be encountered.”²¹ Acceptance of a risk is not voluntary if, while plaintiff is exercising a right or privilege of which defendant has no right to deprive plaintiff, defendant’s conduct leaves plaintiff with no reasonable alternative but to encounter the risk.²²

VI. ASSUMPTION OF THE RISK AND CONTRIBUTORY NEGLIGENCE

The defense of assumption of risk is distinct from, but not inconsis-

¹⁶*Hickman v. Parks Const. Co.*, 162 Neb. 461, 474, 76 N.W.2d 403, 411 (1956) (emphasis in original) (concluding that walking on dark, unfamiliar ground without artificial light not assumption of risk). *Accord Hughes*, 274 Neb. at 32-33, 735 N.W.2d at 808; *Pleiss*, 260 Neb. at 775-76, 619 N.W.2d at 829.

¹⁷Same quotation: *Williamson v. Williamson v. Provident Group, Inc.*, 250 Neb. 553, 556, 550 N.W.2d 338, 340 (1996); *Winslow*, 247 Neb. at 429, 527 N.W.2d at 638. *Accord Darnell v. Panhandle Co-op. Ass’n*, 175 Neb. 40, 52, 120 N.W.2d 278, 287 (1963).

¹⁸*Williamson*, 250 Neb. at 557, 550 N.W.2d at 341 (plaintiff had extremely limited vision; standard is what she in fact saw, with her limited vision). *Accord, e.g., Hughes*, 274 Neb. at 33, 735 N.W.2d at 808; *Burke*, 268 Neb. at 21, 679 N.W.2d at 424; *Jay*, 264 Neb. at 883, 652 N.W.2d at 881.

¹⁹*Lindelov v. Peter Kiewit Sons’, Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962).

²⁰*Burke*, 268 Neb. at 21, 679 N.W.2d at 424; *Schmidt v. Johnson*, 184 Neb. 643, 647-49, 171 N.W.2d 64, 67-67 (1969); *Brackman v. Brackman*, 169 Neb. 650, 657-58, 100 N.W.2d 774, 779-80 (1960).

²¹*Dukat v. Leiserv, Inc.*, 255 Neb. 750, 754-55, 587 N.W.2d 96, 99 (1998) (finding that the route plaintiff took leaving a building was icy; assumption of risk is an affirmative defense and the burden is on the defendant; the defendant introduced no evidence of an alternative route; therefore the defendant failed to prove a prerequisite for assumption of risk). *Pachunka v. Rogers Const., Inc.*, 271 Neb. 950, 953, 716 N.W.2d 728, 731 (2006); *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967) (finding that since both exits from the building were icy; there was no assumption of risk) (quoting *Schwab v. Allou Corp.*, 177 Neb. 342, 352, 128 N.W.2d 835, 841 (1964)).

²²*Fiscel v. Beach*, 254 Neb. 678, 682, 578 N.W.2d 52, 55 (1998) (involving ice).

tent with, contributory negligence. The two defenses may arise under the same set of facts.²³ "The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event."²⁴ "The subjective standard involves what 'the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence.'"²⁵

As noted above, in part II of these Authorities, part of the difference between assumption of risk and contributory negligence is specificity. Contributory negligence does not require that plaintiff "have anticipated the exact risk which occurred"²⁶

The defense of assumption of risk involves a choice made more or less deliberately and negates a defendant's liability without regard to whether the plaintiff acted with due care or not. The defense of contributory negligence, on the other hand, involves a failure to exercise due care. Assumption of risk relates to a mental state of willingness, while contributory negligence relates to conduct.²⁷

In commentary directed to *Mandery v. Chronicle Broad. Co.*, but really relevant to most all of the discussion in these Authorities, Dean Harvey Perlman stated:

1. The only issue dividing the court [in *Mandery*] is whether

²³*E.g.*, *Cassio v. Creighton University*, 233 Neb. 160, 172-75, 446 N.W.2d 704, 712-14 (1989); *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Sandberg v. Hoogensen*, 201 Neb. 190, 198-99, 266 N.W.2d 745, 749-50 (1978); *Garcia v. Howard*, 200 Neb. 57, 61, 262 N.W.2d 190, 193 (1978); *Circo v. Sisson*, 193 Neb. 704, 710, 229 N.W.2d 50, 53 (1975); *Munson v. Bishop Clarkson Memorial Hospital*, 186 Neb. 778, 780, 186 N.W.2d 492, 494 (1971); *Landrum v. Roddy*, 143 Neb. 934, 946, 12 N.W.2d 82, 89 (1943).

²⁴*Dukat v. Leiserv, Inc.*, 255 Neb. 750, 754, 587 N.W.2d 96, 99 (1998). *Accord, e.g.*, *Talle v. Nebraska Dept. of Social Services*, 249 Neb. 20, 24, 541 N.W.2d 30, 34 (1995).

²⁵*Dukat*, 255 Neb. at 754, 587 N.W.2d at 99 (quoting *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967), in turn quoting the Restatement (Second) of Torts § 496

D, comment c). *See also Tichenor v. Lohaus*, 212 Neb. 218, 227, 322 N.W.2d 629, 634 (1982).

²⁶*Schmidt v. Omaha Public Power Dist.*, 245 Neb. 776, 792, 515 N.W.2d 756, 766 (1994).

²⁷*Jay v. Moog Automotive, Inc.*, 264 Neb. 875, 883, 652 N.W.2d 872, 881 (2002); *Talle*, 249 Neb. at 25-26, 541 N.W.2d at 34-35; *Sikyta v. Arrow Stage Lines, Inc.*, 238 Neb. 289, 299-305, 470 N.W.2d 724, 731-34 (1991) (including a particularly lengthy discussion); *Cassio v. Creighton University*, 233 Neb. 160, 173, 446 N.W.2d 704, 713 (1989); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 450, 412 N.W.2d 56, 74 (1987); *Sandberg v. Hoogensen*, 201 Neb. 190, 199, 266 N.W.2d 745, 750 (1978) (citing cases). Regarding the interplay between assumption of risk and comparative negligence, *see Annot.*, 16 ALR 4th 700 (1982).

there is a factual basis for assumption of risk. The majority, believing assumption of risk requires the plaintiff to have specific, subjective knowledge of the risk, could find no evidence that plaintiff knew the joists were missing. The dissent focusing on the consent base for assumption of risk argues that plaintiff can consent to take his chances of unknown risks which creates here a factual issue for the jury.

2. The court finds itself in this hairsplitting exercise because of its insistence that it can draw a meaningful distinction between assumption of risk and contributory negligence even in the face of a growing recognition among other courts that the distinction is not a meaningful one. The majority in defining its "definite demarcation" between the defenses points to the fact that assumption of risk requires a "subjective" knowledge of the risk where contributory negligence permits an objective standard. Thus if a plaintiff specifically knows of a risk and unreasonably confronts it he is still guilty of contributory negligence. Thus contributory negligence is broad enough to govern *all* cases of plaintiff misbehavior *unless* the court wishes to bar a plaintiff from recovery where he knows of a danger and *reasonably* confronts it.

To solve this problem the Nebraska court has invented "exceptions" to assumption of risk situations to make [assumption of the risk] work like contributory negligence

Some courts have recognized the value of abandoning assumption of risk as a defense in most circumstances, retaining it only for circumstances where a true agreement to accept the risk is present.²⁸

VII. ASSUMPTION OF THE RISK AND A SPECIAL RELATIONSHIP BETWEEN THE PARTIES

Most Nebraska cases involving assumption of risk concern some special relationship between the parties.²⁹ Not all of them do, however.³⁰

²⁸Harvey Perlman, Annual Institute on the Annual Survey of Nebraska Law, Nebraska Tort Law 1987-88, Review and Comments 17 (1988) (commenting on *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 399-400, 423 N.W.2d 115, 120-21 (1988)).

²⁹See, e.g., *Schwartz v. Salvage*, 203 Neb. 158, 277 N.W.2d 681 (1979)

(involving a mail carrier who was a business invitee); *Sandberg v. Hoogensen*, 201 Neb. 190, 266 N.W.2d 745 (1978), and *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943), (involving an automobile guest); *Jeffrey v. Retzlaff*, 187 Neb. 372, 191 N.W.2d 436 (1971), (involving a contract and a participant in stock car race); *Munson v. Bishop Clarkson Memorial Hospital*,

VIII. ASSUMPTION OF RISK AND STRICT LIABILITY

Assumption of risk as a defense to a strict liability theory of recovery is discussed at NJI2d Civ. 11.20, Comment.

NJI2d Civ. 2.02C

EXTRAORDINARY FORCE OF NATURE

A. ISSUES

In defense to the plaintiff's claim, the defendant claims that the only proximate cause of any (injury, damage) suffered by the plaintiff was an extraordinary force of nature.

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with this defense, the burden is upon the defendant to prove by the greater weight of the evidence both of the following:

1. That such force of nature was so extraordinary that it could not have been reasonably anticipated or expected; and

2. That this extraordinary force of nature was the only proximate cause of the (insert descriptive word such as occurrence, accident, collision, fall, et cetera) and the resulting (injury, damage) suffered by the plaintiff.

186 Neb. 778, 186 N.W.2d 492 (1971), (involving a hospital, patient); Barton v. Hobbs, 181 Neb. 763, 151 N.W.2d 331 (1967) and Gamble v. Gamble, 171 Neb. 826, 108 N.W.2d 92 (1961) (involving an employee); Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N.W.2d 776 (1962), (involving a licensee); Wax v. Co-Operative Refinery Ass'n, 154 Neb. 805, 49 N.W.2d 707 (1951) (involving a firefighter who was a licensee); Hines v. Martel Telephone Co., 127 Neb. 398, 255 N.W. 233 (1934) (independent contractor); Thompson v. Young Men's Christian Ass'n, 122 Neb. 843, 241 N.W. 565 (1932) (involving a patron who was an invitee).

³⁰Garcia v. Howard, 200 Neb. 57,

262 N.W.2d 190 (1978) (involving a stranger struck by defendant's car); Schmidt v. Johnson, 184 Neb. 643, 171 N.W.2d 64 (1969) (involving a 13-year-old boy riding with legs dangling over edge of tailgate of pick-up truck rear-ended by defendant). *See also* Buchanan v. Prickett & Son, Inc., 203 Neb. 684, 690-91, 279 N.W.2d 855, 859 (1979) (stating that "the fireman's rule"—the rule negating liability to firefighters by one whose negligence is a cause of a fire that in turn injures the firefighter—is at least partly based upon the theory of assumption of the risk; regarding firefighter's rule, *see* NJI2d Civ. 3.08, and *see* NJI2d Civ. 8.11).

C. EFFECT OF FINDINGS

If the defendant *has* met this burden of proof, then your verdict must be for (him, her, it).

If the defendant *has not* met this burden of proof, then you must disregard this particular defense in reaching your decision in this case.

COMMENT & AUTHORITIES

- I. GENERAL CROSS REFERENCES
- II. EXTRAORDINARY FORCE OF NATURE
- III. AFFIRMATIVE DEFENSE
 - A. THE BURDEN OF PLEADING AND PROVING
 - B. IS EXTRAORDINARY FORCE OF NATURE AN AFFIRMATIVE DEFENSE?
 - C. AN EXAMPLE OF WHAT IT TAKES TO BE AN EXTRAORDINARY FORCE OF NATURE
- IV. EXTRAORDINARY FORCE OF NATURE AND COMPARATIVE NEGLIGENCE

I. GENERAL CROSS REFERENCES

See the Comment to NJI2d Civ. 2.01 and NJI2d Civ. 2.02A. Regarding the unavoidable accident doctrine, see NJI2d Civ. 2.02D, Comment.

II. EXTRAORDINARY FORCE OF NATURE

This defense was previously referred to as “acts of God.” In the context of this instruction, “acts of God” is no more than a label, and not a very precise label at that. In recognition of the fact that this defense is not meant to refer to a volitional act on the part of God, but rather is meant to refer to an unusual and extraordinary natural occurrence, and in the interest of simplifying these instructions and making them clearer to the jurors who must use them, the Committee has removed references to that nondescriptive and possibly confusing label. This is in line with the approach of the Restatement of Torts, Restatement (Second) of Torts § 451 (1965), and it is not a substantive change.

The disservice done by labeling this defense “act of God,” is illustrated by *Davis v. Union Pac. R.R.*¹ A cyclone had overturned a railroad car. A stove that had been fastened to the floor of the car came loose and was thrown against the plaintiff. The plaintiff alleged that,

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Neb. 769, 157 N.W. 964 (1916).

¹Davis v. Union Pac. R. Co., 99

while it was an act of God that overturned the car, had the stove been properly fastened to the floor of the car it would not have broken loose and injured him. The majority opinion says "that an act of God is no defense if defendant's negligence was a concurrent cause of the injury."² Hamer, J., dissenting, said this about negligence that allegedly causes injury in concurrence with an act of God. "That is only another way of saying that man is stronger than the Supreme Power. The act of God is an act of omnipotence, or power which human agency cannot prevent or stay."³ Judge Hamer said that plaintiff's allegation "undertakes to make the power of man superior to the power of God. When the act of God is without power to accomplish that which it seeks to do when arrayed against the power of man, then plaintiff may present such a problem."⁴ The "act of God" that is the subject of this defense in the law need not rise to the level of an act of Omnipotence, an act beyond the power of man to affect. It certainly is not meant to be the sort of volitional act implied in the phrase "When the act of God is without power to accomplish that which it seeks to do . . ."⁵ The Committee believes that it is a disservice to more than just the law to label this defense "act of God."

III. AFFIRMATIVE DEFENSE

A. THE BURDEN OF PLEADING AND PROVING

As noted above, "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone."⁶ Note, however, that, as explained below, with the possible exception of strict liability cases extraordinary force of nature is not an affirmative defense to a personal injury action if defendant's negligence was a concurrent cause, *i.e.*, a proximate cause, of plaintiff's injury.⁷

²*Id.* at 770-71, 157 N.W. at 965.

³*Id.* at 775, 157 N.W. at 967.

⁴*Id.*, at 774, 157 N.W. at 966.

⁵*Id.*

⁶First Nat. Bank, Stromsburg v. Benedict Consol. Industries, Inc., 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987). *But see* part III of the Comment, above. *See also, e.g.*, Maloney v. Kaminski, 220 Neb. 55, 65, 368 N.W.2d 447, 456 (1985) "Even though the [extraordinary force of nature] was pled and timely objection was made to the trial court's refusal to so instruct, this assignment of error must fail because the evidence does not support

the defense. It is clear that it is the duty of the trial court to instruct the jury only on issues which are pled and which find support in the evidence." *Id.*, at 65, 368 N.W.2d at 456 (citing cases); Baum v. Scotts Bluff County, 172 Neb. 225, 235, 109 N.W.2d 295, 301-02 (1961); Cover v. Platte Val. Public Power and Irr. Dist., 162 Neb. 146, 154-55, 75 N.W.2d 661, 668-69 (1956); Snyder v. Farmers Irr. Dist., 157 Neb. 771, 776-77, 61 N.W.2d 557, 561-63 (1953) (citing cases).

⁷*Cover*, above; Maloney, 220 Neb. at 66, 368 N.W.2d at 456; Long v. Crystal Refrigerator Co., 134 Neb. 44, 52-53, 277 N.W. 830, 835 (1938); Davis

B. IS EXTRAORDINARY FORCE OF NATURE AN AFFIRMATIVE DEFENSE?

While it has been held that whether an extraordinary natural occurrence was the only proximate cause of an injury is in the nature of an affirmative defense and the burden of proof is on the defendant, the Committee believes that this issue is really no more than an aspect of proximate cause: if plaintiff proves that defendant's negligence was a proximate cause, then an extraordinary natural occurrence cannot have been the only proximate cause. Since the burden of proving proximate cause is generally on the plaintiff, and since this instruction puts a proximate cause burden on the defendant, the Committee believes that this instruction should not be given except, as discussed below, in a case where the defendant has some special duty to the plaintiff.

Before further explaining that position, a discussion of the precedent to the contrary is warranted. The discussion begins with the court's three opinions in *City of McCook v. McAdams*.⁸ *McCook* #3.

The issue with the instructions in *McCook* was whether an extraordinary natural occurrence was the only proximate cause of an incident. The placement of the burden of proof on the defendant first came about in cases involving common carriers which held that "acts of God" were an exception to the common carrier's common-law liability as insurers of goods and passengers carried. In the common carrier cases "act of God" was an affirmative defense, with the burden of proof on the common carrier.⁹

McCook #2 is the first Nebraska case to discuss the placement of this burden in "an ordinary action in tort for damages caused by some negligent act or omission."¹⁰ This kind of case stands on a different footing than the common-carrier case. In this "ordinary action in tort," the issue is not in the nature of an affirmative defense, and the burden of proof is not defendant's. The plaintiff must prove negligence and proximate cause, and when the defendant puts on evidence of an act of God the defendant is doing no more than putting on evidence in negation of proximate cause. This does not affect the burden of proof.¹¹

And then, on second rehearing, and referring to the just discussed statements, *McCook* #3 said this:

v. Union Pac. R. Co., 99 Neb. 769, 770-71, 157 N.W. 964, 965 (1916); *Amend v. Lincoln & N.W.R. Co.*, 91 Neb. 1, 4, 135 N.W. 235, 236 (1912).

⁸*City of McCook v. McAdams*, 76 Neb. 1, 106 N.W. 988 (1906); *City of McCook v. McAdams*, 76 Neb. 1, 110 N.W. 1005 (1907) (opinion on first rehearing) (adhering to previous judg-

ment); *City of McCook v. McAdams*, 76 Neb. 1, 114 N.W. 596 (1908) (opinion on second rehearing) (vacating previous judgment).

⁹*McCook* #2, 76 Neb. at 8, 110 N.W. at 1006.

¹⁰*Id.* at 9, 110 N.W. at 1006.

¹¹*Id.* at 7-10, 110 N.W. at 1006.

We think these statements hardly applicable to the question before us, for the instruction complained of only cast the burden . . . on the defendant after the jury had been convinced by the plaintiff's proof that the defendant had been guilty of negligence to his damage. While the burden is on the plaintiff to show that his loss is the result of the defendant's negligence, when he has established [that] . . . , he has met all of the conditions the law imposes upon him in order to recover, before any evidence is produced by the defendant. He is not required to go further, and to anticipate and disprove all [the defendants] defenses When the plaintiff has closed his case, the defendant may show that it was not guilty of the negligent act complained of by either direct or indirect proof which negatives the proof offered by the plaintiff as to the fact of its negligence or the plaintiff's damage. Further than this, the defendant may plead and offer proof of matters in excuse or justification, as that the injury complained of would have occurred in any event without the concurrence of the defendant's negligence, or that some outside, independent force, of such nature that the defendant in its duty of observing care could not reasonably have anticipated or guarded against, was the proximate cause of the injury. Such defenses, while not technically confession and avoidance, partake of the nature of such defense. While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, unexplained, would establish the defendant's negligence.

What this seems to say is that once the plaintiff has made a prima facie case, the defendant must present something in rebuttal or the defendant will lose. *McCook #3*, however, puts a different characterization on what is happening.

[These matters] are affirmative in their nature and the burden of proving them is upon the person asserting them.

In [*McCook #2*,] a distinction is sought to be drawn between such defense if pleaded by a common carrier and if offered by another, but we see no reason for the distinction, provided that the person seeking to assert it stands in a similar relation to the person injured. A carrier has undertaken a special duty to carry safely. If he fails to do so a presumption arises against him, which he must explain away. In this case the city had constructed a drainage system which the jury found it had neglected to keep in repair, and that by its negligence the plaintiff apparently was injured. In the one case, the presumption took the place of evidence against the carrier; in the other, the jury found the facts against the city as to neglect to keep up the ditches. The burden then rests alike on the carrier and the city to produce proof to show that its

negligence was not the proximate cause of the loss or injury, but that the loss was attributable to an independent cause without the concurrence of its negligence, or, in other words, that, even if it had not been negligent, the injury would have occurred.¹²

The conclusion in the final sentence just quoted, *i.e.*, “[t]he burden then rests alike on . . .,” does not follow from the premise. This use of the language of presumptions confuses presumptions with rules of law. In the case of the common carrier, the rule of law was that the carrier was responsible for any loss of goods carried unless it could prove certain exceptional reasons for the loss, usually an act of either God or an enemy of the people (formerly an enemy of the king). In the case of a common carrier, a rule of law assigns to defendant the initial burden of proof on the issue of proximate cause. In the case of the *City of McCook*, defendant’s liabilities change once the plaintiff puts on a *prima facie* case of proximate cause. The legal effect of those two rules is not the same. The syllogism in the last previous quotation does not hold up.

In addition, *McCook* #3 said that once the plaintiff has proved that defendant’s negligence was a proximate cause, it is up to the defendant to prove that an extraordinary natural occurrence was the only proximate cause. If defendant’s negligence was a proximate cause, then the natural occurrence cannot be the only proximate cause, and vice versa. *McCook* #3 really places the same burden of proof on both the plaintiff and the defendant.

(It is possible that what *McCook* #3 really means to say is this: Once the plaintiff meets the burden of production and makes a *prima facie* case that the defendant’s negligence was a proximate cause of the plaintiff’s damage then the burden of production shifts to the defendant and, in the context of *McCook* #3, the defendant can rebut the plaintiff’s *prima facie* case. That is, the plaintiff can put on enough evidence that a reasonable trier of fact could find that the defendant’s negligence was a proximate cause of damage to the plaintiff and, therefore, the plaintiff survives a motion to dismiss. Then the defendant can put on evidence that persuades the trier of fact that that defendant was not negligent or did not suffer any damage or, in the context of *McCook* #3, that defendant’s negligence was not a proximate cause of the plaintiff’s damage. In other words, this is all about the difference between the burden of production and the burden of proof, and *McCook* #3 might be saying that both parties have a burden of proof when it really means that both have a burden of producing evidence and from the evidence produced the trier of fact will decide whether the plaintiff has met the burden of proof. Though it seems quite possible this is what *McCook* #3 means to say, it is not what it does say.)

Making this issue an affirmative defense really changes the place-

¹²*McCook* #3, 76 Neb. at 13, 114 N.W. at 596-97.

ment of the burden of proving proximate cause. Outside of the use of this issue as a defense in a case in the nature of a strict liability case, this extraordinary natural occurrence should be just another aspect of plaintiff's prima facie case—i.e., producing sufficient evidence of proximate cause to get past a motion to dismiss—and defendant's burden to produce evidence to rebut (all or part) of plaintiff's prima facie case. *McCook* #3 takes a burden placed on a defendant who has a special duty and makes it applicable to everyone wanting to raise a certain issue.

The Committee is of the opinion that more often than not the subject covered in this instruction is just an aspect of proximate cause: if the plaintiff proves that defendant's negligence was a proximate cause of the incident and the injury, then plaintiff has proved that an extraordinary natural occurrence was not the only proximate cause. The defendant is free to put on rebuttal evidence. And, if the plaintiff makes a prima facie case, the defendant may have to come forward with rebuttal evidence to avoid losing. This is very similar to the subject covered by NJI2d Civ. 3.44.

Since *McCook* #3, this instruction's placement of the burden does not seem to have been challenged. In opposition to *McCook* #3 and the cases that have followed its rule, the Committee believes that this instruction should not be used in what *McCook* #2 referred to as "an ordinary tort action;" it should be used only in cases where the defendant has a special duty to the plaintiff.

C. AN EXAMPLE OF WHAT IT TAKES TO BE AN EXTRAORDINARY FORCE OF NATURE

[F]or a flood to come within the term "act of God", it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected [A]n act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact.¹³

IV. EXTRAORDINARY FORCE OF NATURE AND COMPARATIVE NEGLIGENCE

If the above is correct and in most cases extraordinary force of

¹³Cover v. Platte Val. Public Power 75 N.W.2d 661, 668-69 (1956).
and Irr. Dist., 162 Neb. 146, 154-55,

nature is but an aspect of proximate cause, how is it to be handled under Nebraska's comparative negligence statute? *See* Neb. Rev. Stat. §§ 25-21,185.07 *et seq.* (Reissue 2016), discussed in detail at NJI2d Civ. 5.04, Comment.

This statute requires that in “[c]ivil actions to which contributory negligence is a defense,”¹⁴ and where “is more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only.”¹⁵ This apportionment applies where there is more than one defendant in the case when the case goes to the jury¹⁶ and where there are there are “other persons” liable to the plaintiff who were either never named in the lawsuit or dismissed therefrom by “a release, a covenant not to sue, or a similar agreement entered into by a claimant and a person liable.”¹⁷

What happens, then, in a case involving only one defendant and an extraordinary force of nature? There is only one “person” liable. Does this mean the plaintiff recovers all of his or her damages from the one defendant or are the plaintiff’s damages to be reduced by the portion of damages attributable to the extraordinary force of nature? The extraordinary force of nature is not a person. If we count corporations, partnerships, unions, and the like as artificial persons¹⁸ and therefore within the statute, the extraordinary force of nature still is not a person. A literal reading of the statute suggests that in this situation the plaintiff would recover all of his or her damages from the defendant—there would be no apportionment, no diminishment of plaintiff’s damages, by reason of the extraordinary force of nature.

Whether this is the only interpretation of this statute when one proximate cause of the plaintiff’s damages is extraordinary force of nature or the statute can be read to include apportioning a part of plaintiff’s damages to the extraordinary force of nature remains to be litigated.

All of this is discussed further at in the Comment to NJI2d Civ. 5.04 and the statute on which this discussion is bases is in the Authorities to 5.04. A general discussion of concurring cause can be found at NJI2d Civ 3.42.

See also NJI2d Civ. 3.42, Authorities.

¹⁴Neb. Rev. Stat. §§ 25-21,185.07, 25-21,185.08, 25-21,185.09, 25-21,185.10, 25-21,185.11, (Reissue 2016).

¹⁵*Id.* at § 25-21,185.10.

¹⁶*Maxwell v. Montey*, 262 Neb. 160, 168, 631 N.W.2d 455, 462 (2001).

¹⁷Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008), as discussed in *City of*

Wahoo v. NIFCO Mechanical Systems, Inc., 306 Neb. 203, 210-11, 944 N.W.2d 757, 762-63 (2020).

¹⁸*See, e.g., Citizens United v. Federal Election Com’n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

NJI2d Civ. 2.02D

MISCELLANEOUS AFFIRMATIVE DEFENSES

In defense to the plaintiff's claim, the defendant claims (here state such defense as is appropriate under the pleadings and the evidence).

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

(Here insert burden of proof and effect of findings instructions tailored for the particular defense.)

COMMENT & AUTHORITIES

I. IN GENERAL

"The essence of an affirmative defense is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits the defendant to avoid liability for the acts alleged."¹ "The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone."² "[T]he normal procedure for pleading an affirmative defense is to place it in the answer. However, the purpose of that requirement is to give the opposing party adequate opportunity to meet the defense. Bearing that in mind, we know of no reason why it cannot properly be raised in a motion for summary judgment."³ It may also be raised in a rule 12(b)(6) motion, which may be styled as a motion to dismiss.⁴

2.02D

¹Lawry v. County of Sarpy, 254 Neb. 193, 198, 575 N.W.2d 605, 608 (1998) (overruled on other grounds by, Davis v. State, 297 Neb. 955, 902 N.W.2d 165 (2017)). Accord Funk v. Lincoln-Lancaster County Crime Stoppers, Inc., 294 Neb. 715, 728, 885 N.W.2d 1, 11 (2016) ("[A]n affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.").

²Same quotation: Nathan v. McDermott, 306 Neb. 216, 235, 945 N.W.2d 92, 108 (2020); Hill v. City of Lincoln, 249 Neb. 88, 96, 541 N.W.2d 655, 661 (1996) (quoting First Nat'l

First Nat. Bank, Stromsburg v. Benedict Consol. Industries, Inc., 224 Neb. 860, 865, 402 N.W.2d 259, 262 (1987)). See also, e.g., Maloney v. Kaminski, 220 Neb. 55, 65, 368 N.W.2d 447, 456 (1985). Accord Funk, 294 Neb. at 728, 885 N.W.2d at 11.

³DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 819, 316 N.W.2d 772, 775-76 (1982) (involving the affirmative defense of res judicata).

⁴Effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. Weeder v. Central Community College, 269 Neb. 114, 691 N.W.2d 508 (2005). "A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer." Weeder, 269

“Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal.”⁵

See generally this Comment and Authorities and the Comment & Authorities to NJI2d Civ. 2.01, Comment, and 12.04, Comment & Authorities. See also the various specific cross-references in part II of this Comment and Authorities.

II. VARIOUS AFFIRMATIVE DEFENSES

Various affirmative defense instructions are found in the various chapters of this work that deal with the causes of action to which they are a defense. Following hereafter, in the interest of collecting them in one place for ease of access, are some of the affirmative defenses that are not specifically instructed on elsewhere in this work and cross-references to some of the affirmative defenses that are instructed on elsewhere. (Not all of these defenses will raise jury questions. Some that do not are listed here in the interest of completeness.)

■ **CONTRACT ACTION, MISCELLANEOUS DEFENSES:** See NJI2d Civ. 15.20 et seq.

■ **ELECTION OF REMEDIES:** “[A]n election of remedies is an affirmative defense.”⁶

■ **EXCLUSIONARY CLAUSE IN INSURANCE POLICY:** “The insurer bears the burden of establishing as an affirmative defense that an event falls within an exclusionary clause.”⁷ Regarding insurance policies generally, see NJI2d Civ. 15.01, Comment & Authorities.

■ **GOVERNMENTAL IMMUNITY:** Prior to October 6, 2017, there were two situations in which governmental immunity was an affirmative defense. First, the exceptions to the immunity-waivers in the State Tort Claims Act and the Political Subdivisions Tort Claims Act were issues that the State had to plead and prove as affirmative defenses. *Davis v. State* specifically overrules the cases that had held that these exceptions are affirmative defenses, holding, instead, that “the excep-

Neb. at 123, 691 N.W.2d at 515. This affirmative defense may now be raised in the answer or in a rule 12(b)(6), and the 12(b)(6) motion may be styled a Motion to Dismiss. *Weeder*, 269 Neb. at 122-23, 691 N.W.2d at 515 (involving the affirmative defense of failure to comply with the notice requirements of the Political Subdivision Tort Claims Act).

⁵*Farm Bureau Ins. Co. of Nebraska v. Bierschen*, 250 Neb. 146,

151, 548 N.W.2d 322, 325 (1996). *Accorde, e.g., Linscott*, 288 Neb. at 286, 847 N.W.2d at 292 (“An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.”).

⁶*Porter v. Smith*, 240 Neb. 928, 937, 486 N.W.2d 846, 853 (1992). See also NJI2d Civ. 15.20, Comment.

⁷*Spulak v. Tower Ins. Co., Inc.*, 251 Neb. 784, 791, 559 N.W.2d 197, 202 (1997).

tions are jurisdictional in nature.”⁸ In any case, suits against the state and its political subdivisions are tried by the court; they are nonjury trials. All of this and much more is discussed at NJI2d Civ, 8.72, Comment & Authorities.

■ **JOINT ENTERPRISE:** NJI2d Civ. 6.43, Comment & Authorities, discusses joint enterprise. This may figure into an affirmative defense in cases where a passenger from one vehicle sues the driver of the other vehicle.

■ **LACHES:**

The defense of laches is not favored in Nebraska. Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice. Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage of prejudice of another.⁹

■ **MITIGATION OF DAMAGES:** See NJI2d Civ. 4.70.

■ **PAYMENT OF DEBT:** “[P]ayment on a debt is an affirmative defense, and the burden of proving it rests with the party alleging it.”¹⁰

■ **RECOUPMENT:**

The defense of recoupment survives as long as a plaintiff’s cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations. . . . [R]ecoupment must arise out of the same transaction or occurrence which is the basis of a plaintiff’s action and is merely defensive, that is, does not seek an affirmative judgment in the

⁸Davis v. State, 297 Neb. 955, 960, 902 N.W.2d 165, 175 (2017). *Accord* Amend v. Nebraska Public Service Commission, 298 Neb. 617, 622-23, 905 N.W.2d 551, 556 (2018) (listing some of the cases that Davis overruled, see *id.* at 622, n.5, 905 N.W.2d at 556, n.5).

⁹Same quotation: In re Estate of Adelung, 306 Neb. 646, 675, 947 N.W.2d 269, — (2020) (footnotes omitted); Cleaver-Brooks, Inc. v. Twin City Fire Insurance Company, 291 Neb. 278, 290, 865 N.W.2d 105, 115 (2015) (footnotes omitted); Schellhorn v. Schmieding, 288 Neb. 647, 654, 851 N.W.2d 67, 73 (2014) (citations omit-

ted). *Accord* In re Estate of Forgey, 298 Neb. 865, 895, 906 N.W.2d 618, 640 (2018); Farmington Woods Homeowners Ass’n, Inc. v. Wolf, 284 Neb. 280, 288-89, 817 N.W.2d 758, 766 (2012); Dutton-Lainson Co. v. Continental Ins. Co., 271 Neb. 810, 832, 716 N.W.2d 87, 104 (2006); Vanice v. Oehm, 255 Neb. 166, 171, 582 N.W.2d 615, 619 (1998) (distinguishing the equitable defense of laches and equitable estoppel).

¹⁰Vistar Bank v. Thompson, 247 Neb. 856, 858, 530 N.W.2d 910, 911 (1995) (citing cases). *Accord* Vistar Bank v. Thompson, 253 Neb. 166, 168, 568 N.W.2d 901, 902 (1997).

action. . . . To state an affirmative defense of recoupment, the defendant must prove the elements of his claim and that it occurred in the very same action as the plaintiff's claim against him.¹¹

Regarding the elements of fraudulent misrepresentation, *see* NJI2d Civ. 9.01 (tort action), and 15.08, 15.21 (contract action).

■ **REAL PARTY IN INTEREST:** "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304." Neb. Rev. Stat. § 25-301 (Reissue 2016) (section 25-304 has to do with executors, administrators, guardians and the like). Except where the objection raised goes to the existence of the cause of action or where the facts showing interest are essential to the cause of action, this is an affirmative defense and, as such, cannot be raised by general denial but must be specially pleaded.¹²

■ **RELEASE, SURRENDER OF A CLAIM BY:** "One who seeks to avoid the legal effect of a release of a cause of action for personal injuries has the burden of pleading and proving the facts which entitle him to such relief."¹³

Settlement of a claim against one wrongdoer does not release other wrongdoers from liability.¹⁴ There are situations where the acceptance of satisfaction from and the release of a tortfeasor will also release from liability other tortfeasors or parties who are vicariously liable.¹⁵

■ **RES JUDICATA:** "Res judicata is an affirmative defense which must ordinarily be pleaded to be available."¹⁶

The doctrine of res judicata, or claim preclusion bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former

¹¹Nathan v. McDermott, 306 Neb. 216, 235-36, 945 N.W.2d 92, 108-09 (2020) (paragraph breaks, footnotes, and internal quotation marks omitted) (citing and discussing cases).

¹²Polk County v. Wombacher, 229 Neb. 239, 241-42, 426 N.W.2d 266, 269 (1988) (citing cases).

¹³Nicholson v. Braddock, 201 Neb. 531, 532, 270 N.W.2d 314, 315 (1978). *See* Millman v. County of Butler, 244 Neb. 125, 129-30, 504 N.W.2d 820, 823-24 (1993); McCurry v. School Dist. of Valley, 242 Neb. 504, 514-18, 496 N.W.2d 433, 440-44 (1993) (discussing a release generally and as compared with a covenant not to sue); Ericksen

v. Pearson, 211 Neb. 466, 319 N.W.2d 76 (1982); Crnkovich v. Scaletta, 203 Neb. 22, 23, 277 N.W.2d 416, 419-20 (1979). 76 C.J.S., *Release* § 57-59 (2009). Regarding Legislative Bill 88 (1st Sess., 92nd Legis. 1991) and Legislative Bill 262 (2d Sess., 92nd Legis. 1992) as they relate to release, *see* the Comment to NJI2d Civ. 5.04.

¹⁴Millman, 244 Neb. at 130, 504 N.W.2d at 824.

¹⁵This is discussed at NJI2d Civ. 6.02, Comment & Authorities.

¹⁶Martin v. Nebraska Dept. of Correctional Services, 267 Neb. 33, 39, 671 N.W.2d 613, 618 (2003).

judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigation in the prior action.¹⁷

■ **STATE OF THE ART:** Instruction on the affirmative defense of state of the art is found and discussed at NJI2d Civ. 11.31.

■ **STATUTES OF LIMITATIONS:** Regarding statutes of limitations, *see* the discussion that follows here, the discussion at NJI2d Civ. 5.04, Comment, part II, and the discussion and cross references at NJI2d Civ. 12.04, Comment & Authorities. The latter Comment involves the professional negligence statute of limitations but much of what is said there has to do with general law applying to such statutes across the board. In a breach of contract action, *see also* the Statute of Limitations part of the Comment to NJI2d Civ. 15.01. For these cross references and more, *see* NJI2d Civ. Index, Statutes of Limitations.

"The general rule is that where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts."¹⁸

¹⁷*See* RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC, 294 Neb. 326, 333-34, 886 N.W.2d 240, 249-50 (2016). *See also* Martin, above; Ballard v. Giltner Public Schools, School Dist. No. 2, Hamilton County, 241 Neb. 970, 974, 492 N.W.2d 855, 857 (1992) (involving breach of an employment contract); Kerndt v. Ronan, 236 Neb. 26, 458 N.W.2d 466 (1990) (concerning dissolution of a partnership; the burden is on the party relying on *res judicata*); DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 819, 316 N.W.2d 772, 775-76 (1982) (seeking a money judgment for defendant's failure to pay for goods purchased not a negligence case). *See also* Dakota Title & Escrow Co. v. World-Wide Steel Systems, Inc., 238 Neb. 519, 525, 471 N.W.2d 430, 434 (1991) ("An appellate court is not

precluded from raising the issue of *res judicata sua sponte*, although it is infrequently done.").

¹⁸*Lindner v. Kindig*, 285 Neb. 386, 393, 826 N.W.2d 868, 874 (2013). *See generally* McGill v. Lion Place Condominium Association, 291 Neb. 70, 88, 864 N.W.2d 642, 656 (2015) (noting that appellees did not "raise[] a statute of limitations defense in their answers or motions to dismiss. [And that] [t]he benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded"); *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007); *Manker v. Manker*, 263 Neb. 944, 958, 644 N.W.2d 522 (2002) ("A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to

state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.”) (regarding a demurrer, *see* the second paragraph of this footnote); *Smeal v. Olson*, 263 Neb. 900, 908, 644 N.W.2d 550, 557 (2002); *Blankenau v. Landess*, 261 Neb. 906, 909-14, 626 N.W.2d 588, 592-95 (2001) (involving the Uniform Residential Landlord and Tenant Act; *see also* *NJI2d Civ. 8.31, Comment*); *In re Estate of Reading*, 261 Neb. 897, 903, 626 N.W.2d 595, 600 (2001); *Prokop v. Hoch*, 258 Neb. 1009, 1013, 607 N.W.2d 535, 539 (2000); *Ohio Nat. Life Ins. Co. v. Rust*, 255 Neb. 372, 376-79, 585 N.W.2d 438, 442-43 (1998); *Teater v. State*, 252 Neb. 20, 24-27, 559 N.W.2d 758, 761-63 (1997) (stating that the statute begins to run as soon as cause of action accrues, action in tort accrues as soon as act or omission occurs, and, even under discovery rule, action accrues when injured party recognizes, or, in exercise of reasonable diligence, should have discovered existence of injury, not when injured party recognizes whose negligence was responsible for injury; if petition alleges cause of action ostensibly barred by statute, petition does not state cause of action unless it shows some excuse tolling operation and bar of statute; statute of limitations under State Tort Claims Act tolled until injured party reaches age of 20); *Whitten v. Whitten*, 250 Neb. 210, 212, 548 N.W.2d 338, 339 (1996) (stating that substantive rights of the parties are governed by law of state where cause of action arose, while procedural matters governed by law of forum; generally, statutes of limitations relate to remedies, not substantive rights; statute of limitations of forum governs); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 594-95, 521 N.W.2d 895, 902 (1994) (containing a general discussion of statutes of limitation, with particular discussion of fraudulent concealment delaying running of statute); *St. Paul Fire & Marine Ins. Co. v. Touche Ross*

& Co., 244 Neb. 408, 411, 507 N.W.2d 275, 278 (1993) (stating that if the face of the petition shows a cause of action barred by statute of limitations, the plaintiff must allege sufficient facts to avoid the bar of the statute); *LaPan v. Myers*, 241 Neb. 790, 792, 491 N.W.2d 46, 49 (1992) (stating that a petition alleging a cause of action ostensibly barred by statute of limitations and failing to allege facts tolling or barring operation of statute, fails to allege sufficient facts to constitute a cause of action and is demurrable); *Broekemeier Ford, Inc. v. Clatanoff*, 240 Neb. 265, 270-73, 481 N.W.2d 416, 420-421 (1992) (stating that if the face of a petition challenged under statute of limitations shows the cause of action is barred by said statute, the plaintiff must allege and prove facts sufficient to avoid bar of statute; if the face of the petition does not disclose action is barred by statute, then the defendant must plead statute as affirmative defense and prove said defense); *Millman v. County of Butler*, 235 Neb. 915, 935, 458 N.W.2d 207, 219 (1990) (noting that a statute of limitations neither creates nor extinguishes rights, but limits remedies, and said limit may be tolled or waived; the burden of proving this limitation on remedies is on the party alleging the statute as affirmative defense; if there is no evidence on the issue, then it is not submissible to finder of fact).

Note that effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Community College*, 269 Neb. 114, 691 N.W.2d 508 (2005). “A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer.” *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515. This affirmative defense may now be raised in the answer or in a rule 12(b)(6), and the 12(b)(6) motion may be styled a Motion to Dismiss. *Weeder*, 269 Neb. at 122-23, 691 N.W.2d at 515.

"The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded."¹⁹

"Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights."²⁰

"Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court."²¹ Likewise, "If the facts in a case are undisputed, the issue as to when the statute of limitations began to run is a question of law."²²

The main purpose of a statute of limitations is notice to a party, within reasonable amount of time, of a claim against the party. The limitation protects the party from having to defend against a claim that is filed long after the party could have prepared a defense. Where an amendment to the pleadings relies on the same set of facts as the original pleading, and does not introduce a new cause of action, the amendment does not prejudice the preparation of the party amended against. When the original pleadings were timely filed, then the kind of amendment just described may be allowed after the statute has run. Such an amendment does not violate the right to the statute of limitations defense. Therefore, the trial court has the discretion to allow such an amendment even after the statute has run.²³

¹⁹*McGill v. Lion Place Condominium Association*, 291 Neb. 70, 88, 864 N.W.2d 642, 657 (2015) (appellees did not "raise[] a statute of limitations defense in their answers or motions to dismiss").

²⁰*Dragon v. Cheesecake Factory*, 300 Neb. 548, 558, 915 N.W.2d 418, 425 (2018) (quoting *Harris v. Omaha Housing Authority*, 269 Neb. 981, 986, 698 N.W.2d 58, 63-64 (2005)). *Accord*, e.g., *Whitten*, 250 Neb. at 212, 548 N.W.2d at 339.

²¹Same quotation: *Andres v. McNeil Co., Inc.*, 270 Neb. 733, 740, 742, 707 N.W.2d 777, 785 (2005); *Blankenau v. Landess*, 261 Neb. 906, 908-09, 626 N.W.2d 588, 592 (2001); *Olsen v. Farm Bureau Ins. Co. of Nebraska*, 259 Neb. 329, 334, 609 N.W.2d 664, 668 (2000). *Accord* *Linder*,

285 Neb. at 390, 826 N.W.2d at 872; *Carruth v. State*, 271 Neb. 433, 436, 712 N.W.2d 575, 578 (2006); *Manker v. Manker*, 263 Neb. 944, 951, 644 N.W.2d 522 (2002).

²²*Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 824, 716 N.W.2d 87, 99 (2006); *Accord* *Carruth v. State*, 271 Neb. 433, 436, 712 N.W.2d 575, 579 (2006) (professional negligence statute of limitations).

²³*New Light Co., Inc. v. Wells Fargo Alarm Services*, 252 Neb. 958, 967-68, 567 N.W.2d 777, 783 (1997). *Accord in large part* *Genthon v. Kratville*, 270 Neb. 74, 82, 701 N.W.2d 334, 344 (2005); *Smeal v. Olson*, 263 Neb. 900, 907, 644 N.W.2d 550, 556-57 (2002) (citing cases).

“With respect to arguably competing statutes of limitations, ‘[a] special statute of limitations controls and takes precedence over a general statute of limitations’ ”²⁴

The statute of limitations that applies to “an insured’s claim for uninsured or underinsured motorist benefits” is discussed at some length at *Reimers-Hild v. State*.²⁵

Neb. Rev. Stat. § 25-207 (Reissue 2016) is the statute of limitations that applies “with regard to the establishment of a constructive trust on personal property.”²⁶

Neb. Rev. Stat. § 25-223 (Reissue 2016) is the statute of limitations that applies to an “action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property.”

“The statute of limitations for an action in equity for an accounting of estate property is 4 years.”²⁷

“‘[A] constitutional claim can become time-barred just as any other claim can.’ ”²⁸

Regarding the statute of limitations and an action for contribution and when such an action accrues, see NJI2d Civ. 2.05, Comment & Authorities.

As noted above, under recoupment, “The defense of recoupment survives as long as a plaintiff’s cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.”²⁹

“The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision [below] normally will not be set aside by an appellate court unless clearly

²⁴ *Andres v. McNeil Co., Inc.*, 270 Neb. 733, 742, 707 N.W.2d 777, 785 (2005).

²⁵ *Reimers-Hild v. State*, 274 Neb. 438, 441, 741 N.W.2d 155, 158-59 (2007) (overruled on other grounds by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)).

²⁶ *Manker v. Manker*, 263 Neb. 944, 957, 644 N.W.2d 522 (2002).

²⁷ *In re Estate of Adelung*, 306 Neb. 646, 673, 947 N.W.2d 269, 291 (2020).

²⁸ *Linder*, 285 Neb. at 391, 826 N.W.2d at 872-73 (quoting *Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 292, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983)).

²⁹ *Nathan v. McDermott*, 306 Neb. 216, 235, 945 N.W.2d 92, 108 (2020).

wrong.”³⁰ As a general rule a statute of limitations begins to run on the date the cause of action accrues and a cause of action in tort accrues on the date the act or omission occurs. This is discussed at NJI2d Civ. 5.04, in part II of the Comment.

There is an exception to this general rule: the discovery exception, a.k.a. the discovery rule. The Court has stated that though the statute of limitations

provides no exception for causes of action that are not discovered before the statute of limitations expires, we have held that in certain categories of cases, the statute of limitations begins to run on the date when the party holding the claim discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.³¹

This exception is discussed at length at NJI2d Civ. 12.04, Comment & Authorities, part VIII(G).

In addition to the discovery exception to the statute, there is the “continuing tort doctrine.” “[A] claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period.”³² This is, however, neither a separate doctrine nor an exception to the statute, but simply “a straightforward application of the statute of limitations.”³³

It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortuous conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action. This ‘continuing tort doctrine’ requires that a tortuous act—not simply the continuing ill effects of prior tortuous act—fall within the limitation period. Nor can the necessary tortuous act merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run . . . Rather, when a tort is continuing, although the initial tortuous act may have occurred longer than the statutory pe-

³⁰*Manker*, 263 Neb. at 951, 644 N.W.2d at 531. *Accord* *Behrens v. Blunk*, 284 Neb. 454, 458, 822 N.W.2d 344, 345 (2012).

³¹*Alston v. Hormel Foods Corp.*, 273 Neb. 422, 432, 730 N.W.2d 376, 385 (2007) (footnotes omitted) (“The rationale behind the discovery rule is that in certain categories of cases, the injury is not obvious and the individ-

ual is wholly unaware that he or she has suffered an injury or damage. In such cases, it is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury.”).

³²*Alston*, 273 Neb. at 429, 730 N.W.2d at 382.

³³*Alston*, 273 Neb. at 430, 730 N.W.2d at 383.

rior prior to the filing of an action, an action will not be barred if it can be based upon the continuance of that tort within that period.³⁴

When some of the damage caused by the continuing tort occurred outside the statutory limitation period (*i.e.*, before the statutory period as calculated back from the date suit is filed) and some occurred during the statutory limitation period (again, as calculated from the date suit is filed), the question arises whether the tortfeasor is liable for all of the damages the tort caused or only for those damages the tort caused during the statutory limitation period. The Court has adopted the latter approach.³⁵ If some of the damage caused by the continuing tort falls inside the time allowed by the statute of limitations and some falls outside the statute, the statute does not bar suit on the part of the tortuous act or omission that falls within the statute. "A claim for damages from a continuing tort may be brought to the extent that the claim accrued within the statutory limitations period."³⁶ That is to say that in a case where the discovery rule does not apply and, therefore, the statute of limitations is not tolled, the plaintiff runs the risk of losing damages as the limitations period runs as to various injuries"³⁷ This approach "simply allows claims to the extent that they accrue within the limitations period."³⁸

Regarding the interaction between the discovery rule and the continuing tort doctrine, "regardless of when an initial injury is discovered, the statute of limitations runs with respect to claims for successive injuries at the time they accrue There is no basis for applying th[e discovery] rule to preclude claims that are within the statutory period."³⁹

Regarding criticism of the continuing tort doctrine, see *Dondlinger v. Nelson*.⁴⁰

³⁴ *Alston*, 273 Neb. at 426-27, 730 N.W.2d at 381-82 (footnotes omitted). See also, *e.g.*, *Colwell v. Mullen*, 301 Neb. 408, 415, 918 N.W.2d 858, 865 (2018).

³⁵ *Colwell*, 301 Neb. at 415, 918 N.W.2d at 865; *Alston*, 273 Neb. at 429, 730 N.W.2d at 483.

³⁶ *Alston*, 273 Neb. at 435, 730 N.W.2d at 387. Accord *Colwell*, above.

³⁷ *Alston*, 273 Neb. at 435, 730

N.W.2d at 387.

³⁸ *Alston*, 273 Neb. at 430, 730 N.W.2d at 383. Accord *Colwell*, *supra*.

³⁹ *Alston*, 273 Neb. at 434, 730 N.W.2d at 386 (paragraph break omitted; emphasis in original).

⁴⁰ *Dondlinger v. Nelson*, 305 Neb. 894, 905-09, 942 N.W.2d 772, ___ (2020) (Miller-Lerman, J., concurring), *id.* at 909-11, 942 N.W.2d at ___ (Papik, J., concurring; joined by Stacy, J.).

"We [hold] that the filing of a petition does not toll the running of a statute of limitations for the purpose of bringing subsequent actions on the same set of facts."⁴¹

"There is no legal duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuances of the law."⁴² Regarding both the State and Political Subdivisions Tort Claims Acts, including the statutes of limitations, *see* NJI2d Civ. 8.72.

Fraudulent concealment may delay the running of the statute of limitations. Regarding fraudulent concealment and the statute, *see* NJI2d 9.02, below.

Under the doctrine of equitable estoppel, party who wrongfully conceals a material fact necessary to accrual of cause of action against him- or herself, causing the opposite party to delay filing suit, cannot use the statute-of-limitations defense; the burden to establish such estoppel is on the party who pleads it.⁴³ Regarding equitable estoppel generally, *see* the references in the Index, under Estoppel.

Regarding settlement negotiations as a possible bar to defendant's assertion of the defense of the statute of limitations, *see* Woodard v. City of Lincoln.⁴⁴

The effect of subrogation on the running of a statute of limitations is discussed in the Comment to NJI2d Civ. 12.04, Comment & Authorities.

The statute of limitations is not a bar of its own force, but "a defense to be pleaded by the party relying upon it. It follows that judicial determination of whether a claim is barred by a statute of limitations ordinarily requires both the assertion of the claim and the responsive pleading of the defense, either by answer or demurrer." *In re Estate of Reading*, 261 Neb. 897, 903, 626 N.W.2d 595, 600 (2001). *Accord, e.g.,* McGill v. Lion Place Condo. Ass'n, 291 Neb. 70, 88, 864 N.W.2d 642, 656 (2015) (appellees did not "raise[] a statute of limitations defense in their

⁴¹Sluka v. Herman, 229 Neb. 200, 202, 425 N.W.2d 891, 892 (1988). ("[A previous action] was dismissed . . . for lack of prosecution" and, filing a substituted amended petition, the plaintiff argued that the statute of limitations was tolled during the pendency of the first cause of action. The Court declined to adopt such a rule.)

⁴²Estate of McElwee v. Omaha Transit Authority, 266 Neb. 317, 326-27, 664 N.W.2d 461, 470 (2003).

⁴³Klosure v. Johnson Grant & Co., 229 Neb. 369, 375, 427 N.W.2d 44, 48 (1988).

⁴⁴Woodard v. City of Lincoln, 256 Neb. 61, 69, 588 N.W.2d 831, 837 (1999) (holding that pendency of negotiations is not enough to establish an estoppel); Reifschneider v. Nebraska Methodist Hosp., 233 Neb. 695, 447 N.W.2d 622 (1989).

answers or motions to dismiss. . . . The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded"); *Manker v. Manker*, 263 Neb. 944, 952, 644 N.W.2d 522 (2002); *Broekemeier Ford, Inc. v. Clatanoff*, 240 Neb. 265, 270–73, 481 N.W.2d 416, 420–421 (1992); *Vielehr v. Malone*, 158 Neb. 436, 438, 63 N.W.2d 497, 501 (1954). (Note that effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 691 N.W.2d 508 (2005). "A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer." *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515. This affirmative defense may now be raised in the answer or in a rule 12(b)(6), and the 12(b)(6) motion may be styled a Motion to Dismiss. *Weeder*, 269 Neb. at 122–23, 691 N.W.2d at 515.)

The main purpose of a statute of limitations is notice to a party, within a reasonable amount of time, of a claim against the party. The limitation protects the party from having to defend against a claim that is filed long after the party could have prepared a defense. Where an amendment to the pleadings relies on the same set of facts as the original pleading, and does not introduce a new cause of action, the amendment does not prejudice the preparation of the party amended against. When the original pleadings were timely filed, then the kind of amendment just described may be allowed after the statute has run. Such an amendment does not violate the right to the statute of limitations defense. Therefore, the trial court has the discretion to allow such an amendment even after the statute has run. *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 967–68, 567 N.W.2d 777, 783 (1997). *Accord Genthon v. Kratville*, 270 Neb. 74, 82, 701 N.W.2d 334, 344 (2005); *Smeal v. Olson*, 263 Neb. 900, 907, 644 N.W.2d 550 (2002) (citing cases).

In 1997, the Unicameral amended the statute governing statute-of-limitations trial-procedure to provide that, unless waived by all parties, factual issues concerning the bar of a statute of limitations shall be determined by a jury. Neb. Rev. Stat. § 25-221 (Reissue 2016) (This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first.) This amendment is discussed in the Statute of Limitations part of the Comment & Authorities to NJI2d Civ. 12.04.

Regarding either a legislative change lengthening a statute of limitations and its effect on a cause of action that had already been extinguished or a legislative change shortening a statute of limitations and its effect on a cause of action accrued, but not yet extinguished, see NJI2d Civ. 12.04, Comment & Authorities. "Procedural amendments to statutes are ordinarily applicable to pending cases. . . . Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date." *Harris v. Omaha*

Housing Auth., 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005). *Accord* Farber v. Lok-N-Logs, Inc., 270 Neb. 356, 366, 701 N.W.2d 368, 377 (2005) (“[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.”).

■ **SUPERSEDING CAUSE:** Superseding cause is *not* an affirmative defense. This is discussed at NJI2d Civ. 3.43, Comment & Authorities.

■ **UNAVOIDABLE ACCIDENT:** “The unavoidable accident doctrine is well established in Nebraska and has been defined by this court as an unexpected catastrophe which occurs without any of the parties thereto being to blame for it.”⁴⁵

The related topic “extraordinary force of nature” (formerly act of God) is found at NJI2d Civ. 2.02C.

■ **USURY:** “The claim of usury . . . is a defense to a cause of action. Usury must be pleaded to be available as a defense.”⁴⁶

NJI2d Civ. 2.03

STATEMENT OF THE CASE—WHERE DEFENDANT FILES COUNTERCLAIM

I. DEFENDANT’S COUNTERCLAIM

A. ISSUES

The defendant has made a counterclaim against the plaintiff. To support this counterclaim (he, she, it) claims that the plaintiff was negligent in one or more of the following ways:

(Insert a list of statements of the negligence claimed by the defendant, against the plaintiff.)

The defendant further claims that (he, she, it was injured, [and] his, her, its property was damaged) as a result of that negligence, and seeks a judgment against the plaintiff for (his, her, its) damages.

The plaintiff admits (here state what plaintiff admits, by pleading or otherwise, if anything).

⁴⁵Storjohn v. Fay, 246 Neb. 454, 458-66, 519 N.W.2d 521, 525-30 (1994) (discussing the issue at length and citing cases). *See also* Owen v. Moore, 166 Neb. 226, 232, 88 N.W.2d 759, 764 (1958) (citing cases). *And see* Chris-

tensen v. Sherbeck, 28 Neb. App. 332, 357, 943 N.W.2d 460, 477 (2020) for a valuable discussion of the topic.

⁴⁶General Fiberglass Supply, Inc. v. Roemer, 256 Neb. 810, 816, 594 N.W.2d 283, 287-88 (1999).

The plaintiff denies (here state what plaintiff denies).

B. BURDEN OF PROOF

Before the defendant can recover against the plaintiff on defendant's counterclaim in this action, the defendant must prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff was negligent in one or more of the ways claimed by the defendant;
2. That this negligence was a proximate cause of the (insert descriptive word such as occurrence, accident, collision, fall, et cetera);
3. That the (occurrence, accident, collision, fall, et cetera) was a proximate cause of some damage to the defendant; and
4. The nature and extent of that damage.

C. EFFECT OF FINDINGS

(If there is to be no instruction regarding affirmative defenses to defendant's counterclaim, then the following two paragraphs constitute Part C of this instruction:)

If the defendant *has not* met this burden of proof, then your verdict on the defendant's counterclaim must be for the plaintiff.

On the other hand, if the defendant *has* met this burden of proof, then your verdict on the defendant's counterclaim must be for the defendant.

(If there is to be instruction regarding affirmative defenses to defendant's counterclaim, then, the following two paragraphs constitute Part C of this instruction:)

If the defendant *has not* met this burden of proof, then your verdict on the defendant's counterclaim must be for the plaintiff.

On the other hand, if the defendant *has* met this burden of proof then, with regard to the defendant's counterclaim, you must consider the plaintiff's defenses.

II. PLAINTIFF'S DEFENSES TO COUNTERCLAIM

(At this point insert such instruction on plaintiff's defenses to defendant's counterclaim as is appropriate under the pleadings and the evidence. For contributory and comparative negligence, modify and insert NJI2d Civ. 2.02A, 2.02A-1, or 2.02A-2; for assumption of

risk, modify and insert NJI2d Civ. 2.02B; for an extraordinary force of nature, modify and insert NJI2d Civ. 2.02C; for other defenses, use NJI2d Civ. 2.02D as a model.)

COMMENT

- I. GENERAL CROSS REFERENCES
- II. THE PARAMETERS OF THE COUNTERCLAIM
- III. COUNTERCLAIMS FAVORED
- IV. A COUNTERCLAIM AT LAW FILED IN AN EQUITABLE CAUSE OF ACTION
- V. CHALLENGES TO A COUNTERCLAIM
- VI. BRINGING IN OTHER PARTIES
- VII. STATUTES OF LIMITATIONS FOR A COUNTERCLAIM
- VIII. A PERFECTED APPEAL OF A FINAL ORDER ON A PETITION MAY DIVEST THE TRIAL COURT OF JURISDICTION OVER AN UNRESOLVED COUNTERCLAIM
- IX. AFFIRMATIVE DEFENSES

I. GENERAL CROSS REFERENCES

See the following instructions, and particularly their Comments: NJI2d Civ. 2.01, NJI2d Civ. 2.02A, NJI2d Civ. 2.02A-1, NJI2d Civ. 2.02A-2.

II. THE PARAMETERS OF THE COUNTERCLAIM

Nebraska permits a defendant to make a claim against the plaintiff by counterclaim or set-off, or against a co-party by cross claim. Neb. Ct. R. Pldg. § 6-1113.¹ The Nebraska Court Rules of Pleading allow for permissive counterclaims which may be brought against an opposing party, however, if the claim arises out of the same transaction or occurrence the counterclaimant must assert his counterclaim or else he "cannot recover costs against that party in any subsequent action thereon." Neb. Ct. R. Pldg. § 6-1113(b). A cross claim may only be asserted if the claim against the co-party arises "out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." Neb. Ct. R. Pldg. § 6-1113(g).

The usefulness of case law utilizing former Neb. Rev. Stat. §§ 25-811 to 25-819 (Reissue 1995) is questionable, but this much is clear, the Nebraska Court Rules of Pleading in Civil Actions houses the current state of the law in Nebraska regarding counterclaims and cross-claims.

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¹This rule of pleading is generally a restatement of the former stat-

ute, Neb. Rev. Stat. §§ 25-811 to 25-819 (Reissue 1995), which was repealed in 2002.

Looked at in August of 2021, Nebraska Court Rule of Pleading § 6-1113 "Counterclaim and Cross-Claim," reads as follows:

(a) Counterclaims. A pleading may state as a counterclaim any claim which at the time of serving the pleading, the pleader has against an opposing party.

(b) Failure to Include Counterclaim; Effect in Subsequent Action. A party who does not assert a counterclaim that arises out of the transaction or occurrence that is the subject matter of an opposing party's claim cannot recover costs against that party in any subsequent action thereon.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State and Political Subdivisions. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Nebraska, an officer or agency of the State, or a political subdivision of the State.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Comment. Joinder of additional cross-claims is also governed by [Neb. Rev. Stat.] § 25-701.

(h) Joinder of Additional Parties. [Reserved]

Comment. Joinder of additional cross-claims is also governed by [Neb. Rev. Stat.] § 25-705(4).

(i) Separate Trials; Separate Judgments. [Reserved]

In many ways, this rule is the same as the former statute. In some significant ways it is not.

The Court Rule of Pleading, unlike its predecessor statute, does not say that the counterclaim must be germane to the original suit. Case law regarding this statutory requirement² may be superseded by the Rules of Pleading in Civil Actions.

Even under the statute the Court had stated that a trial court had the power to grant the right to file a cross-petition that is outside the range of the statute and that seeks affirmative relief beyond the scope of the precise issues presented by plaintiff's petition.³ Distinguishing recoupment from counterclaim under the former statute, the Court has stated that "[unlike recoupment, a] counterclaim seeks an affirmative judgment and need not arise out of the same transaction or occurrence which is the basis of a plaintiff's action."⁴ The Court Rules of Pleading in Civil Actions do not mention recoupment, and, unlike the statute, they do not require that a counterclaim must "arise out of the same transaction or occurrence which is the basis of a plaintiff's action."⁵

Again, interpreting the now-repealed statute, the Court has stated that "a" counterclaim, set-off, or cross-petition must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained . . . an action on his part against the plaintiff."⁶ The Court Rule of Pleading, as quoted above, changes "date of commencement" to "date of service" and allows the filing, with leave of court, of a counterclaim maturing or arising after the filing of a pleading, Neb. Ct. R. Pldg. § 6-1113(e), of a counterclaim omitted through oversight, inadvertence, or excusable neglect, and a counterclaim required by justice, Neb. Ct. R. Pldg. § 6-1113(f).

Since the adoption of the Nebraska Court Rules of Pleading in Civil Actions, our Supreme Court has not dealt with the difference between a setoff and a counterclaim, but the Nebraska Court of Appeals did

²*E.g.*, *Tilden Bank v. Retzlaff*, (1965).
188 Neb. 834, 836-37, 199 N.W.2d 734,
736 (1972); *Weller v. Putnam*, 184 Neb.
692, 698, 171 N.W.2d 767, 771 (1969);
McGerr v. Marsh, 148 Neb. 50, 57-58,
26 N.W.2d 374, 378 (1947).

³*Weller v. Putnam*, *supra*, and
Rogers v. Western Elec. Co., 179 Neb.
359, 363-64, 138 N.W.2d 423, 426-27

⁴*Ed Miller & Sons, Inc. v. Earl*,
243 Neb. 708, 718, 502 N.W.2d 444,
452 (1993).

⁵*Ed Miller & Sons*, *above*.

⁶*Weller v. Putnam*, 184 Neb. at
699, 171 N.W.2d at 772.

explain that “By its use of different words, Nebraska statutes distinguish among ‘defense,’ ‘counterclaim,’ and ‘setoff.’”⁷

III. COUNTERCLAIMS FAVORED

In a case predating the now-applicable Court Rule of Pleading, the Court stated the following:

“The adjustment of defendant’s demand by cross-claim in plaintiff’s action, rather than by independent suit, is favored and encouraged by law. Such practice serves to avoid circuity of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court’s time, and injustice.” *Indiana Harbor Belt R.R. v. Alpirn*, 139 Neb. 14, 296 N.W. 158 (1941).⁸

While counterclaims may be preferred, the only penalty in the Rules is the loss of the ability to recover costs in a subsequently filed action. Neb. Ct. R. Pldg. § 6-1113(b).

IV. A COUNTERCLAIM AT LAW FILED IN EQUITABLE CAUSE OF ACTION

A cause of action that is equitable in nature and a counterclaim that is an action at law are capable of existing in the same suit. The key is not whether the original cause of action sounds in equity or law, but whether the factors discussed elsewhere in this Comment, and particularly in part II, are present.⁹

V. CHALLENGES TO A COUNTERCLAIM

Interpreting the statute that has been replaced by the Court Rule of Procedure, the Court held that “the proper manner in which to challenge the appropriateness of a counterclaim or cross-petition is by motion to strike rather than a demurrer.”¹⁰

⁷*M & D Masonry, Inc. v. Universal Sur. Co.*, 6 Neb. App. 215, 222, 572 N.W.2d 408, 413 (1997). *M & D Masonry* discusses the difference between a counterclaim and a setoff. And the court held that a setoff alleged in the answer is not subject to statutory requirement “that a counterclaim arise out of the contract or transaction set forth in the plaintiff’s petition.” *Id.* at 221, 572 N.W. 2d at 413.

⁸*Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 751, 119 N.W.2d 509, 512 (1963). *Accord* *Rafert v. Meyer*, 298 Neb. 461, 470, 905

N.W.2d 30, 37 (2017) (regarding third-party practice).

⁹*Schuelke v. Wilson*, 255 Neb. 726, 731, 587 N.W.2d 369, 374 (1998).

¹⁰*Weller v. Putnam*, 184 Neb. at 695, 171 N.W.2d at 771. *Accord* *Pantano v. McGowan*, 247 Neb. 894, 897, 530 N.W.2d 912, 914 (1995); *Barks v. Cosgriff Co.*, 247 Neb. 660, 670, 529 N.W.2d 749, 756 (1995). Since those cases, and effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Community College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

We have not previously identified the standard by which we review a trial court's ruling on a motion to sever a third-party claim. However, we have held that the matter of granting leave to file a third-party complaint pursuant to [Neb. Rev. Stat.] § 25-331 is within the discretion of the trial court. We therefore conclude that a motion to sever a third-party claim pursuant to § 25-331 is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for abuse of discretion. See, *Swenson v. Suhl*, 19 F.R.D. 517, 519 (D. Neb. 1956) (holding that "motion for the vacation of an order allowing third-party procedure, as also a motion in the first instance for its allowance, is addressed to the mature and informed discretion of the court"); *Beach v. Smith*, 298 S.C. 424, 380 S.E.2d 869 (S.C. App. 1989) (holding whether to grant motion to strike third-party claim is addressed to sound discretion of trial court).¹¹

VI. BRINGING IN OTHER PARTIES

"The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties the court must order them to be brought in." Neb. Rev. Stat. § 25-323 (Reissue 2016).¹²

VII. STATUTES OF LIMITATIONS FOR A COUNTERCLAIM

"[W]hether a counterclaim is barred by the applicable statute of limitations is determined by the date the plaintiff's petition was filed, rather than the date the counterclaim was filed."¹³ A counterclaim, even though filed after the plaintiff's petition, is considered "commenced" on the date the plaintiff's petition is filed. The statute of limitations bars a counterclaim only if the statute had run on the date the plaintiff's petition was filed.¹⁴

In 1997, the Unicameral amended the statute governing the trial of

¹¹*Hradecky v. State*, 264 Neb. 771, 779, 652 N.W.2d 277, 285 (2002).

¹²*Johnson v. Mays*, 216 Neb. 890, 897, 346 N.W.2d 401, 405 (1984) (mentioning indispensable parties).

¹³*Becker v. Hobbs*, 256 Neb. 432, 439, 590 N.W.2d 360, 365 (1999).

¹⁴*Becker v. Hobbs*, 256 Neb. at 439, 590 N.W.2d at 365 (a counterclaim seeks to recover an affirmative judgment; recoupment is purely defensive and survives as long as plaintiff's

cause of action exists). See also *Nathan v. McDermott*, 306 Neb. 216, 235, 945 N.W.2d 92, 108 (2020) ("The defense of recoupment survives as long as a plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations." *Id.* "[R]ecoupment must arise out of the same transaction or occurrence which is the basis of a plaintiff's action and is merely defensive, that is, does not seek an affirmative judgment in the action." *Id.*).

statute of limitations issues. “[U]nless trial by jury is waived by all parties,” a jury shall determine any factual issues concerning the bar of a statute of limitations. Neb. Rev. Stat. § 25-221 (Reissue 2016). (This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first.) This amendment is discussed in the Statute of Limitations part of the Comment & Authorities to NJI2d Civ. 12.04.

Regarding statutes of limitations generally, see NJI2d Civ. 2.02D and 12.04, Comment & Authorities, and the cross-references found therein.

VIII. A PERFECTED APPEAL OF A FINAL ORDER ON A PETITION MAY DIVEST THE TRIAL COURT OF JURISDICTION OVER AN UNRESOLVED COUNTERCLAIM

If a final order is entered on the plaintiff’s petition and the defendant’s counterclaim remains pending, a perfected appeal of the final order on the plaintiff’s petition can divest the trial court of jurisdiction over the counterclaim.

Currie v. Chief School Bus Service (Chief)¹⁵ involves a rather odd use of a counterclaim. Chief, the defendant therein, “filed a counterclaim for attorney fees and costs, alleging that Currie’s suit was frivolous.”¹⁶ The statute generally controlling the award of attorney’s fees and costs against one who files a frivolous claim states, “The court shall assess attorney’s fees and costs if, upon the motion of any party or the court itself,” the court finds the action frivolous.”¹⁷ “[T]he court shall award [these fees and costs] as part of its judgment . . .”¹⁸ The statute does not contemplate a counterclaim for fees and costs.¹⁹

The district court granted Chief’s motion for summary judgment, dismissed Currie’s petition, and set the counterclaim for trial. While the counterclaim was pending, Currie appealed the grant of summary judgment. While the appeal was pending, the district court held a trial on the counterclaim and awarded attorney’s fees and costs to Chief. This procedure led to this result in the Supreme Court:

We determine that an order granting summary judgment is a final, appealable order, notwithstanding the fact that a counterclaim, pled in the answer of the same action, is pending

¹⁵Currie By and Through Currie v. Chief School Bus Service, Inc., 250 Neb. 872, 553 N.W.2d 469 (1996).

¹⁶*Id.* at 873, 553 N.W.2d at 471.

¹⁷Neb. Rev. Stat. § 25-824(4) (Reissue 2016).

¹⁸*Id.* at § 25-824(2).

¹⁹The general subject of court-awarded attorney fees is discussed at part 8 of the Introduction to chapter 4, above.

in the trial court at the time the appeal of the order is perfected. As a result, we conclude that the district court's order, awarding Chief damages on the counterclaim, is void because the district court was divested of jurisdiction to proceed on the counterclaim the instant Currie perfected the appeal of the summary judgment order. Thus, we reverse and vacate the district court's order [on the counterclaim], and remand for a new trial on the counterclaim.²⁰

IX. AFFIRMATIVE DEFENSES

NJI2d Civ. 2.02A, NJI2d Civ. 2.02A-1, NJI2d Civ. 2.02A-2, NJI2d Civ. 2.02B and NJI2d Civ. 2.02C, referenced in part II of this instruction, are drafted for use with regard to defendant's affirmative defenses to plaintiff's claims. Before they can be used here, they must be altered for use with regard to plaintiff's affirmative defenses to defendant's counterclaims. This means that the words plaintiff and defendant must be interchanged.

AUTHORITIES

See the Comment, *supra*, and Authorities to NJI2d Civ. 2.01, NJI2d Civ. 2.01A, NJI2d Civ. 2.02A, NJI2d Civ. 2.02A-1, NJI2d Civ. 2.02A-2, NJI2d Civ. 2.02B and NJI2d Civ. 2.02C.

NJI2d Civ. 2.04

CROSS-CLAIM—THIRD PARTY CLAIM

I. Defendant's (Cross-Claim, Third Party Claim)

A. ISSUES

In (his, her, its) (cross-claim, third party claim) defendant (insert name of defendant A) claims that if (he, she, it) is liable to the plaintiff, then (defendant, insert name of defendant B; third party defendant, insert name of defendant C) is liable to (him, her, it) for (all, part) of this liability to the plaintiff. In support of that claim defendant (name of A) claims the following:

(Here state the allegation supporting the liability over claim.)

(Name of B or C) admits (here state facts admitted).

²⁰Currie, 250 Neb. at 881-82, 553 N.W.2d at 475-76. See also McLaughlin v. Hellbusch, 251 Neb. 389, 396, 557 N.W.2d 657, 662 (1997) (finding that after an appeal is perfected, the

trial court is without jurisdiction in the matter, including no jurisdiction to enter order for attorney fees or for costs).

(Name of B or C) denies (here state facts denied).

B. BURDEN OF PROOF

Before (name of A) can recover against (name of B or C) on (his, her, its) (cross-claim, third party claim), the burden is upon (name of A) to prove by the greater weight of the evidence all of the following:

1. That (name of B or C) was negligent in one or more of the ways alleged by (name of A) in (his, her, its) (cross-claim, third party claim);

2. That this negligence on the part of (name of B or C) was a proximate cause of the (insert descriptive word such as occurrence, accident, collision, fall, et cetera);

3. That the (occurrence, accident, collision, fall, et cetera) proximately caused by (name of B or C)'s negligence was a proximate cause of some damage to the plaintiff; and

4. The nature and extent of that damage.

C. EFFECT OF FINDINGS

(If there is to be no instruction regarding affirmative defenses to the cross-claim or third party claim, then the following two paragraphs constitute Part C of this instruction:)

If (name of A) has *not* met this burden of proof, then your verdict on (his, her, its) (cross-claim, third party claim) must be for (name of B or C).

On the other hand, if (name of A) *has* met this burden of proof, then your verdict on (his, her, its) (cross-claim, third party claim) must be for (name of A).

(If there is to be instruction regarding affirmative defenses to the cross-claim or third party claim, then the following two paragraphs constitute Part C of this instruction:)

If (name of A) has *not* met this burden of proof, then your verdict on (his, her, its) (cross-claim, third party claim) must be for (name of B or C).

On the other hand, if (name of A) *has* met this burden of proof, then you must consider (name of B or C)'s defenses (here insert a statement of the affirmative defenses to the liability over claim).

II. Defenses to Defendant's (Cross-Claim, Third Party Claim)

(At this point insert such instruction on the defenses to the cross-

claim or the third party claim as is appropriate under the pleadings and the evidence. For contributory and comparative negligence, modify and insert NJI2d Civ. 2.02A; for assumption of risk, modify and insert NJI2d Civ. 2.02B; for extraordinary force of nature, modify and insert NJI2d Civ. 2.02C; for other defenses, use NJI2d Civ. 2.02D as a model.)

COMMENT & AUTHORITIES

Regarding crossclaims in Nebraska, *see generally* Nebraska Court Rule of Pleading § 6-1113, which is quoted at NJI2d Civ. 2.03, Comment, and Neb. Rev. Stat. § 25-331 (Reissue 2016). *See also* NJI2d Civ. 2.02A, Comment.

Regarding (1) joint liability, (2) several liability, and (3) joint and several liability under Neb. Rev. Stat. §§ 25-21,185 et seq. (Reissue 2016), the comparative negligence statute applicable to causes of action accruing on or after February 8, 1992, *see* NJI2d Civ. 5.04, Comment.

“A third-party claim under § 25-331 may be asserted *when a third party’s liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant.*”¹ “The basic function of third-party practice is the original defendant’s seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.”² “The policy underlying third-party practice is to avoid circuity of actions and multiplicity of suits, as well as to expedite the resolution of secondary actions arising out of or as a consequence of the same facts involved in the action originally instituted.”³

A defendant’s motions and other pleadings to file a third-party complaint must comply with Neb. Rev. Stat. § 25-331 (Reissue 2016).⁴ If the motions and other pleadings comply with § 25-331, then courts may grant leave to file third-party claims.⁵ Granting or denying such leave is within the discretion of the trial court.⁶ Granting or denying a motion to

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¹Life Investors Ins. Co. of America v. Citizens Nat. Bank of Wisner, 223 Neb. 663, 670, 392 N.W.2d 771, 775-76 (1986) (emphasis in original). *Accord* Slaymaker v. Breyer, 258 Neb. 942, 947, 607 N.W.2d 506, 511 (2000); Dammann v. Litty, 234 Neb. 664, 673, 452 N.W.2d 522, 528 (1990); Russell v. Luevano, 234 Neb. 581, 587, 452 N.W.2d 43, 47 (1990).

²Same quotation: Rafert v. Meyer, 298 Neb. 461, 470, 905 N.W.2d 30, 37 (2017); Hradecky v. State, 264 Neb. 771, 779, 652 N.W.2d 277, 284 (2002);

Life Investors Ins., 223 Neb. at 670-71, 392 N.W.2d at 776.

³Rafert, 298 Neb. at 470, 905 N.W.2d at 37 (multiple quotation marks omitted).

⁴AgriStor Credit Corp. v. Radtke, 218 Neb. 386, 391, 356 N.W.2d 856, 859 (1984).

⁵Neb. Rev. Stat. § 25-331 (Reissue 2016); Slaymaker v. Breyer, 258 Neb. 942, 947, 607 N.W.2d 506, 510-11 (2000) (leave of court required).

⁶Slaymaker, 258 Neb. at 947, 607 N.W.2d at 510-11; Northwestern Bell Telephone Co. v. Woodmen of the World

sever a third-party claim is also within the discretion of the trial court.⁷ Upon its own motion or that of any party, the trial court may strike or sever the third-party claim to prevent delay of the trial, jury confusion, or any jeopardy to the rights of the plaintiff.⁸

Under § 25-331, “a third-party claim can be asserted by a defendant only if the trial court determines that the proposed third-party defendant is or may be liable to the defendant for all or part of the plaintiff’s claim.”⁹

The third-party defendant has all the rights of a defendant.¹⁰ “When a third-party complaint fails to state facts sufficient to constitute a cause of action, such complaint is subject to a demurrer.”¹¹ However, effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer.¹² “A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer.”¹³ It seems that such a complaint is now subject to a rule 12(b)(6), and the 12(b)(6) motion may be styled a Motion to Dismiss.¹⁴

The question in *Slaymaker v. Breyer*¹⁵ was whether the trial court’s order denying the defendants’ motion for leave to commence third-party proceedings was an appealable order. The court concluded it was “not a final, appealable order because it does not determine the action and prevent a judgment. To determine the action and prevent a judgment, an order must dispose of the whole case and must leave nothing for further consideration of the court . . .”¹⁶ In *Slaymaker* there was something left for the trial court to decide: the plaintiff’s negligence claim against the defendant.

Regarding (1) joint liability, (2) several liability, and (3) joint and several liability under Neb. Rev. Stat. §§ 25-21,185 et seq. (Reissue 2016), the comparative negligence statute applicable to causes of action accruing on or after February 8, 1992, see NJI2d Civ. 5.04, Comment.

Regarding contribution and indemnity, see NJI2d Civ. 2.05 and the Comment & Authorities thereto.

Life Ins. Co., 189 Neb. 30, 36, 199 N.W.2d 729, 733 (1972).

⁷*Hradecky*, 264 Neb. at 779, 652 N.W.2d at 285.

⁸Neb. Rev. Stat. § 25-331 (Reissue 2016). See also *Hradecky*, 264 Neb. at 779, 652 N.W.2d at 285.

⁹*Hradecky*, 264 Neb. at 778, 652 N.W.2d at 284.

¹⁰Neb. Rev. Stat. § 25-331 (Reissue 2016).

¹¹*Schuyler State Bank v. Cech*, 228 Neb. 588, 592, 423 N.W.2d 464,

468 (1988).

¹²*Weeder v. Central Community College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

¹³*Id.* at 123, 691 N.W.2d at 515.

¹⁴*Id.* at 122-23, 691 N.W.2d at 514-15.

¹⁵*Slaymaker v. Breyer*, 258 Neb. 942, 947, 607 N.W.2d 506, 510-11 (2000).

¹⁶*Id.* at 948-49, 607 N.W.2d at 511-12.

NJ12d Civ. 2.05

CONTRIBUTION

A. ISSUES

In (his, her, its) claim for contribution, (party seeking contribution) claims that (party from whom it is sought) is liable to (party seeking contribution) for part of (here identify what the party seeking contribution paid, and for what).

In support of that claim (party seeking contribution) claims the following: (Here insert the allegations supporting contribution).

B. BURDEN OF PROOF

Before (party seeking contribution) can recover against (party from whom it is sought), (party seeking contribution) must prove by the greater weight of the evidence each and all of the following:

1. Both that (party seeking contribution) and (party from whom it is sought) had a common liability to (third party), and the amount of that common liability;

2. Both that (party seeking contribution) paid more than (his, her, its) [pro rata] share of the common liability, and the amount of money that (he, she, it) paid over and above (his, her, its) [pro rata] share;

3. The part of the common liability that is owed by (party from whom it is sought); [and]

4. That (party seeking contribution) has extinguished (party from whom it is sought)'s the liability to (third party)[(.:)] and]

(If the liability of party from whom contribution is sought was extinguished by settlement, then add the following paragraph. If this paragraph is added, add it after paragraph 2, as a new paragraph 3, and, of course, renumber the paragraphs following thereafter.)

[3. That the amount that (party seeking contribution) paid in settlement was reasonable.]

C. EFFECT OF FINDINGS

If (party seeking contribution) has *not* met this burden of proof, then your verdict must be for (party from whom it is sought).

On the other hand, if (party seeking contribution) *has* met this burden of proof, then your verdict must be for (party seeking contribution).

bution) and your verdict must be in an amount equal to the amount that (party seeking contribution) paid in excess of (his, her, its) [pro rata] share, but not to exceed the amount of the [pro rata] share of the common liability that is owed by (party from whom it is sought).

COMMENT & AUTHORITIES

I. THE WORDING OF THE PATTERN INSTRUCTION

A. NOTES ON THE INSTRUCTION'S WORDING

This is the pattern instruction for cases involving contribution among joint tort-feasors. An action for contribution in a contract action is discussed below in this Comment & Authorities.

This pattern is based on the statement of the elements found at *Estate of Powell v. Montange*.¹ There may be factual variations that will call for variations in the instruction actually given. For example, under Burden of Proof, the bracketed paragraph numbered [3] states that the one seeking contribution must prove “[t]hat the amount . . . paid in settlement was reasonable.” This element was not the subject of the challenge in *Estate of Powell*. It may be possible that one could pay an unreasonable amount in settlement and yet there would be some room for contribution from another, where the other is liable for some share of a reasonable settlement amount. If that is the case then, of course, the court (likely with input from counsel for the parties) will have to rewrite the referenced paragraph of this pattern.

Throughout, the pattern instruction identifies the parties as “(party seeking contribution)” and “(party from whom it is sought),” respectively. In place of these parenthetical statements, substitute words identifying the party or parties seeking contribution and the party or parties from whom contribution is sought. Identify them by name, by party designation (*i.e.*, plaintiff or defendant), or otherwise. Use language that was used during the trial and, therefore, will be familiar to the jurors.

In part B (1), the pattern instruction refers to “(third party).” Substitute language that identifies the third party to whom the parties in the contribution trial are both allegedly liable. Use language that was used during the trial and, therefore, will be familiar to the jurors.

In parts B (2) and (3) and in the second paragraph of part C, the pattern instruction refers to the “[pro rata] share” of the liability. The Committee suggests that these parts of the pattern instruction be

2.05

v. Montange, 277 Neb. 846, 855-56,

¹*Estate of Powell ex rel. Powell* 765 N.W.2d 496, 504 (2009).

redrafted, substituting language that was used during the trial and, therefore, will be familiar to the jurors.

In part B (4), the pattern states that the party seeking contribution must prove “[t]hat (party seeking contribution) has extinguished the liability of (party from whom contribution is sought).” Rewrite this part of the pattern instruction, substituting language that was used during the trial and, therefore, will be familiar to the jurors.

Bracketed part [3] at the end of part B of the pattern is, of course, used only when the liability to the third party was extinguished through a settlement agreement.

Parts B (1) and (2) of the pattern each contain two related thoughts. B (1), for example, states that the party seeking contribution must prove “That (party seeking contribution) and (party from whom it is sought) have a common liability to (third party), and amount of that common liability.” B (1) can be divided into two separate parts, as follows:

“1. That (party seeking contribution) and (party from whom it is sought) have a common liability to (third party).

2. The amount of that common liability.”

Part B (2) can also be split in two in that same fashion. If either B (1) or B (2) is divided into two separate parts, then both should be so divided.

B. AN EXAMPLE OF THE INSTRUCTION AS IT MIGHT APPEAR IN A SPECIFIC CASE

Here is an example of how the court might tailor parts of this instruction for use in a case where John Smith has settled a claim brought by Jimmy Mallon and Smith has sued Mary Lee for contribution.

A. ISSUES

In his claim for contribution, the plaintiff, John Smith, claims that the defendant, Mary Lee, is liable to him for part of (here identify what the party seeking contribution paid, and for what).

In support of that claim Smith claims the following: (Here insert the allegations supporting contribution).

B. BURDEN OF PROOF

Before Smith can recover against Lee, he must prove by the greater weight of the evidence each and all of the following:

1. Both that he and Lee had a common liability to Jimmy Mallon, and the amount of that common liability, that is, that both of them were liable to Jimmy Mallon, and the total amount that the two of them together owed to Mallon;

2. Both that when Smith settled with Mallon he paid more than his [pro rata] share of the common liability, and the amount of money that he paid over and above his [pro rata] share;

3. That the amount that Smith paid in settlement was reasonable;

4. The part of the common liability that is owed by Lee; and

5. That Smith has extinguished Lee's liability to Mallon.

C. EFFECT OF FINDINGS

If Smith has *not* met this burden of proof, then your verdict must be for Lee.

On the other hand, if Smith *has* met this burden of proof, then your verdict must be for Smith and your verdict must be in an amount equal to the amount that Smith paid in excess of his [pro rata] share of the common liability, but not to exceed the amount of the [pro rata] share of the common liability that is owed by Lee.

II. CONTRIBUTION AMONG JOINT TORTFEASORS

As a general rule in Nebraska, there is a right to contribution among negligent joint tort-feasors.² "The general rule [regarding the right to contribution] is that one who is compelled to pay or satisfy the whole or bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are

²Estate of Powell ex rel. Powell v. Montange, 277 Neb. 846, 849-57, 765 N.W.2d 496, 500-05 (2009); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 762-64, 229 N.W.2d 183, 189-90 (1975) (overruling earlier cases to the contrary and seeming to limit the common-law bar to contribution principally to cases involving intentional wrongdoing). See Cepel v. Smallcomb, 261 Neb. 934, 940-41, 628 N.W.2d 654, 660 (2001); Teegerstrom

v. H.J. Jeffries Truck Line, Inc., 216 Neb. 917, 920-21, 346 N.W.2d 411, 414-15 (1984); Duffy Bros. Const. Co., Inc. v. Pistone Builders, Inc., 207 Neb. 360, 363-64, 299 N.W.2d 170, 173 (1980); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 196 (D. Neb. 1980). See also Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 88 n.17, 101 S. Ct. 1571, 1579 n.17, 67 L. Ed. 2d 750 (1981).

bound to discharge, is entitled to contribution against the others to obtain from them the payment of their respective shares.”³

[I]n order to recover on a claim for contribution among joint tort-feasors, the following elements must be shown: (1) There must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom the contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable.⁴

In *Estate of Powell*,⁵ the estate sued the driver and the owners of a truck in which Powell was a passenger. The defendants filed a third-party complaint against the driver of a second vehicle, Klein. Defendants alleged that the defendant driver took evasive action to avoid colliding with Klein and lost control of the truck, resulting in Powell’s death. Defendants alleged that Klein was the cause of the accident.

“Defendants settled with Powell’s estate and obtained a limited release which stated that Klein was not a party to the settlement.”⁶ “As a result of their settlement with the Estate, the defendants sought contribution from Klein for all sums which exceeded any proportionate share of their negligence and asked that the trier of fact apportion Klein’s negligence.”⁷ “Klein moved for summary judgment, claiming that the defendants could not seek contribution from her.”⁸ “The issue is whether the defendants can maintain an action for contribution against Klein.”⁹

Prior to *Estate of Powell*, the Court had “recognized a right of contribution among joint tort-feasors who share a common liability [but had] not specifically addressed whether a tort-feasor who enters into a settlement with the claimant can recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement.”¹⁰ *Estate of Powell* addresses the latter

³*Royal Indem. Co.*, 193 Neb. at 756, 229 N.W.2d at 185.

⁴*Estate of Powell*, 277 Neb. at 855-56, 756 N.W.2d at 504.

⁵*Id.*

⁶*Id.* at 847, 756 N.W.2d at 498. 01.

⁷*Id.* at 848, 756 N.W.2d at 499.

⁸*Id.* at 847, 756 N.W.2d at 498.

⁹*Id.* at 849, 756 N.W.2d at 500.

¹⁰*Id.* at 851, 756 N.W.2d at 500-

point and holds that such a settling joint tortfeasor can recover contribution.¹¹

Only a tortfeasor who has paid more than his or her pro rata share of the common liability may seek contribution, and recovery is limited to the amount paid in excess of his or her pro rata share. No tortfeasor is compelled to make contribution beyond his or her own pro rata share of the entire liability.¹²

Where a principal and an agent are found jointly and severally liable as joint participants, then, as a general rule, if one of the two pays more than his or her proportionate share of the damages, that one has a right to sue the other for contribution.¹³

"A detailed discussion of the historical development of the doctrine [of contribution] in Nebraska, including an analysis of specific cases, may be found in Busick, Contribution and Indemnity Between Tortfeasors in Nebraska, 7 Creighton L. Rev. 182 (1974), and Comments, The Rule Against Contribution and Its Status in Nebraska, 37 Neb. L. Rev. 820 (1958)."¹⁴

This Comment & Authorities used to have a paragraph about Nebraska's Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008). That statute has been repealed. 2010 Neb. Laws, L.B. 216. See NJI2d Civ. 7.50A, Special Note, for more information about the repeal of this statute. Statements such as this, "[T]here can be no contribution between a host driver and the driver of the other vehicle where the guest statute would preclude a judgment in favor of the guest passenger against the host driver,"¹⁵ no longer apply.

III. CONTRIBUTION DISTINGUISHED FROM INDEMNIFICATION

"[I]t is important to distinguish between principles of contribution and indemnification."¹⁶ In the law relating to tortfeasors, contribution, which is sharing the loss, is distinguished from indemnity, which is shifting the entire loss.¹⁷ "The prerequisites to a claim for contribution are that the party seeking contribution and the party from whom it is

¹¹*Id.* at 855-56, 756 N.W.2d at 504.

¹²*Id.* at 851-52, 756 N.W.2d at 501.

¹³*Royal Indem. Co.*, 193 Neb. 752, 229 N.W.2d 183.

¹⁴*Id.* at 756, 229 N.W.2d at 185.

¹⁵*Teegerstrom v. H.J. Jeffries Truck Line, Inc.*, 216 Neb. 917, 922, 346 N.W.2d 411, 415 (1984).

¹⁶*Kuhn v. Wells Fargo Bank of Nebraska, N.A.*, 278 Neb. 428, 446, 771 N.W.2d 103, 119 (2009).

¹⁷*United General Title Insurance Company v. Malone*, 289 Neb. 1006, 1021, 1023, 858 N.W.2d 196, 212-13 (2015) (containing a lengthy discussion of the issue); *Downey v. Western Community College Area*, 282 Neb. 970, 989, 808 N.W.2d 839, 854 (2012); *Estate of Powell ex rel. Powell v.*

sought share a common liability and that the party seeking contribution has discharged more than his fair share of the common liability.”¹⁸

A party has a claim for indemnification if it pays a common liability that, as between itself and another party, is altogether the responsibility of the other party. In contrast, a claim for contribution arises when a party has paid more than its fair share of a common liability that is allocated in some proportion between itself and another party.¹⁹

“Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.”²⁰

The obligation to indemnify may grow out of a contractual agreement or a liability imposed by law.²¹ “An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.” *Kuhn*, 278 Neb. at 440, 771 N.W.2d at 115.

The Nebraska Model Business Corporation Act is an example of a liability imposed by law. “A corporate director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses”²²

If an employer is found to be vicariously liable for negligent acts committed by his or her employee, the employer may seek full

Montange, 277 Neb. 846, 849, 765 N.W.2d 496, 500 (2009) (“‘Contribution is . . . a sharing of the cost of an injury.’” Indemnification is “‘a complete shifting of the cost from one to another.’” (quoting *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 807, 733 N.W.2d 877, 885 (2007)); *Kuhn*, 278 Neb. at 446, 771 N.W.2d at 119; *Tober v. Hampton*, 178 Neb. 858, 871, 136 N.W.2d 194, 203 (1965), *overruled on other grounds and otherwise “expressly reaffirmed,”* *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 765, 229 N.W.2d 183, 190 (1975).

¹⁸*United Gen. Title Ins.*, 289 Neb. at 1021, 858 N.W.2d 212 (multiple quotation marks omitted).

¹⁹*United Gen. Title Ins.*, 289 Neb. at 1022-23, 858 N.W.2d at 212-13 (footnotes omitted) (citing Restatement (Third) of Restitution and Unjust Enrichment § 23, comment a. (2011)).

See also Downey, 282 Neb. at 989, 808 N.W.2d at 854 (“[O]ne who is him[self] or herself at fault is not due indemnity, because liability for indemnity exists only when the party seeking indemnity . . . is free of fault and has discharged a debt that should be paid wholly by the indemnitor.”) (second brackets and ellipsis added by *Downey*).

²⁰Same quotation: *Downey, supra*; *Kuhn*, 278 Neb. at 436, 771 N.W.2d at 112.

²¹*Kuhn*, 278 Neb. at 447, 771 N.W.2d at 119; *Duffy Bros. Const. Co., Inc. v. Pistone Builders, Inc.*, 207 Neb. 360, 363, 299 N.W.2d 170, 172 (1980).

²²Nebraska Model Business Corporation Act, Neb. Rev. Stat. § 21-2,114 (Reissue 2017). *See Gerber v. P & L Finance Co., Inc.*, 301 Neb. 463, 468, 919 N.W.2d 116, 120 (2018). *See also* *NJI2d Civ 6.30*.

reimbursement from the employee for the damages paid to the third party. "One who is held to be vicariously liable for the active negligence of another has a claim for indemnity from that person who is primarily liable."²³ On the other hand, "[i]f a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution."²⁴

Noncontractual indemnity is not available to a defendant whose liability is based on actual wrongdoing as opposed to constructive or technical fault.²⁵

Passive neglect (failure to discover or remedy) does not estop indemnification from an active wrongdoer.²⁶

Though at one time founded upon an implied contract, today the right to indemnity is generally regarded as equitable in nature. . . .

Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay, unless the party making the payment is barred by the wrongful nature of his conduct. Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable.

Though most often applied in the context of tort claims, courts in other jurisdictions have awarded indemnification in favor of the retail seller of a good and against a manufacturer or supplier liable to the retailer on purely contractual grounds. However, "[i]t is generally recognized that the party seeking indemnification must have been free of wrongdoing, and its liability is vicariously imposed." In the tort context, we have held that indemnity is available to one who engaged in merely passive neglect, but unavailable to one who engaged in direct and active negligence. If a party seeking indemnification is in-

²³*Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164, 168 (1996). See also *Downey*, *supra*.

²⁴*Downey*, *supra* (stating as a general rule that for indemnification the liability of the party seeking same "is vicariously imposed.").

²⁵*Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 196 (D. Neb. 1980) ("In a situation such as this, indemnity is not appropriate. Sears is either blameless, in which case no indemnity

is required, or it is liable for affirmative misconduct, in which case it must bear at least part of the burden for plaintiff's losses."); *Danny's Const. Co., Inc. v. Havens Steel Co.*, 437 F. Supp. 91, 93-94 (D. Neb. 1977).

²⁶*Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 770, 443 N.W.2d 872, 876 (1989). See also, e.g., *Mazankowski v. Harders*, 206 Neb. 583, 586-87, 293 N.W.2d 869, 871 (1980).

dependently liable to the plaintiff, that party is limited to a claim for contribution.²⁷

See also Denzel R. Busick, Pleading and Procedural Considerations in Nebraska in Subrogation, Contribution, and Indemnity Actions, 19 Creighton L. Rev. 278 (1986).

IV. CONTRIBUTION IN A CONTRACT ACTION

The pattern instruction is written for cases involving contribution among joint tort-feasors. It will have to be modified before use in a contract action.

“Every joint debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his co-debtors.”²⁸

As a general rule in a contract action, an action for contribution is, in effect, an action at law upon an implied contract.²⁹ *Scotts Bluff Cty. v. State*³⁰ was an “action in the nature of a claim for contribution in favor of plaintiff and against defendant, plaintiff alleging it paid more than its proportionate share due to certain bridge contractors.”³¹ The court held that this action, which grew “out of three written contracts for the construction of bridges . . . is, in effect, an action at law upon an implied contract.”³²

As an action at law on an implied contract, the applicable statute of limitations is Neb. Rev. Stat. § 25-206 (Reissue 2008), i.e., four years from the date the action accrued.³³

In a contract action, “the right to contribution does not accrue until a party has made payments that exceed his or her proportionate share of the entire debt.”³⁴

In *Rodehorst v. Gartner* the Nebraska Supreme Court states that,

“[T]he most important doctrine, perhaps, which results from

²⁷Warner v. Reagan Buick, Inc., 240 Neb. 668, 676-77, 483 N.W.2d 764, 770-71 (1992) (citations omitted).

²⁸Exchange Elevator Co. v. Marshall, 147 Neb. 48, 60, 22 N.W.2d 403, 410 (1946) (quoting 18 C.J.S., Contribution, § 9, p. 12).

²⁹Cepel v. Smallcomb, 261 Neb. 934, 940, 628 N.W.2d 654, 660 (2001); *Scotts Bluff County v. State*, 133 Neb. 508, 276 N.W. 185 (1937).

³⁰*Id.*

³¹*Id.* at 510, 276 N.W. at 187.

³²*Id.* at 514, 276 N.W. at 189.

³³See *Cepel*, 261 at 940, 628 N.W.2d at 660; *Hoeft v. Five Points Bank*, 248 Neb. 772, 782, 539 N.W.2d 637, 645 (1995).

³⁴*Cepel*, 261 at 941, 628 N.W.2d at 660 (involving payments on an installment contract).

the principle, Equality is equity, is that of contribution . . . among joint debtors, co-sureties, co-contractors, and all others upon whom the same pecuniary obligation arising from contract, express or implied, rests. This doctrine is evidently based upon the notion that the burden in all such cases should be equally borne by all the persons upon whom it is imposed, and its necessary effect is to equalize that burden whenever one of the parties has, in pursuance of his mere *legal* liability, paid or been compelled to pay the whole amount, or any amount greater than his proportionate share. . . .”

“Where there are two or more sureties for the same principal debtor, and for the same debt of obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. . . . The right, however, may be controlled or modified by express agreement among the co-sureties or debtors. . . .”³⁵

V. CONTRIBUTION AMONG INSURERS

On a related matter, contribution among insurers is an equitable remedy and, therefore, there is no call for jury instruction. In the interest of completeness, if the question is the right to contribution among insurers.³⁶

NJI2d Civ. 2.06

ADMITTED LIABILITY—DAMAGES DENIED

Recommend no separate instruction.

NJI2d Civ. 2.07

PLEADINGS NOT EVIDENCE

Recommend no separate instruction.

³⁵Rodehorst v. Gartner, 266 Neb. 842, 847, 669 N.W.2d 679, 684 (2003), quoting Exchange Elevator Co. v. Marshall, 147 Neb. 48, 59, 22 N.W.2d 403, 410 (1946), which in turn quotes 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence, first paragraph quoting § 411, and second paragraph quoting § 1418 (5th ed. 1941). Regard-

ing particularly the second paragraph of the quotation in text, see *Mandolfo v. Chudy*, 5 Neb. App. 792, 797, 564 N.W.2d 266, 270 (1997).

³⁶See *American Family Mutual Insurance Company v. Regent Insurance Company*, 288 Neb. 25, 846 N.W.2d 170 (2014).

NJI2d Civ. 2.08**FACTS DETERMINED BY COURT**

Recommend no separate instruction.

COMMENT & AUTHORITIES

Each of these concepts—NJi2d Civ. 2.06 through 2.08—is adequately covered by NJi2d Civ. 2.01.

Regarding admissions of essential facts or essential facts found by the Court as a matter of law, these are but examples of specific applications of parts of NJi2d Civ. 2.01. Anytime essential facts are admitted or found by the Court as a matter of law, such instruction should be included in the instructions to the jury by tailoring NJi2d Civ. 2.01.

See NJi2d Civ. 2.01, Comment and Authorities.

B. BURDENS OF PROOF**NJI2d Civ. 2.12A****BURDEN OF PROOF—GREATER WEIGHT OF THE EVIDENCE DEFINED**

Any party who has the burden of proving a claim must do so by the greater weight of the evidence.

The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. [It does not necessarily mean a greater number of witnesses or exhibits.]

Any party is entitled to the benefit of any evidence tending to establish a claim, even though such evidence was introduced by another.

If the evidence upon a claim is evenly balanced, or if it weighs in favor of the other party, then the burden of proof has not been met.

COMMENT & AUTHORITIES

This instruction no longer refers to the burden of proof by “a preponderance” of the evidence. Instead, it refers to proof by “the greater weight” of the evidence. Preponderance is not in the common vocabulary of jurors; greater weight is. Greater weight is an exact synonym for

preponderance, and much more understandable. This is not a substantive change.¹

The general rule regarding the assignment of the burdens of proof is this: The burden of proving the necessary elements of a cause of action is on the plaintiff and the defendant has the burden of proving the affirmative defenses. “ [The one] who has the burden of pleading a fact must prove it.”² The burden of proof is ordinarily on the party who suffers if no evidence is introduced.³ “A party’s right to a fair trial may be substantially impaired by jury instructions that . . . suggest an improper shift of the burden of proof”⁴

The burden is not to produce the greater number of witnesses.⁵

In determining whether a party has sustained his or her burden, the jury is not limited to the evidence introduced by such party but should consider all of the evidence, no matter by whom introduced.⁶

The Nebraska Supreme Court has held that an instruction correctly stating that the plaintiff must prove all the material elements of his or her case by a preponderance of the evidence and if the plaintiff fails to so establish any one of them, then the verdict should be for the defendant is not erroneous for failing to state what the verdict should be if the evidence is evenly balanced.⁷ The Court has also held that it is prejudicial error to fail to inform jurors “what their verdict should be in the event the evidence is equally balanced *or* preponderates in favor of

2.12A

¹Malchow v. Doyle, 275 Neb. 530, 539-40, 748 N.W.2d 28, 37 (2008) held that instruction that the burden of proof is “*by the greater weight of the evidence*” is correct. (emphasis in the original). See also, e.g., Pribil v. Koinzan, 266 Neb. 222, 228, 665 N.W.2d 567, 573 (2003); Brown v. Farmers Mut. Ins. Co. of Nebraska, 237 Neb. 855, 863, 468 N.W.2d 105, 111 (1991); Russell v. Board of Regents of University of Nebraska, 228 Neb. 518, 520, 423 N.W.2d 126, 128 (1988). This language is not new to Nebraska law. *Russell* use it in 1998, before the publication of this second edition (NJI2d Civ.).

²Empire State Bldg. Co. v. Bryde, 211 Neb. 184, 191-92, 318 N.W.2d 65, 69 (1982) (quoting Carlson v. Nelson, 204 Neb. 765, 773, 285 N.W.2d 505, 510 (1979)).

³Bishop Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 176, 274 N.W.2d 530, 533 (1979).

⁴Nebraska Depository Inst. Guar. Corp. v. Stastny, 243 Neb. 36, 47, 497 N.W.2d 657, 667 (1993).

⁵E.g., Linch v. Berggren, 135 Neb. 530, 531, 282 N.W. 528 (1938); Nielson v. Kammerer, 128 Neb. 57, 64, 257 N.W. 534, 537 (1934); Thornton v. Davis, 113 Neb. 529, 533-34, 204 N.W. 69, 71 (1925); Jerich v. Union Pac. R. Co., 97 Neb. 767, 772-73, 151 N.W. 310, 311 (1915).

⁶Langford v. Ritz Taxicab Co., 172 Neb. 153, 159, 109 N.W.2d 120, 124 (1961); Barton v. Wilson, 168 Neb. 480, 485, 96 N.W.2d 270, 275 (1959); Southwell v. De Boer, 163 Neb. 646, 654, 80 N.W.2d 877, 882 (1957).

⁷Kohrt v. Hammond, 160 Neb. 347, 351-52, 70 N.W.2d 102, 105 (1955) (citing cases).

the defendant.”⁸ Of course, if the evidence is equally balanced, that issue must be resolved against the party having the burden of proof.⁹

This instruction assumes that the burden is the usual one applied in civil cases, the burden of proving a fact by the greater weight of the evidence.¹⁰ Sometimes, however, the burden in civil cases is greater. Sometimes it is proof by clear and convincing evidence, which is instructed on at NJI2d Civ. 2.12B and discussed below in this Comment and at NJI2d Civ. 2.12B, below. As stated in the Authorities to NJI2d Civ. 2.12B, “Clear and satisfactory evidence” means the same as “clear and convincing evidence.”

In some cases, the burden of proof by clear and convincing evidence applies to decisions made by the trier of law, while, in the same case, the burden of proof by the greater weight of the evidence is applied to the decisions made by the trier of fact. For example, where the law requires that a presumption must be overcome by clear and convincing evidence—as with the presumption that a will, lost while in the possession of the testator, was revoked—the rule only applies to the judge’s determination that the evidence is sufficient to overcome the presumption.¹¹ The jury is still to be instructed—continuing the lost will example—that the burden of proving the (now admissible) lost will is on the proponent and that he or she must do so by the greater weight of the evidence.¹²

In fraud cases there are what seem to be two parallel lines of cases, with one line applying the burden of proof by the greater weight of the evidence and the other applying the burden of proof by clear and convincing evidence. *Tobin v. Flynn & Larsen Implement Co.*, clears this up.

We have historically held that in a law action fraud must

⁸*Ficke v. Gibson*, 153 Neb. 478, 489, 45 N.W.2d 436, 442 (1950) (emphasis added).

⁹*In re Estate of Severns*, 217 Neb. 803, 811, 352 N.W.2d 865, 870-71 (1984); *Bernhardt v. Chicago, B. & Q.R. Co.*, 132 Neb. 346, 353, 272 N.W. 209, 213 (1937).

See also *Hiner v. Nelson*, 174 Neb. 725, 731, 119 N.W.2d 288, 292 (1963), which affirms an unusually strained instruction defining this burden of proving a fact by the greater weight of the evidence.

¹⁰*E.g.*, *Scoular-Bishop Grain Co. v. Bassett Grain, Inc.*, 218 Neb. 280, 284, 352 N.W.2d 904, 907 (1984).

¹¹*In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001) (holding that proponent of a lost will satisfied the burden of proving by clear and convincing evidence facts necessary to overcome the presumption that a lost will is a revoked will, that, therefore, the doctrine of *amino revocandi* did not apply, and upholding an otherwise inadmissible copy of that will).

¹²*First Nat. Bank in Kearney v. Bunn*, 195 Neb. 829, 831, 241 N.W.2d 127, 128 (1976); *In re Drake’s Estate*, 150 Neb. 568, 35 N.W.2d 417 (1948). Regarding lost wills, this point is discussed at NJI2d Civ. 16.01, Comment & Authorities.

be proved by a preponderance of the evidence. . . . It appears that in equity cases we have fairly consistently required proof of fraud to be either by “clear and convincing” or “clear and satisfactory” evidence. . . . Regrettably, some of our opinions have overlooked the distinction between cases brought at law and those brought in equity and, consequently, have inadvertently stated that fraud in actions at law must be proved by “clear and satisfactory” evidence.

We now remove this conflict by disapproving the earlier language which imposes the clear and satisfactory standard to the proof of fraud in suits at law and adhere to the rule that in such actions fraud must be proved by a preponderance of the evidence. This is not to imply . . . that the proof by clear and satisfactory or clear and convincing evidence is never appropriate in any kind of law action.¹³

Having said that, “This is not to imply . . . that the proof by clear and satisfactory or clear and convincing evidence is never appropriate in any kind of law action,” *Tobin* goes on to state that in an action at law “to recover on a lost instrument [the burden of proving the lost instrument is] clear and convincing evidence.”¹⁴

In many cases where this greater burden, *i.e.*, the burden of proof by clear and convincing evidence, applies to decisions made by the trier of fact, the trial will be a non-jury trial and there will be no jury instructions. Here are some examples.

■ An order terminating parental rights.¹⁵

¹³*Tobin*, 220 Neb. at 262-63, 369 N.W.2d at 99-100 (some paragraph breaks and all citations omitted). For one example of this split, see *NJI2d* Civ. 9.01, Comments & Authorities, which supports the proposition that the burden of proof in a fraudulent representation action at law is the greater weight of the evidence and the burden of proof in a fraudulent representation action in equity is clear and convincing evidence. In *Bock v. Bank of Bellevue*, 230 Neb. 908, 918, 434 N.W.2d 310, 317 (1989) the court cited *Tobin* and refused to depart from this distinction. See also, *e.g.*, *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 864-65, 809 N.W.2d 725, 742 (2011) (holding that a quasi-contract claim is an ac-

tion at law courts requiring proof by the greater weight of the evidence).

¹⁴*Tobin*, 220 Neb. at 263, 369 N.W.2d at 100. See also, *e.g.*, the discussion in this Comment, below; *NJI2d* Civ. 16.01, Comment & Authorities; *Citizens Nat. Bank of Wisner v. Kennedy and Coe*, 232 Neb. 477, 479, 441 N.W.2d 180, 182 (1989) (holding that greater weight of evidence correct standard in action for fraud tried to court of law) (citing *NJI2d* Civ. 2.12A).

¹⁵*E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403, 71 L. Ed. 2d 599 (1982); *In re Interest of Angelica L.*, 277 Neb. 984, 1007, 767 N.W.2d 74, 92 (2009); *In re Interest of Sunshine A.*, 258 Neb. 148, 153, 602 N.W.2d 452, 457 (1999) (citing cases)). See also *In re Donald B.*, 304 Neb. 239,

- The legitimacy of children.¹⁶
- Proof that a juvenile is mentally ill and dangerous.¹⁷
- Equitable rescission.¹⁸
- Proof of allegations made in disciplinary proceedings against attorneys or physicians.¹⁹
- The seller's fraud as a basis for the buyer's action to rescind a contract.²⁰
- Undue influence in the execution of a deed.²¹

244-45, 933 N.W.2d 864, 869 (2019) (stating that proof by clear and convincing evidence is required, but "[w]hen a parent admits to the State's allegations regarding the statutory grounds for termination of parental rights and that termination is in the children's best interest, the State does not have to prove those allegations by clear and convincing evidence."); *Erin W. v. Charissa W.*, 297 Neb. 143, 148, 897 N.W.2d 858, 863 (2017) (stating that Nebraska statutes provide that "a child born during a marriage relationship is presumed to be the husband's child The statutory presumption of legitimacy may be rebutted only by clear, satisfactory, and convincing evidence. This court has long held that the testimony of declaration of a husband or wife is not competent to overcome this presumption." (paragraph break and footnotes omitted)).

¹⁶Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence." Same quotation: *Stacy M. v. Jason M.*, 290 Neb. 141, 145, 858 N.W.2d 852, 856 (2015) (footnote omitted); *Alisha C. v. Jeremy C.*, 283 Neb. 340, 343-44, 808 N.W.2d 875, 879-80 (2012). Clear and convincing evidence is required to prove that a child born

during wedlock is illegitimate. *Perkins v. Perkins*, 198 Neb. 401, 404, 253 N.W.2d 42, 45 (1977).

¹⁷Clear and convincing evidence is required to prove "that a juvenile is mentally ill and dangerous under § 43-247(3)(c)." *In re Interest of Christopher T.*, 281 Neb. 1008, 1021, 801 N.W.2d 243, 253 (2011); *see also* the discussion *id.* at 1012-14, 801 N.W.2d at 253.

¹⁸"In an equitable rescission action brought by a client against an attorney representing him or her in the transaction giving rise thereto, the burden is upon the attorney to show by clear and convincing evidence that no advantage was taken of the client and that the transaction was fair and reasonable." *Bauermeister v. McReynolds*, 254 Neb. 118, 120, 575 N.W.2d 354, 356 (1998) (supplemental opinion) (citing cases). For more on rescission, *see* the instructions cited in the Index, at Contract, Rescission.

¹⁹*Davis v. Wright*, 243 Neb. 931, 939, 503 N.W.2d 814, 819 (1993).

²⁰*Kracl v. Loseke*, 236 Neb. 290, 296, 461 N.W.2d 67, 72 (1990).

²¹Allegations that the execution of a deed was the result of undue influence require proof by clear and convincing evidence. *See In re Estate of Hedke*, 278 Neb. 727, 743-45, 775 N.W.2d 13, 28-29 (2009); *Bishop v. Hotovy*, 222 Neb. 623, 627, 385 N.W.2d 901, 904 (1986).

- Fraudulent representation in an action at law.²²
- Setting aside an instrument for undue influence or lack of mental capacity.²³
- Proof of an oral contract to convey property at death.²⁴
- The reformation of a written instrument on a claim of mutual mistake.²⁵

There are, however, trials by jury where the burden of proof clearly and invariably is more than by the greater weight of the evidence. (And where this more stringent burden applies to a question for the jury, it must, of course, be stated. NJI2d Civ. 2.12B is the pattern instruction on clear and convincing evidence.) Examples are in the following paragraphs.

- Transfer of property with intent to defraud.²⁶
- Recovery upon lost, destroyed, or negotiable stolen instruments.²⁷

²²The burden of proof in a fraudulent representation action at law is the greater weight of the evidence and the burden of proof in a fraudulent representation action in equity is clear and convincing evidence. This specific topic is discussed at NJI2d Civ. 9.01, Comment & Authorities. See also NJI2d Civ. 2.12B, Authorities; 15.22, Comment. Regarding fraud cases generally, there are two parallel lines of cases, one of which applies to the burden of proof by the greater weight of the evidence and the other of which applies the burden of proof by clear and convincing evidence. For a discussion of these cases, see the Authorities to NJI2d Civ. 2.12B.

²³Cotton v. Ostroski, 250 Neb. 911, 918, 554 N.W.2d 130, 135 (1996).

²⁴"We regard with great suspicion any claim of an oral contract to convey property at death. Such a contract is normally void on its face as violative of the statute of frauds." Eggers v. Rittscher, 247 Neb. 648, 653, 529 N.W.2d 741, 744 (1995) (citations omitted). Therefore, to enforce such a contract the existence, terms, and partial performance must be proved

by clear and convincing evidence. *Id.* at 653-54, 529 N.W.2d at 744-45. See also NJI2d Civ. 16.01).

²⁵Newton v. Brown, 222 Neb. 605, 613, 386 N.W.2d 424, 430 (1986); see also NJI2d Civ. 15.22, Comment.

²⁶State of Florida ex rel. Dept. of Ins. of State v. Countrywide Ins. Agency, Inc., 275 Neb. 842, 851-52, 749 N.W.2d 894, 901 (2008) ("[W]hether a transfer of property was made with intent to defraud creditors is a question of fact" and whether this "was a fraudulent transfer is a question of fact for the jury.").

²⁷"In an action to recover upon lost, destroyed, or stolen [negotiable] instruments, a plaintiff must prove the elements of the claim by clear and convincing evidence." Fales v. Norine, 263 Neb. 932, 939, 644 N.W.2d 513, 518 (2002). "[O]ne seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument." Castellano v. Bitkower, 216 Neb. 806, 810, 346 N.W.2d 249, 252 (1984).

- Imposing a constructive trust.²⁸
- A libel action by a public figure.²⁹
- Civil contempt.³⁰
- Fraud in an action in equity.³¹

²⁸“A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment.” *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 825-26, 458 N.W.2d 443, 450 (1990). To impose a constructive trust the plaintiff “must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and the enjoy the property so obtained.” *Junker v. Carlson*, 300 Neb. 423, 428, 915 N.W.2d 542, 546 (2018). *Accord* *Dreesen Enterprises, Inc. v. Dreesen*, 308 Neb. 433, 440-41, 954 N.W.2d 874, 880 (2021); *Gottsch*, 235 Neb. at 826, 458 N.W.2d at 450. The plaintiff’s burden of proof is clear and convincing evidence. *Junker, supra*; *Gottsch*, 235 Neb. at 826, 458 N.W.2d at 450; *In re Estate of Redpath*, 224 Neb. 845, 847, 402 N.W.2d 648, 650 (1987).

Neb. Rev. Stat. § 25-207 (Reissue 2016) is the statute of limitations that applies “with regard to the establishment of a constructive trust on personal property.” *Manker v. Manker*, 263 Neb. 944, 957, 644 N.W.2d 522 (2002). *See* *NJI2d Civ. 2.12B* for the pattern instruction on clear and convincing evidence.

²⁹In a libel action by a public figure, the plaintiff must prove both “the falsity of the published statements,” *Deaver v. Hinel*, 223 Neb. 529,

535, 391 N.W.2d 128, 132 (1986), and actual malice, *John E. Nowak & Ronald D. Rotunda*, *Constitutional Law* § 16.33, at 1096 (7th ed. 2007), by clear and convincing evidence. *Accord* *Hoch v. Prokop*, 244 Neb. 443, 446, 507 N.W.2d 626, 629 (1993) (falsity and actual malice).

³⁰“Outside of statutory procedures imposing a different standard or an evidentiary presumption, the complainant must prove all elements of contempt by clear and convincing evidence.” *Sickler v. Sickler*, 293 Neb. 521, 533, 878 N.W.2d 549, 560 (2016).

³¹The burden of proof in a fraudulent representation action at law is the greater weight of the evidence and the burden of proof in a fraudulent representation action in equity is clear and convincing evidence. This specific topic is discussed at *NJI2d Civ. 9.01, Comment & Authorities*. *See also* 15.22, *Comment*. Regarding fraud cases generally, there are two parallel lines of cases, one of which applies to the burden of proof by the greater weight of the evidence and the other of which applies the burden of proof by clear and convincing evidence. For a discussion of these cases, *see* the *Authorities* to *NJI2d Civ. 2.12B*.

Other cases include *Litherland v. Jurgens*, 291 Neb. 775, 783-84, 869 N.W.2d 92, 98 (2015) (holding that in a probate action involving fraudulent self-dealing by the holder of a power of attorney, clear and convincing is needed to rebut a prima facie case of fraud); *deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 162-63, 854 N.W.2d 298, 319 (2014) (equitable and promissory estoppel); *In re Estate of Stephenson*, 243 Neb. 890, 900, 503 N.W.2d 540, 548 (1993) (“In an equity

■ Undue influence in an inter vivos transfer of property.³²

The bracketed sentence of this instruction is to be given when one party has many more witnesses testifying with regard to an essential element than does an opposing party, and the opposing party requests that it be given. Since this instruction comes in two versions only, each version may be prepared in advance and kept on file to be used as appropriate.

Commenting on *Gilbert v. Archbishop Bergan Mercy Hospital*,³³ Dean Harvey Perlman stated:

The court correctly recognized that instructions which tell the jury that an injury or an accident alone does not prove negligence is merely part of establishing the burden of proof. The court finds the instruction in this case redundant because a clear burden of proof instruction was given. The court also recognizes that in some cases giving the redundant instruction might be prejudicial if it unduly emphasizes the burden of proof. It would seem wise not to give the instruction.³⁴

NJI2d Civ. 2.12B

BURDEN OF PROOF—CLEAR AND CONVINCING EVIDENCE DEFINED

[In this case, the plaintiff has the burden of proving (his, her, its) claims by clear and convincing evidence.]

[In this case, the plaintiff has the burden of proving (identify appropriate issue or issues) by clear and convincing evidence.]

case, fraud must be proven by clear and convincing evidence.'"); *Kracl v. Loseke*, 236 Neb. 290, 296, 461 N.W.2d 67, 72 (1990) (as basis for buyer's action to rescind contract, seller's fraud must be proved by clear and convincing evidence); *ServiceMaster Industries Inc. v. J.R.L. Enterprises, Inc.*, 223 Neb. 39, 388 N.W.2d 83 (1986) (equity action for an accounting and to enjoin defendants from further breach of agreement).

³²In "[a]n action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and . . . undue influence must be proved

by clear and convincing evidence." *Peterson v. Peterson*, 230 Neb. 479, 486, 432 N.W.2d 231, 236 (1988) (citations omitted) (by contrast, in the contest of a will undue influence "must be proved by a preponderance of the evidence"; regarding the burden of proving undue influence in a will contest, see NJI2d Civ. 16.06).

³³*Gilbert v. Archbishop Bergan Mercy Hosp.*, 228 Neb. 148, 421 N.W.2d 760 (1988).

³⁴Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law*, Nebraska Tort Law 1987-88, Review and Comments 10 (1988).

[In this case, the plaintiff has the burden of proving the following claims by clear and convincing evidence: (here list the claims to which this burden applies).]

Clear and convincing evidence means evidence that produces a firm belief or conviction about the fact to be proved. [Clear and convincing evidence means more than the greater weight of the evidence and less than proof beyond a reasonable doubt.]

COMMENT

Much of the discussion of clear and convincing evidence is in the Comment & Authorities to NJI2d 2.12A. Please see that Comment & Authorities.

Care must be taken to see that this instruction is applied only to the appropriate issues. The pattern is drafted for the situation where this burden is the plaintiff's. It must be modified if the burden is the defendant's.

The first three paragraphs (the three in brackets) are alternatives, the first is to be used where the plaintiff must prove all of his or her claims by clear and convincing evidence and the second or third is to be used where the plaintiff must prove some, but not all, of his or her claims by clear and convincing evidence.

All or part of the bracketed material in the fourth paragraph is to be included, as appropriate, in a case where the jury is to be instructed on both the burden of the greater weight of the evidence and the burden of clear and convincing evidence. Otherwise, it is to be used at the judge's discretion, in cases where it will help the jury more clearly understand their task.

If the jury is to be instructed on the greater weight of the evidence, NJI2d Civ. 2.12A, and on clear and convincing evidence, NJI2d Civ. 2.12B, then NJI2d Civ. 2.12A will have to be modified to reflect the fact that it does not apply to all of the claims the jury must decide.

For examples of facts the proof of which requires clear and convincing evidence, see NJI2d Civ. 2.12A, Comment & Authorities.

AUTHORITIES

The usual burden of proof in a civil case is the burden of proving a fact by the greater weight of the evidence. NJI2d Civ. 2.12A. In a number of situations, however, a party has a greater burden. Some of these situations involve decisions of law to be made by the court and some involve questions of fact in non-jury trials. See the Comment & Authorities to NJI2d Civ. 2.12A. But some involve questions of fact in a

jury trial. For example, "one seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument."¹ In a jury trial where this more stringent burden is applicable, the burden must, of course, be stated (and, if there is more than one issue and two different burdens apply, confined to the relevant issue) in the instructions.

"Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."² "Clear and satisfactory evidence" means the same as "clear and convincing evidence."³ While it means the same, it is not recommended.

C. RES IPSA LOQUITUR

NJI2d Civ. 2.13

RES IPSA LOQUITUR

To prove defendant's negligence, the plaintiff is relying on a legal doctrine known as *res ipsa loquitur*.

In order for this doctrine to apply, the plaintiff has the burden of proving by the greater weight of the evidence each of the following:

1. That the (Insert descriptive word such as occurrence, ac-

2.12B

¹Castellano v. Bitkower, 216 Neb. 806, 809-10, 346 N.W.2d 249, 252 (1984).

²Same quotation: *R and B Farms, Inc. v. Cedar Valley Acres, Inc.*, 281 Neb. 706, 714, 798 N.W.2d 121, 128 (2011) (involving an attempt to reform a deed); *In re Interest of Sunshine A.*, 258 Neb. 148, 153, 602 N.W.2d 452, 457 (1999). *Accord, e.g.*, *State of Florida ex rel. Dept. of Ins. of State v. Countrywide Ins. Agency, Inc.*, 275 Neb. 842, 851, 749 N.W.2d 894, 901 (2008); *Poppe v. Siefker*, 274 Neb. 1, 7, 735 N.W.2d 784, 790 (2007); *In re Interest of Phoenix L.*, 270 Neb. 870, 880, 708 N.W.2d 786, 795 (2006) ("Clear and convincing evidence is a lower standard than proof beyond a reasonable doubt.") (disapproved of on other grounds by *In re Destiny A.*, 274 Neb. 713, 742 N.W.2d 758 (2007)); *In*

re Guardianship and Conservatorship of Garcia, 262 Neb. 205, 213, 631 N.W.2d 464, 470 (2001); *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 263, 369 N.W.2d 96, 99 (1985); *Cotton v. Ostroski*, 250 Neb. 911, 918, 554 N.W.2d 130, 135 (1996); *In re Interest of K.M.S.*, 236 Neb. 665, 670, 463 N.W.2d 586, 590 (1990) ("Clear and convincing evidence requires that the trier of fact must be firm in its belief or conviction that the evidence shows the existence of the fact to be proven."); *J.J. Schaefer Livestock Hauling, Inc. v. Gretna State Bank*, 229 Neb. 580, 585, 428 N.W.2d 185, 189 (1988) (equity action); *Castellano v. Bitkower*, *supra*. See also *State v. Kofoed*, 283 Neb. 767, 771, 817 N.W.2d 225, 231 (2012) (criminal case).

³*Tobin, above*; *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

cident, collision, fall, et cetera) was proximately caused by a (insert appropriate description of the instrumentality involved) that was in the exclusive control of the defendant; and

2. That in the normal course of events the (occurrence, accident, collision, fall, et cetera) would not have occurred unless the defendant was negligent.

If you find that the plaintiff *has* met this burden of proof, the law permits, but does not require, you to infer therefrom that the defendant was negligent with respect to (insert appropriate description of the instrumentality involved) while it was under (his, her, its) control.

SPECIAL NOTE

This pattern instruction states two elements of the burden of proof. Some cases state three:

There are three elements that must be met for *res ipsa loquitur* to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.¹

Do not use this instruction without reading the Comment, below, and deciding whether or not a third element must be added.

COMMENT

- I. IN GENERAL
- II. RES IPSA LOQUITUR AND THE DOCTRINE THAT NEGLIGENCE IS NEVER PRESUMED
- III. PLEADING SPECIFIC ACTS OF NEGLIGENCE AND RES IPSA LOQUITUR
- IV. RES IPSA LOQUITUR ACTING AS A BURDEN-OPPROOF SHIFTING PRESUMPTION
- V. SUMMARY JUDGMENT
- VI. CROSS REFERENCES

I. IN GENERAL

This is a statement of the doctrine of *res ipsa loquitur*. NJI2d Civ. 2.01 should be used along with it.

2.13

¹McLaughlin Freight Lines, Inc.

v. Gentrup, 281 Neb. 725, 728, 798 N.W.2d 386, 389 (2011).

II. RES IPSA LOQUITUR AND THE DOCTRINE THAT NEGLIGENCE IS NEVER PRESUMED

It is true, as a general rule, that “negligence is never presumed.”² As a matter of law, “[t]he mere fact that an injury or accident occurred does not raise a presumption of negligence.”³ Regarding these general rules, see NJI2d Civ. 2.01, Authorities.

Res ipsa loquitur has been said to be an exception to the general rule that negligence cannot be presumed.⁴ Whether this is so or not is unclear. As discussed in the next paragraph, res ipsa does not seem to presume negligence, but rather to be a label put on a certain specific kind of circumstantial evidence.

Here is another way of looking at how res ipsa fits with this general rule. Res ipsa requires more than just the happening of an injury-causing accident: It requires an injury-causing accident of a sort that, in the ordinary course of affairs, does not happen when those in control of the instrumentality causing the injury exercise proper care. When the situation is such that in the ordinary course of affairs the accident would not have happened had those in control of the injury-causing instrumentality used proper care, then the happening of the accident is circumstantial evidence of negligence. Therefore, when res ipsa kicks in, there is more than just the happening of an accident: There is that plus circumstantial evidence of negligence. Res ipsa is not a matter of substantive law but a form of circumstantial evidence.⁵

²*Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 567, 558 N.W.2d 540, 546 (1997). *Accord*, e.g., *Pantano v. American Blue Ribbon Holdings, LLC*, 303 Neb. 156, 165, 927 N.W.2d 357 (2019) (“Negligence is not presumed and must be proved by evidence, direct or circumstantial.”); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1025-26, 574 N.W.2d 478, 484-85 (1998); *Burrows v. Jacobsen*, 209 Neb. 778, 781, 311 N.W.2d 880, 883-84 (1981).

³*Herrera v. Fleming Companies, Inc.*, 265 Neb. 118, 123, 655 N.W.2d 378, 383 (2003). *Accord*, e.g., *Pantano*, 303 Neb. at 165, 927 N.W.2d at —; *Fynbu v. Strain*, 190 Neb. 719, 721, 211 N.W.2d 917, 919 (1973) (“Proof that an accident happened and that the plaintiff was injured is not enough unless the standard of liability to be applied to the defendant is that of an insurer.”).

⁴*Anderson v. Union Pacific Railroad Company*, 295 Neb. 785, 791, 890 N.W.2d 791, 796 (2017); *McLaughlin Freight Lines, Inc. v. Gentrup*, 281 Neb. 725, 728, 798 N.W.2d 386, 389 (2011); *Chism v. Campbell*, 250 Neb. 921, 927, 553 N.W.2d 741, 746 (1996), or a qualification, *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1026, 574 N.W.2d 478, 485 (1998); *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 247, 533 N.W.2d 664, 667 (1995).

⁵*See Anderson*, 295 Neb. at 791, 890 N.W.2d at 796 (“The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof. . . . [It] is a procedural tool that, if applicable, allows an inference of a defendant’s negligence to be submitted to the fact finder, where it may be accepted or rejected.” (multiple quotation marks

Res ipsa “is not a rule of pleading, not a substantive rule of law, but a rule of evidence.”⁶

Under res ipsa loquitur, “the accident and resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or the agency proximately causing such injury use proper care. When applicable, the essence of the doctrine is that an inference of negligence arises without further proof and that the facts speak for themselves.”⁷

This is discussed further in the next part of this Comment.

III. PLEADING SPECIFIC ACTS OF NEGLIGENCE AND RES IPSA LOQUITUR

Pleading both specific acts of negligence and res ipsa loquitur is inconsistent. If a party either pleads specific acts of negligence or there is direct evidence of the precise cause of the accident, then res ipsa loquitur is inapplicable and, of course, since the res ipsa loquitur doctrine is inapplicable, this instruction should not be given.⁸ All is not lost, however: Whatever maybe the basis for res ipsa can still be argued to the trier of fact.

“[G]eneral allegations of negligence,” however, “[do] not foreclose res ipsa loquitur.”⁹

An unsuccessful attempt on the part of the plaintiff to show

and citations omitted)) and other cases cited and discussed in the next part of this Comment.

⁶*Anderson*, 295 Neb. at 792, 890 N.W.2d at 796 (internal quotation marks omitted).

⁷*Long v. Hacker*, 246 Neb. 547, 557, 520 N.W.2d 195, 202 (1994).

⁸See *Anderson v. Union Pacific Railroad Company*, 295 Neb. 785, 792, 890 N.W.2d 791, 798 (2017); *Stahl-ecker v. Ford Motor Co.*, 266 Neb. 601, 607, 667 N.W.2d 244, 252 (2003); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1026, 574 N.W.2d 478, 485 (1998); *Long v. Hacker*, 246 Neb. 547, 558, 520 N.W.2d 195, 202 (1994); *McVaney v. Baird*, *Holm*, *McEachen*, *Pedersen*, *Hamann & Strasheim*, 237 Neb. 451, 462, 466 N.W.2d 499, 507 (1991); *Maly v. Arbor Manor, Inc.*, 225

Neb. 276, 280, 404 N.W.2d 419, 423 (1987); *Beatty v. Davis*, 224 Neb. 663, 665, 400 N.W.2d 850, 852 (1987); *Finley v. Brickman*, 186 Neb. 747, 752, 186 N.W.2d 111, 113-14 (1971); *Lund v. Mangelson*, 183 Neb. 99, 103-04, 158 N.W.2d 223, 227 (1968); *Sankey v. Williamsen*, 180 Neb. 714, 718, 144 N.W.2d 429, 431 (1966); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 567, 106 N.W.2d 871, 875 (1961) (citing cases); *Weston v. Gold & Co.*, 167 Neb. 692, 699, 94 N.W.2d 380, 385 (1959) (where plaintiff pleaded specific acts of negligence, error to submit case to jury under res ipsa loquitur doctrine); *Mischnick v. Iowa-Nebraska Light & Power Co.*, 125 Neb. 598, 602, 251 N.W. 258, 259 (1933).

⁹*Long v. Hacker*, 246 Neb. at 559, 520 N.W.2d at 203.

the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of *res ipsa loquitur*. It is quite generally agreed that the introduction of some evidence which tends to show the specific acts of negligence on the part of the defendant, but which does not purport to furnish full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence and so does not deprive the plaintiff of the benefit of *res ipsa loquitur*.¹⁰

It is not necessarily inconsistent to submit a case on both the negligence theory of *res ipsa loquitur* and the contract theory of implied warranty.¹¹

IV. RES IPSA LOQUITUR ACTING AS A BURDEN-OF-PRODUCTION SHIFTING PRESUMPTION

As stated in the Special Note, above, the pattern instruction states two elements of the burden of proof and some cases cite three:

There are three elements that must be met for *res ipsa loquitur* to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.¹²

What follows attempts to explain that third element—the one missing from the pattern instruction.

Furthermore, the part of this Comment immediately preceding this one states that it is inconsistent to plead specific acts of negligence and *res ipsa loquitur*. Much of what followed can seem inconsistent with that. What follows is an attempt to explain this specious inconsistency.

Perhaps the rule is that *res ipsa* can be relied on as a legal doctrine on which one can base recovery, and regarding which one is entitled to instruction, but only when *res ipsa* is pleaded and both specific acts of

¹⁰Long v. Hacker, 246 Neb. 547, 520 N.W.2d at 202 (1994) (citations and quotation marks omitted). *Accord* *McVane*, 237 Neb. at 462, 466 N.W.2d at 508 (1991); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 928, 62 N.W.2d 127, 131 (1954).

¹¹*Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 860, 112 N.W.2d 252, 256 (1961).

¹²*McLaughlin Freight Lines, Inc. v. Gentrup*, 281 Neb. 725, 728, 798 N.W.2d 386, 389 (2011).

negligence are not pleaded and there is no direct evidence of the precise cause of the accident. If specific acts of negligence are pleaded or there is direct evidence of the precise cause of the accident, then *res ipsa* is simply a rule of evidence, not a separately-instructed-upon legal doctrine: The "it wouldn't have happened but for defendant's negligence" element of *res ipsa* serves as circumstantial evidence from which a trier of fact may be able to infer negligence, and this instruction would not be given.¹³

Perhaps this is what happens: *Res ipsa* is like a common-law presumption in that it satisfies the plaintiff's burden of production and gets the plaintiff's case past a motion to dismiss, which is, of course, a question of law. If that question of law is answered in favor of the application of *res ipsa*, then the jury can be instructed on this doctrine. Finally, the doctrine can be the basis for a verdict, which is a question of fact. It is like a common-law presumption in that once it satisfies the burden of production, it disappears from the case as a presumption and remains for whatever value it has in terms of logical relevance, that is, it remains as circumstantial evidence. And when *res ipsa* applies, this instruction, NJI2d Civ. 2.13, in effect, substitutes for the usual presumption-instructions, NJI2d Civ. 2.14A through 2.14D.

Since the initial publication of the above discussion, the court has decided *Harvey* and *Roberts*, quoted immediately below, which support the above discussion:

The doctrine of *res ipsa loquitur* is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. When *res ipsa loquitur* is applied, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination of whether the defendant is negligent.¹⁴

In a conventional negligence case, the mere occurrence of an accident which causes an injury and does damage does not create a presumption of negligence or authorize an inference of negligence. *Res ipsa loquitur* is a qualification of the general rule that negligence is not to be presumed. The doctrine of *res ipsa loquitur* is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. If *res ipsa*

¹³See *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 247, 533 N.W.2d 664, 667 (1995); *Brown v. Scrivner, Inc.*, 241 Neb. 286, 290, 488 N.W.2d 17, 19 (1992); *Anderson v. Service Merchandise Co., Inc.*, 240 Neb. 873, 880-81, 485 N.W.2d 170, 176 (1992),

all discussing *res ipsa loquitur*'s operation as a type of circumstantial evidence raising a jury question.

¹⁴*Harvey v. Metropolitan Utilities Dist. of Omaha*, 246 Neb. 780, 783-84, 523 N.W.2d 372, 375 (1994) (citations omitted).

loquitur applies, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the inference in the factual determination of whether the defendant is negligent.¹⁵

Regarding circumstantial evidence generally, *see* NJI2d Civ. 1.31.

V. SUMMARY JUDGMENT

[Appellant] argues that merely pleading *res ipsa loquitur* precludes summary judgment When the doctrine of *res ipsa loquitur* is utilized, the examination of whether there is a genuine issue of material fact must be related solely to the issues under the required elements of the doctrine. If the doctrine of *res ipsa loquitur* is applicable, the inference of negligence itself presents a question of material fact, and summary judgment is improper. If, however, the doctrine of *res ipsa loquitur* is inapplicable as a matter of law and there is no material question of fact regarding actionable negligence, summary judgment is proper. Therefore, merely pleading *res ipsa loquitur* does not preclude [the court] from granting summary judgment.¹⁶

VI. CROSS REFERENCES

General rules regarding *res ipsa loquitur* are discussed above and in the NJI2d Civ. 12.01, Comment (focusing on *res ipsa* in medical malpractice cases).

The general rule that negligence is never presumed but must be proved by evidence and how that squares with the doctrine of *res ipsa loquitur* is discussed in part II the Comment to this instruction and at NJI2d Civ. 2.01, both above.

¹⁵*Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 247, 533 N.W.2d 664, 667 (1995) (citations omitted). In addition to *Harvey, above*, and *Roberts*, *see* *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 714, 571 N.W.2d 783, 787 (1998) (stating that *res ipsa loquitur* affords evidence that the occurrence arose as result of the alleged wrongdoer's negligence); *Chism v. Campbell*, 250 Neb. 921, 927, 553 N.W.2d 741, 746 (1996) (stating that *res ipsa* is procedural tool allowing inference of defendant's negligence to be submitted to fact finder, which inference allowed because it is probable and more plausible than any other explanation propounded); *Benedict v. Eppley Hotel Co.*, 161 Neb. 280, 283, 73 N.W.2d 228,

230 (1955); *Anderson v. Service Merchandise Co., Inc.*, 240 Neb. 873, 879-81, 485 N.W.2d 170, 175-76 (1992) (discussing *res ipsa*'s operation as type of circumstantial evidence raising jury question); *Swanson v. Murray*, 172 Neb. 839, 842, 112 N.W.2d 11, 13 (1961); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 925, 62 N.W.2d 127, 129 (1954).

¹⁶*Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 713-14, 571 N.W.2d 783, 786 (1998) (citations omitted). Regarding *res ipsa* and summary judgment, *also see particularly* *McLaughlin Freight Lines*, 281 Neb. at 728-31, 798 N.W.2d at 389-91.

Regarding *res ipsa*'s applicability in escaped livestock cases, see particularly *McLaughlin Freight Lines*.¹⁷

Also see generally Comment, *Res Ipsa Loquitur—An Analysis of Its Application and Procedural Effects in Nebraska*, 41 Neb. L. Rev. 747 (1962); Note, *Res Ipsa Loquitur: Pleading Acts of Negligence*, 52 Neb. L. Rev. 404 (1973).

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Regarding the two elements of the burden of proof, see the cases footnoted here.¹⁸ More recently, the exclusivity of defendant's control of the instrumentality is discussed in the footnotes here.¹⁹

*Asher v. Coca Cola Bottling Co.*²⁰ recognizes exclusive control as an element of this doctrine and finds the element satisfied in a bit of an unusual factual setting. In *Asher*, the plaintiff sued Coca Cola for damages suffered as a result of having found a dead mouse in a bottle of pop served him in the Eagle Cafe. Twice a week the bottler delivered wholesale quantities of Coke to the Eagle Cafe and stacked it near a cooling machine. As needed, bottles were transferred to the cooling

¹⁷*McLaughlin Freight Lines, Inc. v. Gentrup*, 281 Neb. 725, 728-33, 798 N.W.2d 386, 389-92 (2011) (discussing, among other things, the effect of Neb. Rev. Stat. § 25-21,274 (Reissue 2016)).

¹⁸*McLaughlin Freight Lines, Inc. v. Gentrup*, 281 Neb. 725, 728, 798 N.W.2d 386, 389 (2011) (stating as a third element that "there must be an absence of explanation by the alleged wrongdoer; regarding this third element, see part IV of the Comment, above); *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 714, 571 N.W.2d 783, 787 (1998) (discussing control; control was exclusive if was no possibility third party, non-defendant could have caused injury in question); *Chism v. Campbell*, 250 Neb. 921, 927, 553 N.W.2d 741, 746 (1996) (stating third element; see *McLaughlin Freight Lines*, above); *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 247, 533 N.W.2d 664, 667 (1995) (regarding a vehicle colliding with livestock); *Harvey v. Metropolitan Utilities Dist. of Omaha*, 246 Neb. 780, 785, 523 N.W.2d 372, 375 (1994); *Brown v. Scrivner, Inc.*, 241 Neb. 286, 288-89, 488 N.W.2d 17, 18 (1992); *Anderson v. Service Merchandise Co., Inc.*, 240

Neb. 873, 879-80, 485 N.W.2d 170, 175 (1992); *Widga v. Sandell*, 236 Neb. 798, 803, 464 N.W.2d 155, 158-59 (1991) (discussing both elements of burden of proof, particularly exclusivity of control and stating that "failure to plead any degree of control and management in defendant" fatal to attempt to plead *res ipsa loquitur*); *Maly v. Arbor Manor, Inc.*, 225 Neb. 276, 278-81, 404 N.W.2d 419, 422-23 (1987) (discussing both elements of burden of proof and citing cases; stating that though the plaintiff must prove the control was "exclusive", it was not fatal when the word "exclusive" was not included in the petition); *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 3-4, 165 N.W.2d 85, 88 (1969) (citing cases). See also *Burrows v. Jacobsen*, 209 Neb. 778, 781, 311 N.W.2d 880, 883-84 (1981).

¹⁹*Anderson v. Service Merchandise Co., Inc.*, 240 Neb. 873, 879-80, 485 N.W.2d 170, 175 (1992); *Widga v. Sandell*, 236 Neb. 798, 803-04, 464 N.W.2d 155, 158-59 (1991).

²⁰*Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 857-59, 112 N.W.2d 252, 254-55 (1961).

machine. As ordered, bottles were taken from the cooling machine, uncapped, and served, all by the employee serving the customer. The defendant contended that the divided control over the bottle by the defendant and the Eagle Cafe precluded recovery under the doctrine of *res ipsa loquitur*. The Supreme Court said this: "The jury in consideration of all the evidence had a reasonable basis for its finding that the dead mouse was in the bottle at the time of the delivery of the bottle to the Eagle Cafe. The trial court, therefore, did not err in submitting negligence on the theory of the *res ipsa loquitur* doctrine."²¹ This case seems to say that if the jury finds from the evidence that subsequent to the delivery of the pop to the cafe, the cafe was not negligent, then the negligence of the bottler can be shown by the doctrine of *res ipsa loquitur*.

The court revisited this issue in *Harvey v. Metropolitan Utilities District* and stated that, "In certain settings, strict exclusive control is not required and *res ipsa loquitur* will be applied to the party who had the last opportunity to affect an instrumentality which then passed out of its control but was not changed before the accident."²²

For a discussion of the relationship between *res ipsa* and negligence, the *res ipsa* doctrine as a qualification of the general rule that negligence is not presumed, and *res ipsa* as a form of circumstantial evidence, see the Comment, above.

D. PRESUMPTIONS

NJI2d Civ. 2.14A

PRESUMPTIONS—BASIC FACTS NOT CONTESTED; PRESUMED FACT NOT CONTESTED

[No separate instruction is required. This is analogous to an admission or to judicial notice. See NJI2d Civ. 2.01.]

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. TRUE PRESUMPTIONS (BLACK'S LAW DICTIONARY)
VERSUS CASUAL USES OF THE WORD (MERRIAM-
WEBSTER DICTIONARY)

²¹*Id.* at 859-60, 112 N.W.2d at 255.

²²*Id.* at 785, 523 N.W.2d at 376
(*res ipsa* used to find MUD liable for

explosion and fire in plaintiffs' home, caused by natural gas leak from some part of MUD's gas meter assembly).

- A. LEGALLY PERMISSIBLE INFERENCES
- B. THE PRIMA FACIE CASE
- C. RULES OF LAW
- D. DICTIONARY DEFINITIONS
- III. TRUE PRESUMPTIONS
- IV. IN NEBRASKA THERE ARE TWO KINDS OF PRESUMPTIONS
 - A. EVIDENTIARY PRESUMPTIONS
 - B. NON-EVIDENTIARY PRESUMPTIONS
 - C. THE ESSENTIAL DIFFERENCE BETWEEN THE TWO
- V. ONE PRESUMPTION CANNOT BE BUILT UPON ANOTHER
- VI. ADDITIONAL AUTHORITY

I. IN GENERAL

This Comment & Authorities and NJI2d Civ. 2.14B-2.14D are applicable in civil actions only. Regarding criminal prosecutions *see* Neb. Evid. R. 303, Neb. Rev. Stat. § 27-303 (Reissue 2016); NJI2d Crim. Ch. 2.

Even in civil actions, these instructions do not apply to a claim or defense “to which federal law supplies the rule of decision.” Federal law regarding presumptions applies to that claim or defense. Neb. Evid. R. 302, Neb. Rev. Stat. § 27-302 (Reissue 2016).¹

Furthermore, these instructions do not apply to all true or legal presumptions (*see* part II of this Comment & Authorities, below), but only to those that are “evidentiary” presumptions (*see* part IV(A) of this Comment & Authorities, below). Before these instructions are used, counsel and the trial judge must make sure that the presumption in question is both a true presumption and an evidentiary presumption.

When a party relies on the doctrine of *res ipsa loquitur* use NJI2d Civ. 2.13. The Nebraska Evidence Rule on presumptions does not seem to control *res ipsa*.²

2.14A

¹*See also* Dawes v. Wittrock Sandblasting & Painting, Inc., 266 Neb. 526, 544-45, 667 N.W.2d 167, 185 (2003) (citing Neb. Evid. R. 301), *disapproved on other grounds*, Kimminau v. Uribe Refuse Service, 270 Neb. 682,

684-85, 707 N.W.2d 229, 231 (2005).

²Christopher B. Mueller, *The Nebraska Rules of Evidence, 1980: Chapter III, Presumptions in Civil Cases*, 19 (NCLE, Inc.). *Cf.*, various authorities cited at NJI2d Civ. 2.13, Authorities.

II. TRUE PRESUMPTIONS (BLACK'S LAW DICTIONARY) VERSUS CASUAL USES OF THE WORD (MERRIAM-WEBSTER DICTIONARY)

Lawyers, courts, and legislatures often use the word presumption either carelessly or in the Merriam-Webster Dictionary sense rather than the Black's Law Dictionary sense. (These definitions are at part II(D) of this Comment & Authorities, below.) To understand true legal presumptions, one must be able to distinguish them from the three other concepts to which the word is most often casually applied: legally permissible inferences, the prima facie case, and rules of law, the latter sometimes called irrebuttable presumptions.

A. LEGALLY PERMISSIBLE INFERENCES

Sometimes legally permissible inferences are called presumptions. For example, in *Trieweiler v. Sears*, the trial court held that there is "[a] presumption that the missing, lost or destroyed records contained information" unhelpful to the party keeping the records and helpful to the party requesting them. This is nothing more than an expression of a legally permissible inference, which the Supreme Court recognizes when, on appeal, it states that the missing records "may be indicative of fraud and a desire to suppress the truth," and cites a First Circuit case stating that such a situation "would clearly support the inference that the information contained therein would be harmful to the [party keeping the records]." ³ This "presumption" is simply an inference the law allows a trier of fact to draw from the evidence presented. It gains no weight as it would were it a true legal presumption. This is a use of the word presumption in a lay-dictionary sense.

B. THE PRIMA FACIE CASE

Sometimes when an attorney establishes his or her prima facie case, it is said that there is a presumption that the attorney's case has been made. Again, this is a use of the word in a lay dictionary sense. When an attorney makes a prima facie case, it simply means that, other issues aside, that part of the attorney's case gets to the jury. And the prima facie case gains no weight when we attach to it the word presumption, used for its lay-dictionary meaning. ⁴

³*Trieweiler v. Sears*, 268 Neb. 952, 988-89, 689 N.W.2d 807, 987 (2004) (citation omitted).

⁴*See In re Estate of Clinger*, 292 Neb. 237, 249, 872 N.W.2d 37, 48 (2015) (recognizing that what is sometimes called a presumption of undue influence in a will contest is really just a

statement of when the contestant has established a prima facie case and thereby shifted the burden of going forward); *Broken Bow Production Credit Ass'n v. Western Iowa Farms Co.*, 232 Neb. 357, 360-61, 440 N.W.2d 480, 482 (1989) (applying Neb. Rev. Stat. § 54-109, which states that, "In

Likewise, the court has held “that the file stamp of an agency such as the PSC is afforded a presumption of regularity and that therefore, in the absence of evidence to the contrary, the date the document was received by and in the possession of the agency for filing is the date shown by the file stamp.”⁵ This is no more than saying that when the file stamp is entered into evidence, then, unless there is contrary evidence, the file stamp is the only evidence and the agency has satisfied not only its burden of producing evidence, but also its burden of proof. If there is admissible evidence to the contrary, then the trier of fact must decide “the date the document was received by and in the possession of the agency for filing.”⁶

And there is this.

“Generally the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties in the premises. One in exclusive possession of the real estate of another with the latter’s knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner’s permission.”⁷

The first sentence, as noted again below, is but a statement of the rule of law that a contract—here a lease—can be implied from the actions of the parties. The second sentence simply states one way that a party can evidence the implied contract, that is, the lease.

In truth, often, establishing the *prima facie* case, discussed here, is not so different than the so-called “non-evidentiary presumptions” discussed below in part IV(B) of this Comment & Authorities. It is sometimes difficult to distinguish between the two.

all suits at law or in equity, or in any criminal proceedings, wherein the title to animals is an issue, the certified copy provided for in [§ 54-108] shall be *prima facie* evidence of the ownership of such animal by the person whose brand or mark it may be,” the court recognizes that this is not a true presumption, not a Rule 301 burden-of-proof-shifting presumption; instead, it “shift[s] the burden of going forward with the evidence [and] . . . means that in the absence of other evidence, proof of ownership of the brand is sufficient to constitute a *prima facie* case which will withstand a motion for a directed verdict on that issue”; “when evidence to the contrary is introduced,” wrote the court, “any ‘*presumption*’ of

ownership disappears and ownership becomes a question of fact to be determined by the preponderance of the evidence”) (emphasis added) (citing *Matter of McGowan’s Estate*, 197 Neb. 596, 603-04, 250 N.W.2d 234, 238-39 (1977)).

⁵In re Application No. C-4973 of Skrdlant, 305 Neb. 635, 641, 942 N.W.2d 196, 200 (2020).

⁶See also *State v. Hess*, 261 Neb. 368, 377, 622 N.W.2d 891, 900-01 (2001) discussed in part II(C)(1) of this Comment & Authorities, below.

⁷AVG Partners I, LLC v. Genesis Health Clubs of Midwest, LLC, 307 Neb. 47, 56, 948 N.W.2d 212, 225 (2020) (footnote omitted).

C. RULES OF LAW

1. Rules of Law Called Presumptions

Sometimes rules of law are called presumptions. For example, “[a] statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.”⁸ This is no more than a statement of the rule of law that the burden of proof is on the party challenging the validity of a statute or regulation and it is not a form of evidence and it has nothing to do with the legal-dictionary definition of presumption.

“In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.”⁹ This is simply a foundational fact supporting to rule of law that a later statute amends or repeals inconsistent earlier statutes or parts thereof. It cannot be changed by evidence that the Legislature was unaware of the previous statute; the later enacted still trumps. Same with the next sentence: “The Legislature is also presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.”¹⁰

Similarly, absent “evidence to the contrary, it may be presumed that public officers faithfully performed their official duties”¹¹ This is a statement of a rule of law. Just as the constitutionality of a statute is “presumed” to be valid so are the official acts of public agents and officers “presumed” to be valid. And when a party seeks recusal of a judge, the moving party “bears a heavy burden of overcoming the presumption of judicial impartiality.”¹² Both, again, are nothing more than statements of the rule of law that those challenging acts of government have the burden of proof, in the first, the burden of proving that the challenged assessment is excessive and, in the second, the burden of showing grounds for recusal of the judge.

And when a taxpayer protests the assessor’s valuation of its property “[t]he burden of proof rests upon the taxpayer to rebut this

⁸Adams v. State Board of Parole, 293 Neb. 612, 616, 879 N.W.2d 18, 21 (2016) (footnotes omitted).

⁹J.S. v. Nebraska Department of Health and Human Services, 306 Neb. 20, 35, 944 N.W.2d 266, — (2020) Accord In re Estate of Psota, 297 Neb. 570, 576, 900 N.W.2d 790, 795 (2017).

¹⁰J.S., 306 Neb. at 35, 944 N.W.2d

at 278.

¹¹State v. Hess, 261 Neb. 368, 377, 622 N.W.2d 891, 900-01 (2001).

¹²Same quotation: Tilson v. Tilson, 307 Neb. 275, 293, 948 N.W.2d 768, 783 (2020); Thompson v. Millard Public School District No. 17, 302 Neb. 70, 74, 921 N.W.2d 589, 594 (2019).

presumption [that the assessment is valid] and to prove that an assessment is excessive.”¹³ When the evaluation is entered in evidence, then, unless evidence to the contrary is introduced, then the evaluation is the only evidence and it carries the day.

As noted above, in part I(B), “Generally the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties in the premises.”¹⁴ This is but a statement of the rule of law that a contract—here a lease—can be implied from the actions of the parties.

For more examples, see the cases cited in this footnote.¹⁵

¹³Cain v. Custer County Board of Equalization, 298 Neb. 834, 845, 906 N.W.2d 285, 295 (2018). See also Wheatland Industries, LLC/Mid America Agri Products v. Perkins County Board of Equalization, 304 Neb. 638, 644-45, 935 N.W.2d 764, 769 (2019).

¹⁴AVG Partners I, LLC v. Genesis Health Clubs of Midwest, LLC, 307 Neb. 47, 56, 948 N.W.2d 212, 225 (2020).

¹⁵McGill Restoration, Inc. v. Lion Place Condominium Association, 309 Neb. 202, 225, 595 N.W.2d 251, 270 (2021) (“[T]he right of an attorney to enter an appearance for a party can be called in question only by the party. In any event, when an attorney appears in an action as the representative of a party to the action, the presumption of the law is that the attorney appears by the authority of the party whom the attorney ‘assumes to represent.’ (footnotes omitted). So, when the party has not called into question the attorney’s right to enter an appearance on its behalf, then, as a matter of law, the attorney appears as the by the authority of the party whom the attorney ‘assumes to represent’; Brown v. Jacobsen Land and Cattle Company, 302 Neb. 538, 545, 924 N.W.2d 65, 71 (2019) (stating, in adverse possession litigation, that in the case of a parent-child relationship, ‘possession of the land of . . . one by the other is presumed permissive, which is a statement of a rule of law

placing the burden of proof and not a form of evidence); Webb v. Nebraska Department of Health and Human Services, 301 Neb. 810, 828, 920 N.W.2d 268, 282 (2018) (“In a court of general jurisdiction, jurisdiction may be presumed absent a record showing the contrary.” This is simply a restatement of the statutory rule that courts of general jurisdiction have jurisdiction “in all matters except where otherwise provided.” (quoting Neb. Rev. Stat. § 24-203 (emphasis added by Webb))); Estate of Schluntz v. Lower Republican Natural Resources District, 300 Neb. 582, 587, 915 N.W.2d 427, 431 (2018) (“[W]here a statute has been judicially construed and that construction has not evoked an amendment, it is presumed that the Legislature has acquiesced in the court’s determination of the Legislature’s intent.”); Woodmen of the World Life Insurance Society v. Nebraska Department of Revenue, 299 Neb. 43, 54, 907 N.W.2d 1, 9 (2018) (“An exemption from taxation is never presumed.”) Marshall v. Marshall, 298 Neb. 1, 902 N.W.2d 223, 232 (2017) (The burden of proving that some or all of a personal injury “settlement is nonmarital [property] rests on the spouse making the claim. If the burden is not met, the presumption remains that the proceeds from the settlement are marital property.” (footnote omitted)); In re Estate of Psota, 297 Neb. 570, 576, 900 N.W.2d 790, 795 (2017) (“In enacting a statute, the Legislature must be presumed to have knowledge of all previ-

The true presumption says that if the party with the burden proves certain basic facts, then the final fact may be presumed. And the above rules of law have nothing to do with that.

It should be pointed out that there is similarity, if not overlap, between parts II(B) and (C)(1) of this Comment & Authorities. As noted above, some cases it can be difficult to tell the difference. But in neither case is the “presumption” a true law-dictionary presumption.¹⁶

See also “Evidentiary Presumptions” in part IV(A) of this Comment & Authorities.

2. Rules of Law Called “Irrebuttable” or “Conclusive” Presumptions

“[A] conclusive presumption is ‘a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted’”¹⁷

Sometimes rules of law are called “irrebuttable presumptions.” *State ex rel. Freezer Servs. Inc. v. Mullen* is simply stating a rule of law when it holds that “when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes as-

ous legislation upon the subject. The Legislature is also presumed to know the language used in a statute); *Erin W. v. Charissa W.*, 297 Neb. 143, 148, 897 N.W.2d 858, 863 (2017) (Nebraska statutes provide that “a child born during a marriage relationship is presumed to be the husband’s child. . . . The statutory presumption of legitimacy may be rebutted only by clear, satisfactory, and convincing evidence. This court has long held that the testimony of declaration of a husband or wife is not competent to overcome this presumption.” (paragraph break and footnotes omitted)); *State v. Covey*, 290 Neb. 257, 269, 859 N.W.2d 558, 566 (2015) (stating “that the same words used in the same sentence are presumed to have the same meaning”; this is not a presumption, but a rule of statutory interpretation); *Burns v. Burns*, 296 Neb. 184, 192, 892 N.W.2d 135, 141 (2017) (“In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible, rather than an absurd, result”; again, this is not

a presumption, but a rule of statutory interpretation). *Accord*, *In re Adoption of Luke*, 263 Neb. 365, 376, 640 N.W.2d 374 (2002).

And see, the following cases, among others, regarding the general verdict rule: *First National Bank North Platte v. Cardenas*, 299 Neb. 497, 516, 909 N.W.2d 79, 93 (2018) (“Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury.”); *Lewison v. Renner*, 298 Neb. 654, 666, 905 N.W.2d 540, 549 (2018); *Golnick v. Callender*, 290 Neb. 395, 411, 860 N.W.2d 180, 193-94 (2015).

¹⁶Compare, e.g., *Skrdlant*, in part II(B) of this Comment and Authorities, with *Hess*, in this part.

¹⁷*Salem Grain Company, Inc. v. City of Falls City*, 302 Neb. 548, 571, 924 N.W.2d 678, 696 (2019) (holding that such presumptions are not procedural statutes of limitations; “[n]or are they affirmative defenses”).

sociated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.”¹⁸ This “presumption” is a rule of law created by Canons 4, 5, and 9 and DR 5-105(D) of the Code of Professional Responsibility.

For a second example, there is a so-called irrebuttable presumption that an insured who has settled for less than the tortfeasor’s liability-limits has received full compensation. Thus, the insurer may assert subrogation rights to recoup its medical payments out of the settlement.¹⁹ This is a statutory rule of law created by Neb. Rev. Stat. § 44-3,128.01 (Reissue 2010).

Again, these are simply lay-dictionary uses of the word. In the law-dictionary sense of the word all presumptions are rebuttable; there is no such thing as an “irrebuttable” presumption.²⁰

See also “Evidentiary Presumptions” in part IV(A) of this Comment & Authorities.

D. DICTIONARY DEFINITIONS

The Merriam-Webster Dictionary defines presumed as “an attitude or belief dictated by probability: ASSUMPTION.”²¹ Black’s Dictionary defines presumption as, “A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts.”²² The examples above use the former meaning; these instructions apply to the latter meaning.

¹⁸State ex rel. Freezer Services, Inc. v. Mullen, 235 Neb. 981, 993, 458 N.W.2d 245, 253 (1990) (citing “Canons 4, 5, and 9 and DR 5-105(D) of the Code of Professional Responsibility”).

¹⁹Ploen v. Union Ins. Co., 253 Neb. 867, 871, 573 N.W.2d 436, 441 (1998).

²⁰See, e.g., G. Michael Fenner, *About Presumptions In Civil Actions*, 17 Creighton L.Rev. 307 (1983). See also R. Collin Mangrum, *Presumptions in General*, 3 Neb. Prac., Mangrum Neb. Evid. § 27-301 (2015) (“An irrebuttable presumption is not really a presumption, but instead a rule of law.”); Clifford S. Fishman and Anne T. McKenna, *Conclusive presumptions*, 1 Jones on Evidence § 4:57 (7th Edition 2014); Daniel A. Morris, *Irrebuttable or conclusive presumptions—*

Exclusionary rules of evidence, 2 Neb. Prac., Nebraska Trials § 18:17 (2014) (“Irrebuttable or conclusive presumptions . . . are better described as ‘rules’ rather than ‘presumptions.’”); John M. Phillips, *Irrebuttable Presumptions: An Illusory Analysis*, 27 Stan. L. Rev. 449, 462-63 (1975) (every “conclusive presumption is “a rule of substantive law” and “every rule of substantive law effecting a summary classification can be recast in terms of an irrebuttable presumption”).

²¹Presumption, Merriam-Webster Unabridged Dictionary, <http://unabridged.merriam-webster.com/unabridged/presumption> (last visited March 17, 2019).

²²Presumption, Black’s Law Dictionary (10th ed. 2014).

III. TRUE PRESUMPTIONS

True presumptions operate as follows. The party with the burden of proving a fact in issue puts on evidence of certain other so-called “basic facts” and, if the jury finds those basic facts to be true, then that constitutes either evidence or proof of the “presumed fact.”

Take the example of the familiar presumption of due receipt in the mail. Often (more often than not?) a party who must prove that another received a letter will not have any direct evidence that the other did in fact receive the letter. But, if the party with that burden introduces evidence of certain “basic facts”—*i.e.*, that he or she correctly address the envelope containing the letter; affixed the proper postage; and put it in a United States Post Office mailbox—and by the greater weight of the evidence the jury finds those basic facts to be true, then that kicks in the “presumed fact”—*i.e.*, that the addressee timely received the letter, *a.k.a.*, the presumption of due receipt in the mail. In most jurisdictions, the presumption of due receipt in the mail shifts the burden of production: the alleged recipient must produce some evidence rebutting either the presumed fact or one or more of the basic facts. (In Nebraska, there are two kinds of true presumptions, evidentiary and non-evidentiary. As discussed below, the former shift the burden of proof and the latter shift the burden of production. The presumption of due receipt in the mail is a non-evidentiary burden-of-production-shifting presumption. Evidentiary versus non-evidentiary presumptions are discussed immediately below.)

IV. IN NEBRASKA THERE ARE TWO KINDS OF PRESUMPTIONS

As noted above, in civil actions in Nebraska there are two kinds of true presumptions: “evidentiary” presumptions, which shift the burden of proof, and non-evidentiary” presumptions, which shift the burden of producing evidence. These instructions only apply to “evidentiary” presumptions.

A. EVIDENTIARY PRESUMPTIONS

Evidentiary presumptions shift the burden of proof to the party against whom the presumption operates. That is, once the basic facts are shown and the presumption kicks in, the party against whom the presumption operates bears the burden of proving “that the nonexistence of the presumed fact is more probable than its existence.” Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2016).²³

²³See *Dawes v. Wittrock* (2003) (addressing the statutory pre-Sandblasting & Painting, Inc., 266 Neb. Rev. Stat. § 48-526, 544-45, 667 N.W.2d 167, 185 162.01(3) (Reissue 2010) that “any

Other examples of evidentiary presumptions include those cited in this footnote.²⁴

vocational rehabilitation plan developed by [a] vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the [workers] compensation court is an appropriate form of vocational rehabilitation"; finding that this presumption, is governed by Neb. Evid. R. 301 and shifts the burden to opposing counsel to prove that the plan is incorrect (quoting Neb. Evid. R. 301; citing cases and G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 Creighton L. Rev. 383 (1992)), disapproved on other grounds, *Kimminau v. Uribe Refuse Service*, 270 Neb. 682, 684-85, 707 N.W.2d 229, 231 (2005). See also G. Michael Fenner, *About Presumptions In Civil Actions*, 17 Creighton L. Rev. 307, 314 (1983).

²⁴*Wisner v. Vandelay Investments, L.L.C.*, 300 Neb. 825, 845, 916 N.W.2d 698, 716 (2018) (applying Neb. Rev. Stat. § 77-1842 (Reissue 2009), which "provides that a tax deed is presumptive evidence that" that the notice the holder must provide before obtaining the deed was in fact provided that the required to obtain a tax deed required notice; this presumption "may be rebutted, but the burden [of proof] is upon the party attacking the validity of such a deed."); *Stacy M. v. Jason M.*, 290 Neb. 141, 145, 858 N.W.2d 852, 856 (2015) (applying Neb. Rev. Stat. § 42-377 (Reissue 2008), which states that the "legitimacy of children born during wedlock is presumed"; this, however, is simply a rule of law, a statutory placement of the burden of proof; whether the child was born during wedlock is the only basic fact and in almost every case (and perhaps every case) that fact will be indisputable); *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002) (applying Neb. Rev. Stat. § 25-1028, which "states that after a gar-

nishee fails to answer, the garnishee 'shall be presumed to be indebted' to the garnishor," *Spaghetti Ltd. P'ship*, 264 Neb. at 370, 647 N.W.2d at 620 (emphasis supplied in *Spaghetti Ltd. P'ship*), *disapproved on other grounds* *ML Manager, LLC v. Jensen*, 287 Neb. 171, 176, 842 N.W.2d 566, 572 (2014); *Brtek v. Cihal*, 245 Neb. 756, 768, 515 N.W.2d 628, 637 (1994) (regarding a deed, "if the evidence shows that the deed was in the grantor's possession at the time of his death and was not then recorded," there is a presumption of non-delivery that shifts "the burden of persuasion" to the grantee. (citation omitted)); *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987) (applying Neb. Rev. Stat. § 16-615, which provides that in the case of a city's establishment of or change to the grade of any street, avenue, or alley, "[f]or the purpose of paying the damages, if any, so awarded, the mayor and council shall have power to borrow money from any available fund in the amount necessary, which amount, upon the collection of the same by special assessment, shall be transferred from such special fund to the fund from which it has been borrowed," and holding that these special assessments are entitled to a presumption of validity; this is not a true presumption, but rather a statement of the rule of law that the acts of government are presumed to be valid and the challenger has the burden of proving otherwise; many of the subsequent cases on this point do not cite the statute, but simply cite the holding of *Brown*; see, e.g., *NEBCO, Inc. v. Board of Equalization of City of Lincoln*, 250 Neb. 81, 86-87, 547 N.W.2d 499, 503 (1996); *Bennett v. Board of Equalization of City of Lincoln*, 245 Neb. 838, 842, 515 N.W.2d 776, 779 (1994).

In re McGowan's Estate states that the facts that create evidentiary presumptions (the Rule 301 presumptions) vary very little from case to case, and result in uniform application of the presumption.²⁵

All of the above cases involve key aspects that satisfy the "specific and definite" requirement of *McGowan*. All involve the existence of other statutes (other than the Nebraska Evidence Rule on presumptions, Rule 301),²⁶ rules, or regulations, and many involve standard procedural tasks that vary little over time. All seem to be rules of law rather than presumptions, and, as rules of law, are for the court to decide and apply, not the jury.

Nevertheless, under a true evidentiary presumption (if any such Nebraska Rule 301 presumptions do exist), if the jury finds the basic facts to be true, then they must find the presumed fact to be true unless the party against whom the presumption is operates proves by the greater weight (or the preponderance) of the evidence that the presumed fact is not true. Once the jury accepts the basic facts as true, then the evidentiary presumption shifts the burden of proof regarding the presumed fact.

The rule that evidentiary presumptions involving questions of fact for the jury to decide shift the burden of proof makes possible four different situations that each call for different approaches to instructing the jury; these approaches are set out in NJI2d Civ. 2.14A through 2.14D. In each instance it is intended that the basic facts and the presumed fact should be stated without using the words "basic fact" or "presumed fact" or even talking in terms of a presumption.²⁷ There is a fifth possible situation: where evidence of the basic facts is too slight to trigger the presumption. In that situation, of course, there is no presumption and, therefore, no instruction on a presumption.

B. NON-EVIDENTIARY PRESUMPTIONS

Many presumptions in Nebraska, though true presumptions, are not "evidentiary presumptions." These are non-evidentiary presumptions and they do not shift the burden of proof. Rather, they shift the burden of producing evidence. If the party against whom the presumption operates fails to produce evidence that rebuts either a basic fact or the presumed fact, then that party loses the point. The non-evidentiary

²⁵*Matter of McGowan's Estate*, 197 Neb. 596, 603-04, 250 N.W.2d 234, 238-39 (1977). *See also* *Dawes v. Wittrock Sandblasting & Painting, Inc.*, 266 Neb. 526, 544-45, 667 N.W.2d 167, 185-86 (2003) (stating that a report produced in the course of a vocational rehabilitation counselor's

duties is entitled to the evidentiary presumption of correctness).

²⁶Codified at Neb. Rev. Stat. § 27-301 (Reissue 2016).

²⁷*Cf. Jack Weinstein & Margaret Berger, Weinstein Evidence*, ¶ 303[02], at 303-12 n. 5 (Dec. 1980 Supp.).

presumption gets the party in whose favor it operates past a motion to dismiss for failure to have introduced direct evidence of the presumed fact. It really is a way of giving extra weight to some circumstantial evidence. (Regarding circumstantial evidence generally, *see* NJI2d Civ. 1.31.)

Nebraska non-evidentiary presumptions are often otherwise referred to by their common-law name, “bursting bubble” presumptions. The presumption is the bubble. Once opposing counsel introduces evidence that rebuts either a basic fact or the presumed fact, the bubble bursts. The presumption disappears, the party against whom the presumption flowed has satisfied the burden of production that the presumption placed upon him or her, and what is left is for the jury is to assess the credibility and weight of the basic facts and the rebuttal evidence.²⁸

That is to say, “A presumption is not evidence and should never be placed in the scale to be weighed as evidence.”²⁹ But, an unrebutted presumption “take[s] the place of evidence.”³⁰ And if a basic fact or the presumed fact is not rebutted, then the party in whose direction the unrebutted presumption flows wins that point. If a basic fact or the presumed fact is rebutted, then the presumption disappears. But, the basic facts still exist; they still retain whatever persuasive value they possess; and they can be weighed as evidence just as they would be had the presumption never existed in the first place. In these cases, there is no need to instruct on a presumption that “vanish[ed] upon the introduction of contrary evidence.”³¹

²⁸*E.g., Dawes, supra; McGowan, supra; In re Estate of Clinger*, 22 Neb. App. 692, 706-09, 860 N.W.2d 198, 212 (2015), *aff’d*, 292 Neb. 237, 872 N.W.2d 37 (2015).

²⁹*Cain v. Custer County Board of Equalization*, 298 Neb. 834, 852, 906 N.W.2d 285, 299 (2018).

³⁰*Cain*, 298 Neb. 851, 906 N.W.2d at 298.

³¹*Dawes v. Wittrock Sandblasting & Painting, Inc.*, 266 Neb. 526, 544, 667 N.W.2d 167, 185 (2003) (*disapproved on other grounds*, *Kimminau v. Uribe Refuse Service*, 270 Neb. 682, 684-85, 707 N.W.2d 229, 231 (2005)). (*Green v. Morrill County Board of Equalization*, 299 Neb. 933, 911 N.W.2d 551 (2018) and *Cain v. Custer Cty. Bd. of Equal.*, *above*, concern the “presumption” that a property tax as-

essment by a county board of equalization is valid. As explained above, this is not a true presumption, but, instead, is a manifestation of the general rule of law that government acts are presumed to be valid and the burden of proving otherwise is on the challenger.)

See generally *In re Estate of Hedke*, 278 Neb. 727, 745, 775 N.W.2d 13, 29 (2009) (regarding a will contest alleging undue influence, “‘after [rebuttal] evidence has been introduced, the presumption disappears.’”) (citing cases); *Wilkins v. Wilkins*, 269 Neb. 937, 943, 697 N.W.2d 280, 285 (2005) (“The child support guidelines are to be applied as a rebuttable presumption . . . and any deviation from the guidelines must take into consideration the best interests of the children. A court may deviate from the guide-

Also, as noted above, none of these instructions applies when the presumption is a “non-evidentiary” “bursting bubble” presumption.

In truth, these so-called “non-evidentiary presumptions” and not so different from an attorney simply establishing his or her prima facie case that gets the attorney past a motion to dismiss and gets the attorney the verdict on the issue when there is no opposing evidence opposing evidence. It is sometimes difficult to distinguish between the prima facie case discussed in part II(B) of this Comment and Authorities and the evidentiary presumptions discussed here.

C. THE ESSENTIAL DIFFERENCE BETWEEN THE TWO

The essential differences between evidentiary and non-evidentiary presumptions are explained in *In re McGowan's Estate*.³² In 1975 the Unicameral passed into law the Nebraska Evidence Rules. See L.B. 279 (1975). Rule 301 states that, with some exceptions, presumptions shift the burden of proof to the party against whom the presumption runs. Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2016). *McGowan* found two kinds of presumptions, those subject to the statute (*i.e.*, evidentiary presumptions) and others not subject to the statute (*i.e.*, non-evidentiary presumptions).

McGowan notes that prior to the adoption of the Nebraska Evidence Rules all Nebraska presumptions shifted the burden of producing evidence. These are called “bursting bubble” presumptions, meaning that if evidence is produced to rebut either one or more of the basic facts or the presumed fact, then the presumption bursts—it “vanishe[s].”³³ While the presumption vanishes, the basic facts, that is, the facts that kicked in the presumption, remain in the case. They remain in evidence. And the trier of fact weighs those basic facts exactly

lines when one or both of the parties have provided sufficient evidence to rebut the presumption. . . . “The party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the *burden of providing evidence* regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.” (emphasis added; citations omitted); *Golgert v. Smidt*, 197 Neb. 667, 673, 250 N.W.2d 628, 632 (1977) (“A presumption of undue influence [in a will contest] is not a presumption contemplated by [Neb. Evid. R. 301] and the burden of proof on the issue of undue influence remains on the contestant.” (citing

Matter of McGowan's Estate, 197 Neb. 596, 250 N.W.2d 234 (1977)); *Dawes, supra* (discussing the statutory presumption of correctness of the opinion of a court-appointed vocational rehabilitation counselor in Workers Compensation Court) (citing cases), *disapproved on other grounds, Kimminau, supra*; *Patrick v. Union Cent. Life Ins. Co.*, 150 Neb. 201, 204-05, 33 N.W.2d 537, 539-40 (1948); *Clinger*, 22 Neb. App. at 706-09, 860 N.W.2d at 212 (citing cases and authorities).

³²*Matter of McGowan's Estate*, 197 Neb. 596, 250 N.W.2d 234 (1977).

³³*McGowan*, 197 Neb. at 603-04, 250 N.W.2d at 238.

as it weighs every other fact in evidence. They can find the basic facts to be true or not. And if they find the basic facts to be true, they can infer therefrom the formerly presumed fact. That is, the weight added when the presumption kicks in is the shift in the burden of production; when the presumption bursts, that weight is removed; nothing else changes. The facts that created the presumption have not vanished and trier-of-fact still considers them for whatever they are worth.

The bursting bubble presumption says that if the basic facts are proved and there is no evidence rebutting either one or more of the basic facts or the presumed fact, then the point goes to the party in whose favor the presumption runs. In some cases, that can mean that that party is entitled to a directed verdict; in some cases it means that the court must instruct the jury that if they find the basic facts to be true, then they must find the presumed fact to be true—that they have no choice in the matter. While a bursting bubble presumption does not shift the burden of proof, in the right case—the case where no evidence is produced to rebut a critical presumption—it can determine the outcome.³⁴

McGowan found that the Nebraska Evidence Rules created a new second kind of presumption, one that shifts the burden of proof. So, following the enactment of the rules there are two kinds of presumption—evidentiary presumptions that shift the burden of proof and non-evidentiary presumptions that shift only the burden of production. The essential difference seems to be that the evidentiary presumptions arise from statutes other than Nebraska Rule of Evidence 301 or from other state created rules or regulations and the non-evidentiary presumptions are common-law, court-created presumptions.

Part IV(A) of this Comment & Authorities, above, contains examples of evidentiary burden-of-proof-shifting presumptions. The thing that they all have in common is that they are all mandated by statute or administrative regulation.

There is, however, one outlier from this otherwise common element of presumptions mandated by statute or administrative regulations being evidentiary presumptions and shifting the burden of proof. In *Meier v. State, Department of Social Services*, the court recognized that a presumption arose from a provision of the Nebraska Administrative Code.

The transfer of a home is considered gratuitous when the individual does not receive fair market value for the property. . . . The gratuitous transfer of a client's home at any time within two years before his/her moving into a different facility is

³⁴*Id.*

presumed to be a transfer of a resource to qualify for assistance.³⁵

The court stated:

The regulatory presumption contained in § 2-009.07B4 does not come within the ambit of [Rule 301] of the Nebraska Evidence Rules, which provides that, unless within some exception, a presumption imposes upon a party upon whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The regulatory presumption is not evidence, and merely establishes the burden of going forward with the evidence. It does no more than take the place of evidence unless and until evidence is adduced to overcome or rebut it. In other words, in the absence of any evidence on the point, § 2-009.07B4 operates to establish that a conveyance of real estate for less than market value made within 2 years before moving into a different facility was made with the intention and for the purpose of qualifying for public assistance. However, once evidence to the contrary is adduced, the presumption disappears.³⁶

The court treats this Administrative Code presumption as a non-evidentiary, bursting bubble presumption.

With this one outlier, it is fair to say that the Nebraska Supreme Court generally applies Rule 301's shift in the burden of proof to presumptions created by other sections of the Nebraska Revised Statutes or by state created rules or regulations. Other presumptions (with *Meier* as an exception), will receive bursting-bubble treatment.

V. ONE PRESUMPTION CANNOT BE BUILT UPON ANOTHER

"One presumption cannot be built upon another."³⁷

³⁵Neb. Admin. Code tit. 469, ch. 2, § 2-009.07B4 (1985), *as quoted in* *Meier v. State*, Dept. of Social Services, 227 Neb. 376, 382, 417 N.W.2d 771, 776 (1988) (italics added).

³⁶*Meier*, 227 Neb. at 384, 417 N.W.2d at 777-78 (citing *McGowan*).

³⁷Same quotation: *Wolcott v. Drake*, 162 Neb. 56, 61, 75 N.W.2d 107, 110 (1956) (stating that a presumption of negligence on the part of the defendant cannot be inferred from a presumption of due care raised by

the instinct of self-awareness on the part of a decedent in a car accident) and *Flory v. Holtz*, 176 Neb. 531, 540, 126 N.W.2d 686, 692-93 (1964) (stating that actionable negligence on the part of the defendant cannot be built on a presumption of due care arising from a decedent's instinct of self-preservation in a car accident). *Accord*, e.g., *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 576, 198 N.W.2d 329, 334 (1972) (rejecting plaintiff's theory of negligence, which relied on inferences built upon inferences); *R &*

VI. ADDITIONAL AUTHORITY

Additional authority particularly regarding Nebraska presumptions can be found in this footnote.³⁸

Additional authority regarding presumptions generally, in addition to materials cited above in this Comment & Authorities, can be found in this footnote.³⁹

NJI2d Civ. 2.14B

PRESUMPTIONS—BASIC FACT(S) CONTESTED;
PRESUMED FACT NOT CONTESTED

If you find by a greater weight of the evidence that the following facts are true:

- 1.
- 2.
- 3.

S Corp. v. Barnes, 182 Neb. 431, 433, 155 N.W.2d 379, 381 (1967) (stating that plaintiff's theory of negligence was too speculative and conjectural when plaintiff's theory required a series of multiple inferences leading to causation of a fire); *Stump v. Stransky*, 168 Neb. 414, 419, 95 N.W.2d 691, 695 (1959) (finding for defendant because plaintiff's theory of negligence in a slip and fall case was based on a series of inferences relying upon each other).

³⁸R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article III (Vol. 3, Nebraska Practice Series, West Group); G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 Creighton L.Rev. 383 (1992); G. Michael Fenner, *About Presumptions In Civil Actions*, 17 Creighton L.Rev. 307 (1983); C. Thomas White, *Nebraska Rules of Evidence*, 1984: Article 3, *Presumptions In Civil Cases* (NCLE, Inc.); Christopher B. Mueller, *The Nebraska Rules of Evidence*, 1980: Chapter III, *Presumptions in Civil Cases*, 19 (NCLE, Inc.); *Patrick v. Union Cent.*

Life Ins. Co., 150 Neb. 201, 204-05, 33 N.W.2d 537, 539-40 (1948). *See also* *Matter of McGowan's Estate*, 197 Neb. 596, 602-04, 250 N.W.2d 234, 238-39 (1977); *Gandy v. Bissell's Estate*, 81 Neb. 117, 117, 117 N.W. 349, 349 (1908) (commenting on the dangers of mislabeling presumptions when it comes to instructing the jury).

³⁹Christopher Mueller & Laird Kirkpatrick, *Evidence* §§ 3.4-3.10 (civil cases), 3.13-3.14 (criminal cases) (5th ed. 2012); 2 McCormick on Evidence §§ 336-347 (Kenneth S. Broun et al. eds, 7th ed. 2013); Glen Weissenberger & James Duane, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* chs. 301-302, §§ 301.01-302.2 (7th ed. 2011); F. James, G. Hazard, & J. Leubsdorf, *Civil Procedure* § 7.9 (2001); 1 J. Weinstein & M. Berger, *Weinstein's Evidence Manual: A Guide To The Federal Rules Of Evidence Based on Weinstein's Federal Evidence* ¶¶ 300[01]-303[08] (2008); Wright & Graham, *Federal Practice and Procedure: Evidence* §§ 5121 to 5160 (1977).

then you must find that (insert phrase identifying the presumed fact).

COMMENT & AUTHORITIES

See NJI2d Civ. 2.14A, Comment.

The numbered subparagraphs should list those of the basic facts-in-evidence that are contested with sufficient evidence that a reasonable person could find them untrue. Where necessary to avoid possible confusion on the part of the jurors—for example, where many of the basic facts are not contested—this instruction should begin with some explanation that certain of the basic facts must be taken as true and certain others are for the jury to find. The requirement that the presumed fact must be found to be true flows from the combination of those basic facts that must be taken as true as a matter of law plus the disputed basic facts when they are found to be true.

NJI2d Civ. 2.14C

PRESUMPTIONS—BASIC FACT(S) CONTESTED; PRESUMED FACT CONTESTED

If you find by a greater weight of the evidence that the following facts are true:

- 1.
- 2.
- 3.

then (B: the party against whom the presumption operates) has the burden of proving by a greater weight of the evidence that (insert the negative of the presumed fact).

[If you do not find by a greater weight of the evidence that the above-numbered facts are true, then the burden of proof remains upon (A: the party attempting to take advantage of the presumption) to prove by a greater weight of the evidence that (insert phrase identifying the presumed fact).]

COMMENT & AUTHORITIES

See the Comment to NJI2d Civ. 2.14A, NJI2d Civ. 2.14B and NJI2d Civ. 2.14D. See also NJI2d Civ. 2.12A and 2.12B defining “burden of proof” and note that in some cases involving presumptions the burden of proof is greater than the standard of proof by the greater weight of

the evidence. For example, the presumption favoring legitimacy of children, Neb. Rev. Stat. § 42-377 (Reissue 2008), may only be rebutted by clear and convincing evidence beyond the husband or the wife's testimony denying legitimacy. Supporting citations appear at NJI2d Civ. 2.14A, Comment & Authorities.

If, of course, the evidence of one or more of the basic facts is too slight to trigger the presumption, then there should not be any instruction on a presumption.

The bracketed paragraph of this instruction is appropriate and should be given only when it is possible from the evidence to find the presumed fact true without the operation of the presumption, without finding all of the basic facts to be true.

NJI2d Civ. 2.14D

PRESUMPTIONS—BASIC FACTS NOT CONTESTED; PRESUMED FACT CONTESTED

[The burden of proof is upon (insert identification of the party against whom the presumption operates) to prove by a greater weight of the evidence that (insert the negative of the presumed fact).]

[One of the issues in this case is whether (insert phrase identifying the presumed fact). The burden of proof on this issue is on (insert identification of the party against whom the presumption operates), that is, (insert identification of the party against whom the presumption operates) has the burden to prove by a greater weight of the evidence that (insert the negative of the presumed fact).]

COMMENT & AUTHORITIES

See the Comment to NJI2d Civ. 2.14A, NJI2d Civ. 2.14B and NJI2d Civ. 2.14C.

This instruction should be given along with the other burden of proof instructions. It is presented here not because it would logically be given at this point but rather so that the various options regarding presumptions can be discussed as a unit.

The bracketed paragraphs are offered as suggested alternative methods of so instructing. In any particular case, one or the other or some other language might more easily be understood.

Where the basic fact is not contested, but the presumed fact is, Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2016), states that the burden of proof as to whether the presumed fact is true or not is on

the party against whom the presumption operates. This instruction assigns that burden. For that reason it should be given along with the other burden of proof instructions.

E. THE NUMBER AND NATURE OF THE PARTIES

NJI2d Civ. 2.20

MULTIPLE PLAINTIFFS

There are (here insert number of plaintiffs) plaintiffs in this lawsuit.

(Their interests are the same. If you find in favor of one of them, you must find in favor of (both, all) of them. If you find against one of them, you must find against (both, all) of them.)

(You should decide the case of each plaintiff separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific plaintiff, the instructions apply to each plaintiff.)

COMMENT & AUTHORITIES

The two paragraphs in parentheses are offered as alternatives. If the interests of the plaintiffs are not identical, and yet are not completely separate, as perhaps in the case of a partnership, this should be so stated through either a variation of the second of these alternative paragraphs or some other instruction specifically drafted to meet the particular circumstances.

Regarding multiple plaintiffs, Neb. Rev. Stat. § 25-311 (Reissue 2016) states, "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."; Neb. Rev. Stat. § 25-318 (Reissue 2016) states, ("Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he or she may be made a defendant, the reason being stated in the complaint."¹

Although over defendant's objection, two plaintiffs cannot join sev-

2.20

¹See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 265-66, 512 N.W.2d 626, 630 (1994) (involving multiple plaintiff in an action to enjoin nuisance

and for monetary damages, the plaintiffs were properly joined as to the injunction, but misjoined as to damages; stating that "any one plaintiff would have no interest in the mon-

eral claims for damages, it is permissible for one claimant to assign his or her interest to the suing plaintiff and the two claims may then be joined. Neb. Rev. Stat. § 25-701 (Reissue 2016) (“A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party”).² If this is the case, it should be so stated in accordance with NJI2d Civ. 2.22.

Regarding class actions, *see* Neb. Rev. Stat. § 25-319 (Reissue 2016).

NJI2d Civ. 2.21

MULTIPLE DEFENDANTS

There are (here insert number of defendants) defendants in this lawsuit.

(Their interests are the same. If you find in favor of one of them, you must find in favor of (both, all) of them. If you find against one of them, you must find against (both, all) of them.)

(You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.)

COMMENT & AUTHORITIES

The two paragraphs in parentheses are offered as alternatives. If a case involves yet a different situation, it should be clearly stated.

Mandatory Joinder: A potential party is considered a necessary party and must be joined if a final determination of the action cannot be made without affecting that party's rights.¹

etary relief demanded by each of the others, as required by § 25-311”; finding the error was not prejudicial). *See also* Neb. Rev. Stat. § 25-701 (Reissue 2016) (“A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party.”).

²*See* Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

2.21

¹*See* Neb. Rev. Stat. § 25-318 (Reissue 2016) (“Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he or she may

Regarding failure to join necessary parties as defeating federal court diversity jurisdiction, see *Overlander v. Mellon*.²

Permissive Joinder: A potential party may be joined as a defendant if a claim asserted against the potential party arises out of the "same transaction, occurrence, or series of transactions or occurrences and if any question of law of fact common to all defendants arise in the case."³

Early cases are collected in McNish, *Joinder and Splitting of Causes of Action in Nebraska*, 26 Neb. L. Rev. 42 (1946).

Regarding procedures upon joinder, see Neb. Rev. Stat. § 25-705 (Reissue 2016).

On related matters, regarding joinder of claims, see Neb. Rev. Stat. § 25-701 (Reissue 2016); Neb. Ct. R. Pldg. § 6-1113.

In *Wright v. Lincoln City Lines, Inc.*,⁴ the Court stated that where two defendants are sued as concurrent tortfeasors, jointly and severally liable, it is customary for each of the defendants to admit the allegations that the other was negligent. This raises the question of whether, based on such admissions, each defendant is entitled to an instruction that in considering the defense that other defendants were the sole cause of the accident the negligence of the others must be assumed. Such an instruction was held necessary when requested by the defendant in a case where that defendant was sued as a concurrent tortfeasor with another who was not a party. In *Yunker v. Peter Kiewit*

be made a defendant, the reason being stated in the complaint."). See also, e.g., the following cases relying on statutes since (sometimes long since) repealed, amended, or recodified, but which provide essentially the same thing as modern statutes, *Marsh v. Marsh*, 173 Neb. 282, 288, 113 N.W.2d 323, 328 (1962) ("It is well-settled law that the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding.") (quoting *Ben B. Wood Realty Co. v. Wood*, 132 Neb. 817, 821, 273 N.W. 493, 495 (1937)); *Burke Lumber & Coal Co. v. Anderson*, 162 Neb. 551, 561, 76 N.W.2d 630, 638 (1956) ("Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their

interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.") (quoting *Cunningham v. Brewer*, 144 Neb. 211, 221, 16 N.W.2d 533, 535 (1944)).

²*Overlander v. Mellon*, 10 F.R.D. 131, 132-33 (D. Neb. 1950).

³Neb.Rev.Stat § 25-320 (Reissue 2008) ("All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.").

⁴*Wright v. Lincoln City Lines*, 160 Neb. 714, 71 N.W.2d 182 (1955).

Sons Co.,⁵ however, the *Wright* case was distinguished on the ground that in *Wright*, the concurrent tortfeasor had been dismissed from the case before the trial; where all defendants are still in the action and the jury is otherwise properly instructed, no such instruction is required. The *Younker* case also pointed out that the defendant's admission therein was not of specific acts of negligence of the other defendants; the same was not true of the *Wright* case.

Where an injured employee has received worker's compensation benefits, he or she may still sue a third person for having caused his or her injuries. In this event, the employee must make the employer a party to the lawsuit—usually a defendant. Neb. Rev. Stat. § 48-118 (Reissue 2004). The Committee believes that it is customary in such cases to keep from the jury the fact of the employer's presence in the suit and the fact of compensation payments to the plaintiff employee. Often this is done by stipulation or pretrial order. This seems consistent with the rule excluding evidence of collateral benefits, exemplified in *Singles v. Union Pac. R. Co.*

NJI2d Civ. 2.22

PARTY SUING OR BEING SUED IN A REPRESENTATIVE CAPACITY

The plaintiff [, insert name,] is suing in this case as the personal representative of the estate of (insert name of, and perhaps plaintiff's relationship to, deceased) and for the benefit of (insert names, and perhaps relationship to deceased, of beneficiaries). (Insert names of beneficiaries) are the persons who will receive the benefits of any recovery you may find.

COMMENT & AUTHORITIES

Such an instruction may be desirable wherever the plaintiff or defendant is involved in a representative capacity. The instruction should of course be varied depending on the nature of the representation, whether it be as conservator, guardian, trustee, administrator, assignee, or the like, and must be modified if the defendant or more than one party is involved in a representative capacity.

NJI2d Civ. 2.23

CORPORATE PARTY

All of the parties to a lawsuit are entitled to the same fair and impartial consideration, whether they are corporations or individuals.

⁵*Younker v. Peter Kiewit Sons* (1966).
Co., 180 Neb. 835, 146 N.W.2d 202

COMMENT & AUTHORITIES

This instruction may be given in cases where there are both individual parties and business association or governmental parties. As written, it applies when the nonnatural-person party is a corporation, the situation that the Committee believes to be the most common. If the nonnatural-person party is not a corporation, then other words will have to be substituted. Possible substitutes run from the specific, *e.g.*, “partnership”, to the general, *e.g.*, “business entity” or “public entity”. If there is a dispute as to the nature of a business entity involved in the litigation, such substitution should be done very carefully so as not to seem to decide that issue.

If it aids clarity, this instruction may be personalized. If the case involves one or two individual plaintiffs, John and Martha Smith, for example, and one corporate defendant, XYZ Corporation, then NJI2d Civ. 2.23 may be adapted as follows:

“The fact that Martha and John Smith are individuals and XYZ Corporation is a corporation must not influence your deliberations or your verdict. All parties are entitled to the same fair and impartial consideration.”

This instruction is proper, but failure to give it cannot be successfully assigned as error.¹

2.23

¹Blackwell v. Omaha Athletic Club, 123 Neb. 332, 336, 242 N.W. 664,

667 (1932); Hoskovec v. Omaha Street Ry. Co., 85 Neb. 295, 303-04, 123 N.W. 305, 309 (1909).

CHAPTER 3

NEGLIGENCE—GENERAL INSTRUCTIONS

TABLE OF INSTRUCTIONS

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NJI2d Civ. 3.01

RIGHT TO ASSUME ANOTHER'S REASONABLE CARE

A person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears.

COMMENT

"[T]his instruction is essentially applicable in contributory negligence situations."¹ Comparative negligence is the subject of Chapter 5. *See particularly* NJI2d Civ. 5.04, Comment.

AUTHORITIES

"A person has no duty to anticipate negligence on the part of others, and, in the absence of notice or knowledge to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care."²

The following is an often-repeated general statement of this rule as

3.01

¹*Kluender v. Mattea*, 214 Neb. 327, 332, 334 N.W.2d 416, 419 (1983).

²*Matson v. Dawson*, 185 Neb. 686, 692, 178 N.W.2d 588, 592 (1970). *Accord* *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 56, 793 N.W.2d 338, 346 (2011) ("[O]ne is not negligent simply by failing to anticipate the negligence of another."). *Accord* *Good v. Jones*, 184 Neb. 454, 456-57, 168 N.W.2d 520, 522 (1969). *See also* *Zoucha v. Nw. Bell Tel. Co.*, 176 Neb. 408, 126 N.W.2d 220 (1964).

Support for this instruction in the context of cases involving drivers who know themselves to be favored at an intersection and assume non-favored drivers will respect their right-of-way can be found in the following cases: *E.g.*, *McFarland By and Through McFarland v. King*, 216 Neb. 92, 94-95, 341 N.W.2d 920, 922 (1983) (applying the assumption against a 15-year-old riding a bicycle out of a driveway who collided with favored driver); *Pickett v. Parks*, 208 Neb. 310, 312, 303 N.W.2d 296, 298 (1981); *Schanaman v. Ramirez*, 206 Neb. 212, 216, 292

N.W.2d 39, 41-42 (1980) ("One does not forfeit his right-of-way by driving at an unlawful speed"); *Bonnes v. Olson*, 197 Neb. 309, 313, 248 N.W.2d 756, 759 (1976) (involving a motorcyclist with the right-of-way); *Riekes v. Schantz*, 144 Neb. 150, 153, 12 N.W.2d 766, 768 (1944). *But see* *Jerishin v. Becker*, 217 Neb. 645, 650, 351 N.W.2d 48, 52 (1984) (holding that a motorist on a favored street may not claim right-of-way when "too distant from the intersection to be entitled to it.>").

For support for this instruction in other specific contexts, *see, e.g.*, *Trackwell v. Burlington Northern R. Co.*, 235 Neb. 224, 229, 454 N.W.2d 497, 499-500 (1990) (stating that one who helps another clear wreckage from railroad tracks is entitled to expect the other will use reasonable care); *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 216-17, 306 N.W.2d 902, 905-06 (1981) (holding that an engineer operating train has no duty to yield right-of-way until it becomes reasonably apparent that otherwise a collision probably will result); *Matson v. Dawson*, above (supporting the assumption by a driver that a horseback

applied to travelers on highways: Absent warning, notice, or knowledge to the contrary, travelers on the highway may assume that others will use the highway in a lawful manner and are entitled to govern their actions in accordance with such assumption.³

The rules of the road are instructed on and discussed in Chapter 7. Regarding lookout, control, conditions affecting visibility, and the like, and how they affect a driver's negligence, *see* NJI2d Civ. 7.03A. Regarding the range of vision rule, *see* NJI2d Civ. 7.03B.

NJI2d Civ. 3.02

DEFINITION OF NEGLIGENCE

Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.

COMMENT & AUTHORITIES

- I. CROSS REFERENCES
- II. NEGLIGENCE DEFINED
- III. THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION FOR NEGLIGENCE
- IV. PROVING NEGLIGENCE WITH CIRCUMSTANTIAL EVIDENCE

rider making left-hand turn between intersections will not turn into the driver's oncoming automobile); *Good v. Jones*, above (holding that one who maintains a sidewalk is entitled to assume that those walking thereon will use ordinary care for their own safety); *Zoucha v. Northwestern Bell Telephone Co.*, 176 Neb. 408, 413, 126 N.W.2d 220, 223-24 (1964) (applying the assumption that children and adults will use reasonable care in a case where a 5-year-old boy ran from between two parked cars and into defendant's truck); *Heeney v. Churchill*, 154 Neb. 848, 853-54, 50 N.W.2d 72, 73, (1951) (involving the reciprocity of duties of pedestrian and driver and the pedestrian's right to assume ordinary care in the lookout being kept by a driver approaching from the rear); *Plumb v.*

Burnham, 151 Neb. 129, 138, 36 N.W.2d 612, 618 (1949) (discussing a highway user's assumption regarding others using highway).

³*Steinauer v. Sarpy Cty.*, 217 Neb. 830, 836-37, 353 N.W.2d 715, 721 (1984); *Jerishin v. Becker*, 217 Neb. 645, 650, 351 N.W.2d 48, 52 (1984); *Circo v. Transit Authority of City of Omaha*, 217 Neb. 497, 500, 348 N.W.2d 908, 910 (1984) ("[Highway travelers] must nevertheless keep a proper lookout and watch where [they are] driving."); *Pickett*, above; *Shanaman*, above; *Bonnes*, above; *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960); *Parsons v. Cooperman*, 161 Neb. 292, 73 N.W.2d 235 (1955); *Angstadt v. Coleman*, 156 Neb. 850, 58 N.W.2d 507 (1953); *Plumb*, above.

- V. KNOWLEDGE OF THE DANGER ON THE PART OF THE PERSON CHARGED WITH NEGLIGENCE
- VI. NEGLIGENCE IS UNINTENTIONAL
- VII. NEGLIGENCE ON THE PART OF A PERSON WITH A DISABILITY
- VIII. DUTY
 - A. THERE CAN BE NO NEGLIGENCE IF THERE IS NO DUTY
 - B. WHETHER A DUTY EXISTS IS A QUESTION OF LAW DEPENDENT ON THE PARTICULAR FACTS INVOLVED
 - C. WHETHER THE DUTY HAS BEEN BREACHED (*i.e.*, FORSEEABILITY) IS A QUESTION OF FACT
 - D. THE DUTY TO EXERCISE THE CARE THAT WOULD BE EXERCISED BY A REASONABLE PERSON UNDER THE CIRCUMSTANCES—THE RISK/UTILITY BALANCE HAS BEEN ABANDONED
 - E. A DUTY MAY BE IMPOSED BY STATUTE OR ORDINANCE
 - F. A DUTY MAY BE IMPOSED BY CONTRACT
 - G. THE SCOPE AND EXTENT OF THE DUTY
 - H. DUTY TO PREVENT A THIRD PARTY FROM INJURING ANOTHER
 - I. MISCELLANEOUS DUTIES
 - J. NONDELEGABLE DUTIES
- IX. NEGLIGENCE VERSUS LIABILITY
- X. NEGLIGENCE IS NOT PRESUMED FROM THE EXISTENCE OF AN INJURY OR THE HAPPENING OF AN ACCIDENT

I. CROSS REFERENCES

Negligence is discussed throughout this book. Here are some cross references to other points at which this topic is discussed.

■ The general statement-of-the-case instructions in a negligence action are found at NJI2d Civ. 2.01, *et seq.*

■ Contributory negligence and pre-February 8, 1992, comparative negligence are the subject of NJI2d Civ. 2.02A, *et seq.* and many of the instructions in this chapter, chapter 3.

■ Post-February 8, 1992, comparative negligence, including the relationship between it and contributory negligence, is the subject of chapter 5. *See particularly* NJI2d Civ. 5.04, Comment.

■ Res ipsa loquitur is the subject of NJI2d Civ. 2.13.

■ Basic principles of the law of negligence in various specific situa-

tions—sudden emergencies, the intoxicated tortfeasor, imputed negligence, etc.—is the subject of most of the instructions in this chapter.

■ Vicarious liability for the acts of one's employee, partner, or joint venturer is the subject of chapter 6.

■ Negligence on the part of a driver is the focus of chapter 7. In the case of a passenger in a motor vehicle, *see also* NJ12d Civ. 7.40.

While this pattern instruction states the basic standard of care in a negligence case, it is not the standard of care applied in some negligence cases. Other standards of care are discussed throughout this book. For example:

■ An owner, occupant, or lessor of land's liability for negligent acts occurring on the land is the subject of much of chapter 8.

■ Liability in negligence for a manufacturer or supplier of personal property is the subject of part of Chapter 11.

■ Professional malpractice is the focus of Chapter 12.

And, of course, do not use this instruction where the applicable standard of care is greater than that normally required in a negligence case.

II. NEGLIGENCE DEFINED

“Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances.”¹

3.02

¹*Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 811, 774 N.W.2d 370, 379 (2009). *Accord, e.g.*, *Reiber v. Cty. of Gage*, 303 Neb. 325, 337, 928 N.W.2d 916, 925 (2019) (“When one person owes a legal duty to another, the standard of care which defines the scope and extent of the duty is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; that is, what a reasonable person of ordinary prudence would have done in the same or similar circumstances.”); *Blaser v. Cty. of Madison*, 285 Neb.

290, 306, 826 N.W.2d 554, 566 (2013) (It is “a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances.”); *Cingle v. State*, 277 Neb. 957, 966, 766 N.W.2d 381, 388 (2009); *Caguioa v. Fellman*, 275 Neb. 455, 460, 747 N.W.2d 623, 627 (2008); *Fu v. State*, 263 Neb. 848, 867, 643 N.W.2d 659, 763 (2002); *Cerny v. Cedar Bluffs Junior/Senior Pub. School*, 262 Neb. 66, 74, 628 N.W.2d 697, 704 (2001) (“a duty ‘to conform to the legal standard of reasonable conduct in light of the apparent risk’”); *Desel v. City of Wood River*, 259 Neb. 1040, 1045, 614 N.W.2d

The definition of negligence in this pattern instruction “has been approved many times by this court but it does not follow that it cannot be defined otherwise.”²

The instructions in a negligence case need not necessarily use the word negligence, but they must limit the jury’s consideration to the degree of caution a reasonably careful person would use under similar circumstances. In *Palmtag v. Gartner Constr. Co.*,³ the trial court’s instructions spoke of failure to use reasonable care, rather than negligence. So far, so good. But, the reversible error came from that court’s failure to define reasonable care as that which “an ordinary, or reasonably prudent, person would exercise under like circumstances.”⁴ The circumstances in *Palmtag* included that the defendant was a contractor and, therefore, the standard was that “caution a reasonably prudent contractor would have exercised in like circumstances.”⁵

Commenting on *Gilbert v. Archbishop Bergan Mercy Hosp.*,⁶ Dean Harvey Perlman stated: “The court correctly recognized that instructions which tell the jury that an injury or an accident alone does not prove negligence⁷ is merely part of establishing the burden of proof. The court finds the instruction in this case redundant because a clear burden of proof instruction was given. The court also recognizes that in some cases giving the redundant instruction might be prejudicial if it unduly emphasizes the burden of proof. It would seem wise not to give the instruction.”⁸

As noted above, among the cross references in part I of this Com-

313, 317 (2000); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1024-25, 574 N.W.2d 478, 484 (1998); *Johnson By and Through Johnson v. School Dist. of Millard*, 253 Neb. 634, 638, 573 N.W.2d 116, 119 (1998); *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 152, 555 N.W.2d 778, 785 (1996); *Johannes v. McNeil Real Estate Fund VIII, Ltd.*, 225 Neb. 283, 288, 404 N.W.2d 424, 429 (1987) (“[T]here is in truth, but one standard: that of reasonable prudence under the circumstances.”).

Many of the cases in this footnote and below speak of the “reasonably prudent person.” “reasonably careful” seems easier for jurors to understand than does “reasonably prudent.”

²*Hess v. Holdsworth*, 176 Neb. 774, 787-88, 127 N.W.2d 487, 495 (1964).

³*Palmtag v. Gartner Const. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

⁴*Id.* at 419, 513 N.W.2d at 504 (finding plain error and reversing even though there was no objection and no request for an appropriate instruction). *See also, Reiber*, above.

⁵*Id.*

⁶*Gilbert v. Archbishop Bergan Mercy Hosp.*, 228 Neb. 148, 421 N.W.2d 760 (1988).

⁷*See Pantano v. Am. Blue Ribbon Holdings*, 303 Neb. 156, 165, 927 N.W.2d 357, 365 (2019) (“Establishing that an accident has occurred does not prove a case of negligence.”).

⁸Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law*, Nebraska Tort Law 1987-88, Review and Comments 10 (1988).

ment & Authorities, this instruction states the basic standard of care in negligence cases. But, there are categories of negligence cases where this general standard is not applied. Part I of this Comment & Authorities lists other places in this book where other standards of care are discussed.

“Determining the standard of care to be applied in a particular case is a question of law, and the duty of care does ‘not exist in the abstract, but must be measured against a particular set of facts and circumstances.’ ”⁹

See also NJI2d Civ. 2.01, Comment and Authorities. *See generally* Prosser and Keeton On the Law of Torts¹⁰ and the Restatement (Second) of Torts.¹¹

III. THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION FOR NEGLIGENCE

The four essential elements of every negligence action are duty, breach of duty, causation, and damages. For discussion of and cases supporting this statement, *see* NJI2d Civ. 2.01.

IV. PROVING NEGLIGENCE WITH CIRCUMSTANTIAL EVIDENCE

Regarding the use of circumstantial evidence and the rule that “[t]he law makes no distinction between [direct and circumstantial] evidence, *see* NJI2d Civ. 1.31 and its Comment & Authorities.

V. KNOWLEDGE OF THE DANGER ON THE PART OF THE PERSON CHARGED WITH NEGLIGENCE

A person charged with negligence must have had knowledge or be reasonably chargeable with knowledge that the act or omission occasioned danger to another.¹² The reader with this particular problem is referred to those cases. This aspect of negligence is taken care of in this instruction’s imposition of the standard of “a reasonably careful person . . . under similar circumstances.”

⁹*Fu v. State*, 263 Neb. 848, 867, 643 N.W.2d 659, 673 (2002). *Accord* Cingle v. State, 277 Neb. 957, 968, 766 N.W.2d 381, 389 (2009) (whereas, of course, whether a party deviated from the standard of care is a question of fact); *Cerny v. Cedar Bluffs Junior/Senior Pub. School*, 262 Neb. 66, 74, 628 N.W.2d 697, 704 (2001) (same as *Cingle*, above). (Duty—including the fact that the existence of a duty is a question of law—is discussed at length below, in this Comment & Authorities.)

¹⁰Prosser and Keeton On the Law of Torts §§ 32, *et seq.* (W. Keeton gen. ed. 5th ed. 1984).

¹¹Restatement (Second) of Torts §§ 282–285 (Am. Law Inst. 1965).

¹²*McClure v. Forsman*, 266 Neb. 90, 96, 662 N.W.2d 566, 571 (2003); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 851, 438 N.W.2d 485, 490 (1989); *Wilson v. F & H Const. Co.*, 229 Neb. 815, 819–21, 428 N.W.2d 914, 918 (1988).

VI. NEGLIGENCE IS UNINTENTIONAL

“[N]egligence is unintentional.”¹³

VII. NEGLIGENCE ON THE PART OF A PERSON WITH A DISABILITY

“In determining liability, our fault-based regime considers not only a deviation from an established standard of conduct but also a plaintiff’s or defendant’s ability to comply with that standard.”¹⁴ The generally accepted standard of care applied to a person with a disability is the same standard applied to any other person: “ordinary care under the circumstances [and the] disability is one of the circumstances to be considered in determining whether such person exercised ordinary care”¹⁵ “Whether a disabled person has breached his or her duty is based upon how a reasonably careful person with such a disability would have acted.”¹⁶ So, ordinary care may require greater effort from one with a disability.¹⁷

Traphagan v. Mid-America Traffic Marking involved an automobile that collided with a truck. The deceased driver, whose representatives filed the lawsuit, was visually impaired. Regarding the defendant’s allegation of contributory negligence on the part of the deceased the trial court’s instruction defining negligence stated that, “Negligence is doing something that a reasonably careful person with physical abilities identical to those of the person accused of negligence would not do under similar circumstances, or failing to do something that a reasonably careful person with physical abilities identical to those of the person accused of negligence would do under similar circumstances.”¹⁸

¹³State Farm Fire and Cas. Co. v. van Gorder, 235 Neb. 355, 358, 455 N.W.2d 543, 545 (1990) (holding that there is no such thing as negligent assault and battery, as assault and battery is intentional). *Accord* Torrison v. Overman, 250 Neb. 164, 174, 549 N.W.2d 124, 132 (1996) (disapproved of by, *ML Manager, LLC v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014)). Regarding the intentional torts of battery and assault, *see, e.g.,* Wulf v. Kunnath, 285 Neb. 472, 827 N.W.2d 248 (2013); *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996) (plurality opinion). Regarding consent as a defense to an intentional tort, *see* NJ12d Civ. 9.04, Comment.

¹⁴*Baldwin v. City of Omaha*, 259 Neb. 1, 13, 607 N.W.2d 841, 851 (2000) (mentally ill plaintiff) (citing *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 32 (5th ed. 1984) & Supp. 1988). (Regarding the risk-utility balance formerly used to determine duty, *see* below in this Comment & Authorities.)

¹⁵*Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 155-56, 555 N.W.2d 778, 787 (1996).

¹⁶*Kent v. Crocker*, 252 Neb. 462, 467, 562 N.W.2d 833, 838 (1997) (involving a visually impaired driver).

¹⁷*Traphagan*, 251 Neb. at 156, 555 N.W.2d at 787.

¹⁸*Traphagan*, 251 Neb. at 155, 555 N.W.2d at 787.

“Clearly, [this instruction] was a correct statement of the law and was not misleading.”¹⁹

VIII. DUTY

A. THERE CAN BE NO NEGLIGENCE IF THERE IS NO DUTY

The essential elements of any negligence action are duty, breach of duty, proximate cause, and damages. To prevail, the plaintiff must plead and prove those four things. See NJI2d Civ. 2.01 and its Authorities.

“[T]he threshold issue in any negligence action is whether the defendant owed a legal duty to the plaintiff.”²⁰ “If there is no duty owed, there can be no negligence.”²¹

For actionable negligence there must be a defendant’s legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such un-discharged duty.

“Duty” is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk.

¹⁹*Traphagan*, 251 Neb. at 156, 555 N.W.2d at 787 (also finding that the instruction was supported by the pleadings and the evidence).

²⁰*Kimminau v. City of Hastings*, 291 Neb. 133, 147, 864 N.W.2d 399, 411 (2015). *Accord*, e.g., *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 547, 955 N.W.2d 707, 716 (2021); *Sundermann v. Hy-Vee*, 306 Neb. 749, 764, 947 N.W.2d 492, — (2020); *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 146, 907 N.W.2d 705, 713 (2018); *Thomas v. Board of Trustees of Neb. State Colls.*, 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017); *McReynolds v. RIU Resorts & Hotels*, 293 Neb. 345, 350, 880 N.W.2d 43, 47 (2016); *Kimminau v. City of Hastings*, 291 Neb. 133, 147, 864 N.W.2d 399, 411 (2015); *Durre v. Wilkinson Development, Inc.*, 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013); *A.W. v. Lancaster Cty. Sch. Dist.* 0001, 280 Neb. 205, 210, 784 N.W.2d 907, 913 (2010); *Ashby v. State*, 279 Neb. 509, 518, 779 N.W.2d

343, 352 (2010); *Erickson v. U-Haul Intern., Inc.*, 274 Neb. 236, 241, 738 N.W.2d 453, 459 (2007); *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 24, 735 N.W.2d 793, 803 (2007); *Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754, 766, (2007), clarified at 274 Neb. 267, 735 N.W.2d 754 (2007); *Munstermann ex rel. Rowe v. Alegent Health-Immanuel Med. Ctr.*, 271 Neb. 834, 841, 845, 716 N.W.2d 73, 80, (2006); *Spear T Ranch, Inc. v. Nebraska Dept. of Natural Resources*, 270 Neb. 130, 134, 699 N.W.2d 379, 383 (2005).

²¹Same quotation: *McReynolds*, above; *Kimminau*, above; *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1027, 574 N.W.2d 478, 485 (1998). *Accord*, e.g., *Ashby*, 279 Neb. at 523, 779 N.W.2d at 355; *Erickson*, 274 Neb. at 241-42, 738 N.W.2d at 459; *Hughes*, 274 Neb. at 24, 735 N.W.2d at 803 (“If there is no legal duty, there is no actionable negligence.”); *Swanson v. Ptak*, 268 Neb. 265, 269, 682 N.W.2d 225, 230 (2004); *Fu*, 263 Neb. at 860, 643 N.W.2d at 668; *Knoll*, above.

“A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” Prosser and Keeton on the Law of Torts, *Limited Duty* § 53, at 356 (5th ed. 1984). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.²²

In *Fulk v. McLellan*²³ the Court held that while the plaintiff did not identify a specific legal duty owed by the defendant, the plaintiff did plead facts from which it could be inferred that the defendant owed a legal duty to the plaintiff. This, said the Court, is enough to resist demurrer.²⁴ (Note that effective January 1, 2003, the Nebraska Rules of

²²*Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 791–92, 496 N.W.2d 902, 908–09 (1993) (disapproved of by, *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014)) (ellipses and most internal quotation marks and citations omitted). *Accord*, e.g., *Sundermann v. Hy-Vee*, 306 Neb. 749, 763, 947 N.W.2d 492, — (2020) (same quotation as final sentence of the *Parrish* quotation in text above); *Reiber v. Cty. of Gage*, 303 Neb. 325, 336, 928 N.W.2d 916, 925 (2019) (“While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.”); *Benard v. McCowall, LLC*, 298 Neb. 398, 404–05, 904 N.W.2d 679, 685 (2018) (same quotation as final sentence of *Parrish* quotation); *Pittman v. Rivera*, 293 Neb. 569, 573, 879 N.W.2d 12, 16 (2016) (duty, breach, causation, and damages); *McReynolds*, 293 Neb. at 350, 800 N.W.2d at 46–47 (same as first and third paragraphs of the quotation); *Holloway v. State*, 293 Neb. 12, 29, 875 N.W.2d 435, 449 (2016); *Kimminau*, 291 Neb. at 147, 864 N.W.2d at 411; *Peterson v. Kings Gate Partners-Omaha I, L.P.*, 290 Neb. 658, 661–62, 861 N.W.2d 444, 448 (2015) (same as the final sentence of the quotation; noting that “special relationships can give rise to a duty”; discussing the “duty owed by a landlord to a tenant”);

Duree, 285 Neb. at 889, 830 N.W.2d at 80; *Olson v. Wrenshall*, 284 Neb. 445, 449–50, 822 N.W.2d 336, 340–41 (2012) (same as first and third paragraphs of the quotation); *Ashby*, 279 Neb. at 518–19, 779 N.W.2d at 352–53; *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 298, 770 N.W.2d 619, 627 (2009) (same as third paragraph of the quotation); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 608, 667 N.W.2d 244, 252–53 (2003); *Drake v. Drake*, 260 Neb. 530, 538, 618 N.W.2d 650, 658 (2000); *Doe v. Gunny’s Ltd. Partnership*, 256 Neb. 653, 659, 593 N.W.2d 284, 289 (1999); *Bargmann*, 253 Neb. at 1025, 574 N.W.2d at 484 (observing that actionable negligence requires legal duty, failure to discharge that duty, and damage proximately resulting therefrom; defining duty; noting the following: whether duty exists is a question of law; duty is question of whether defendant is under any obligation for benefit of particular plaintiff; and there is always a duty to conform to the legal standard of reasonable conduct in light of apparent risk). *See also* *Bakody Homes and Development, Inc. v. City of Omaha*, 246 Neb. 1, 7, 516 N.W.2d 244, 248 (1994) (stating that failure to act cannot be negligent absent duty to act).

²³*Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993),

²⁴*Id.* at 147–48, 498 N.W.2d at 94–95.

Pleading in Civil Actions abolished the demurrer.²⁵ Presumably, under the new rules, this would be enough to resist a rule 12(b)(6) motion, and the 12(b)(6) motion may be styled a Motion to Dismiss.²⁶

B. WHETHER A DUTY EXISTS IS A QUESTION OF LAW DEPENDENT ON THE PARTICULAR FACTS INVOLVED

“The duty in a negligence case is to conform to the legal standard of reasonable conduct in light of the apparent risk.”²⁷ Whether a duty exists “is grounded in public policy and based upon legislative facts”²⁸ “[A]nd not adjudicative facts arising out of the particular circumstances of the case.”²⁹ Therefore, it “is a question of law dependent on the facts in a particular situation.”³⁰ It is “a legal conclusion that an actor must

²⁵Weeder v. Central Cmty. Coll., 269 Neb. 114, 691 N.W.2d 508 (2005). “A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer.” *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515.

²⁶*Weeder*, 269 Neb. at 122-23, 691 N.W.2d at 514-15.)

²⁷Same quotation: *Gaytan v. Wal-Mart*, 289 Neb. 49, 56-57, 853 N.W.2d 181, 192 (2014); *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 336, 622 N.W.2d 684, 687 (2001). *Accord Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 557, 955 N.W.2d 707, 722 (2021); *Thomas v. Board of Trustees of Neb. State Colls.*, 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017); *Martensen v. Rejda Bros., Inc.*, 283 Neb. 279, 287, 808 N.W.2d 855, 863 (2012); *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 210, 784 N.W.2d 907, 913 (2010); *Moglia v. McNeil Co., Inc.*, 270 Neb. 241, 251, 700 N.W.2d 608, 618 (2005).

²⁸*Kimminau v. City of Hastings*, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015). “Whether a duty exists is a policy decision.” Same quotation, but with multiple quotation marks omitted from some to the following: *Rodriguez v. Catholic Health Initiatives (Rodriguez I)*, 297 Neb. 1, 11, 899 N.W.2d 227, 235 (2017) (stating that “[d]uty rules are meant to serve as broadly applicable guidelines for pub-

lic behavior, i.e., rules of law applicable to a category of cases.” (quoting *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. at 212-13, 784 N.W.2d at 914-15)); *Phillips*, 293 Neb. at 131, 876 N.W.2d at 368; *Peterson*, 290 Neb. at 661, 662, 861 N.W.2d at 448 (citing *A.W.*, 280 Neb. at 215, 784 N.W.2d at 916); *Martensen*, 283 Neb. at 285, 808 N.W.2d at 862 (quoting *A.W.*, above, emphasis omitted in *Martensen*). *Accord, e.g., Rodriguez II*, 308 Neb. at 557, 955 N.W.2d at 722; *Thomas*, 296 Neb. at 734, 895 N.W.2d at 699; *Tolbert v. Jamison*, 281 Neb. 206, 213, 94 N.W.2d 877, 883 (2011).

²⁹*Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 557, 955 N.W.2d 707, 722 (2021).

³⁰Same quotation: *Benard v. McDowall, LLC.*, 298 Neb. 398, 904 N.W.2d 679 (2017); *Pittman v. Rivera*, 293 Neb. 569, 574, 879 N.W.2d 12, 16 (2016); *Phillips v. Liberty Mutual Insurance Company*, 293 Neb. 123, 130, 876 N.W.2d 361, 368 (2016) (Political Subdivision Tort Claims Act; claim against county that deputy used excessive force). *Accord, e.g., Rodriguez II*, 308 Neb. at 546, 955 N.W.2d 707 at 715-16; *Sundermann v. Hy-Vee*, 306 Neb. 749, 763, 947 N.W.2d 492, — (2020); *Cruz v. Lopez*, 301 Neb. 531, 541-42, 919 N.W.2d 479, 489-90 (2018); *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 146, 907 N.W.2d 705, 713 (2018); *Rodriguez I*,

exercise such degree of care as would be exercised by a reasonable person under the circumstances.”³¹

See also part VIII(C) of this Comment & Authorities, immediately below.

C. WHETHER THE DUTY HAS BEEN BREACHED (*i.e.*, FORSEEABILITY) IS A QUESTION OF FACT

Historically, our Court held that as to duty foreseeability was a question of law and as to proximate cause it was a question of fact.³² This is no longer the law in Nebraska. In 2010 the Court “expressly h[e]ld that foreseeability is not a factor to be considered by courts when making determinations of duty.”³³

Deciding whether a duty exists involves questions of public policy and legislative facts. Deciding whether a particular injury was foreseeable does not “require considering far-reaching policy concerns,” does not “require special training, expertise, or instruction,” and is “based on adjudicative facts arising out of the particular circumstances of the

297 Neb. at 10, 899 N.W.2d at 235; Thomas, 296 Neb. at 734, 895 N.W.2d at 699; Peterson v. Kings Gate Partners-Omaha I, L.P., 290 Neb. 658, 662, 861 N.W.2d 444, 448 (2015); Olson v. Wrenshall, 284 Neb. 445, 449, 822 N.W.2d 336, 340 (2012) (medical malpractice); Martensen, 283 Neb. at 285, 808 N.W.2d at 862; A.W., 280 Neb. at 210, 784 N.W.2d at 913; Wilke v. Woodhouse Ford, Inc., 278 Neb. 800, 811, 774 N.W.2d 370, 380 (2009); Knoll v. Board of Regents of University of Nebraska, 258 Neb. 1, 6, 601 N.W.2d 757, 762 (1999) (abrogated by, A.W. v. Lancaster Cty. School Dist. 0001, 280 Neb. 205, 784 N.W.2d 907 (2010)) (discussing the issue; overruling a contrary line of cases).

³¹Reiber v. Cty. of Gage, 303 Neb. 325, 336, 928 N.W.2d 916, 925 (2019); Rodriguez I, 297 Neb. at 10, 899 N.W.2d at 235; Phillips, 293 Neb. at 131, 876 N.W.2d at 368; Blaser, 285 Neb. at 306, 826 N.W.2d at 563. Accord Rodriguez II, 308 Neb. at 557, 955 N.W.2d at 722; Peterson, 290 Neb. at 661, 662, 861 N.W.2d at 448.

³²See A.W. v. Lancaster Cty. School Dist. 0001, 280 Neb. 205, 784 N.W.2d 907 (2010).

³³A.W., 280 Neb. at 218, 784 N.W.2d at 918 (adopting “the duty analysis contained in the Restatement (Third) of Torts, § 7”). Accord Thomas v. Board of Trustees of Neb. State Colls., 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017).

case.³⁴ So, the former is a question of law and the latter is a question of fact.³⁵

In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.³⁶

It is, of course, still the case that the court will decide the foresee-

³⁴A.W., 280 Neb. at 212-13, 784 N.W.2d at 914-15. *Accord*, e.g., *Kimminau v. City of Hastings*, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) ("A no-duty determination, then, is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case. And such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.") (footnote omitted); *Latzel*, 288 Neb. at 13, 846 N.W.2d at 163.

As noted in the preceding subpart of this Comment & Authorities, "[t]he question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation." A.W., 280 Neb. at 206, 784 N.W.2d at 911 (footnote omitted). That quotation continues: "But it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of that duty." *Id.* at 210-11 (footnote omitted). *Accord*, e.g., *Latzel*, 288 Neb. at 13, 846 N.W.2d at 163.

³⁵*Reiber v. Cty. of Gage*, 303 Neb. 325, 336, 928 N.W.2d 916, 925 (2019) ("While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of

care and was therefore negligent is a question of fact.").

³⁶*Pittman v. Rivera*, 293 Neb. 569, 575, 879 N.W.2d 12, 17 (2016) (footnotes omitted). *Accord*, e.g., *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 557, 955 N.W.2d 707, 722 (2021) ("[S]ometimes reasonable minds cannot disagree about whether an actor exercised reasonable care. When an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that, as a matter of law, the defendant has no duty or that the ordinary duty of reasonable care requires modification."); *Reiber*, 303 Neb. at 336, 928 N.W.2d at 925 *Latzel v. Bartek*, 288 Neb. 1, 12-13, 846 N.W.2d 153, 163 (2014); *Hodson v. Taylor*, 290 Neb. 348, 361-62, 860 N.W.2d 162, 175 (2015) ("Under the Restatement (Third) of Torts, which Nebraska has adopted, foreseeability is analyzed as a fact-specific inquiry into the circumstances that might have placed the defendant on notice of the possibility of injury." *Id.* at 362, 860 N.W.2d at 175.); A.W., 280 Neb. at 218, 784 N.W.2d at 918; *Deviney v. Union Pacific R. Co.*, 280 Neb. 450, 458, 786 N.W.2d 902, 908-09 (2010). *And see Martensen*, 283 Neb. at 287, 808 N.W.2d at 863 ("[D]eterminations of actual 'knowledge' are also fact specific.").

ability issue as a matter of law when “no reasonable person could differ on the matter.”³⁷

Regarding foreseeability, *see also* NJI2d Civ. 3.41, Authorities, part III.

D. THE DUTY TO EXERCISE THE CARE THAT WOULD BE EXERCISED BY A REASONABLE PERSON UNDER THE CIRCUMSTANCES—THE RISK/UTILITY BALANCE HAS BEEN ABANDONED

As discussed above, the question of whether a duty exists is a question of law, that is, one for the court. Prior to 2010, Nebraska courts used a risk-utility balancing test to determine whether a duty exists.³⁸

In *A.W. v. Lancaster Cty. Sch. Dist. 0001*, . . . we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts. Under this approach, an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm. This approach examines the defendant’s conduct, not in terms of whether he had a “duty” to take particular actions, but, rather, in terms of whether his conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.³⁹

Common statements of the now-abandoned risk-utility balance listed six considerations: “(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm,

³⁷ *A.W.*, 280 Neb. at 216, 216-18, 784 N.W.2d at 917. *Accord* *Thomas*, 296 Neb. at 699, 895 N.W.2d at 699; *Pittman*, 293 Neb. at 575-76, 879 N.W.2d at 17; *Hodson*, 290 Neb. at 362-63, 860 N.W.2d at 175.

³⁸ *Riggs v. Nickel*, 281 Neb. 249, 256, 796 N.W.2d 181, 187 (2011); *A.W. v. Lancaster Cty. School Dist. 0001*, 280 Neb. 205, 211, 784 N.W.2d 907, 914 (2010).

³⁹ *Riggs*, 281 Neb. at 256-57, 796 N.W.2d at 187-88 (footnotes omitted, including a footnoted citation to Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (Am. Law Inst. 2010)). *Accord* *Thomas v. Board of Trustees of Neb. State*

Colls., 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017); *Phillips v. Liberty Mutual Insurance Company*, 293 Neb. 123, 131, 876 N.W.2d 361, 368 (2016); *Kimminau v. City of Hastings*, 291 Neb. 133, 148, 864 N.W.2d 399, 411-12 (2015); *Peterson v. Kings Gate Partners-Omaha I, L.P.*, 290 Neb. 658, 662, 861 N.W.2d 444, 448 (2015); *Olson v. Wrenshall*, 284 Neb. 445, 453, 822 N.W.2d 336, 343 (2012); *Martensen v. Rejda Bros., Inc.*, 283 Neb. 279, 285, 808 N.W.2d 855, 862 (2012); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1033, 809 N.W.2d 487, 492 (2012) (regarding the adoption of the approach of the Restatement (Third) of Torts in an action brought under the Political Subdivision Tort Claims Act).

and (6) the policy interests in the proposed solution.”⁴⁰ All but the fifth consideration on this list may still be relevant to the determination of duty, but only to the extent that they are relevant to whether the defendant’s “conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.”⁴¹

After *A.W.*, the fifth item on the above list, foreseeability, is to be considered by triers of fact when they determine whether a duty has been breached, and not by the judge when he or she determines whether a duty exists.⁴² As discussed above in this Comment & Authorities, Nebraska law used to distinguish between foreseeability in the context of legal duty and in the context of proximate cause, holding that the former was a question of law for the judge and the latter was a question of proximate cause for the trier of fact. And *A.W. v. Lancaster Cty. Sch. Dist. 0001* changes that to this extent: foreseeability is no longer a question of law even in the context of a legal duty. The existence of the duty is a question of law, “but foreseeability is not a factor to be considered by courts when making determinations of duty.”⁴³

It is still true that “[n]egligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances.”⁴⁴ “[T]he risk reasonably to be perceived defines the duty to be obeyed.”⁴⁵ “To constitute want of due care . . . , it is not necessary that [the party] should have anticipated the exact harm which

⁴⁰*A.W.*, 280 Neb. at 211, 784 N.W.2d at 914.

⁴¹*Riggs*, 281 Neb. at 257, 796 N.W.2d at 188.

⁴²See *A.W.* 280 Neb. at 206, 784 N.W.2d at 911 (“[O]ur case law has, in the past, placed factual questions of foreseeability in the context of a legal duty when they are more appropriately decided by the finder of fact in the context of determining whether an alleged tort-feasor’s duty to take reasonable care has been breached. As a result, we find that the questions of foreseeability presented in this appeal are matters of fact, not of law.”).

⁴³*A.W.*, 280 Neb. at 206, 784 N.W.2d at 918.

⁴⁴Same quotation: *Desel v. City of Wood River*, 259 Neb. 1040, 1046, 614 N.W.2d 313, 318 (2000); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1025, 574 N.W.2d 478, 484 (1998). *Accord*, e.g., *Thomas*, 296 Neb. at 735, 895 N.W.2d at 699; *Erickson v. U-Haul Intern.*,

Inc., 274 Neb. 236, 242, 738 N.W.2d 453, 460 (2007); *Norman v. Ogallala Pub. School Dist.*, 259 Neb. 184, 195, 609 N.W.2d 338, 347 (2000); *Baldwin v. City of Omaha*, 259 Neb. 1, 18, 607 N.W.2d 841, 853 (2000); *Popple v. Rose*, 254 Neb. 1, 6, 573 N.W.2d 765, 769 (1998) (abrogated by, *A.W. v. Lancaster Cty. School Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010)); *Engleman v. Nebraska Pub. Power Dist.*, 228 Neb. 788, 795, 424 N.W.2d 596, 601–02 (1988); *Center State Bank v. Dana, Larson, Roubal & Assocs., Inc.*, 226 Neb. 408, 415, 411 N.W.2d 635, 639 (1987); *McGinn v. City of Omaha*, 217 Neb. 579, 585, 352 N.W.2d 545, 549 (1984).

⁴⁵*Breeden v. Anesthesia West, P.C.*, 265 Neb. 356, 365, 656 N.W.2d 913, 921 (2003). *Accord*, e.g., *A.W.*, 280 Neb. at 210, 784 N.W.2d at 913 (“The duty in a negligence case is to conform to the legal standard of reasonable conduct in light of the apparent risk.”); *Hughes v. Omaha Pub. Power Dist.*,

occurred: it is sufficient that he knew or should have known that substantial injury was likely to result from his acts.”⁴⁶

“In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant’s alleged negligence.”⁴⁷ “Foreseeability is analyzed as a fact-specific inquiry. The foreseeability analysis requires us to ask what the defendants knew, when they knew it, and whether a reasonable person would infer from those facts that there was a danger. . . . [I]t is sufficient if what occurred is one of the kinds of consequences which might reasonably be foreseen.”⁴⁸

To recap: There can, of course, be no negligence if there is no duty. Whether there was a duty is a question of law for the trier of law. If the court finds that a duty existed, then whether that duty was breached is a question for the trier of fact. Like the standard of care of which it is a part, duty is not to be judged with hindsight.⁴⁹ “Foresight, not retrospect, is the standard of diligence.”⁵⁰

Regarding hindsight versus foresight and the law of negligence, see also the subsequent remedial measure rule, Nebraska Evidence Rule 407.⁵¹

274 Neb. 13, 29, 735 N.W.2d 793, 806 (2007); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 608, 667 N.W.2d 244, 253 (2003); *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 336, 622 N.W.2d 684, 687 (2001); *Drake v. Drake*, 260 Neb. 530, 539, 618 N.W.2d 650, 658 (2000) (quoting *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (Cardozo, J.)); *Doe v. Gunny’s Ltd. Partnership*, 256 Neb. 653, 659, 593 N.W.2d 284, 289 (1999) (also quoting *Palsgraf*).

⁴⁶*Baldwin v. City of Omaha*, 259 Neb. 1, 17, 607 N.W.2d 841, 853 (2000). *Accord* *Fuhrman v. State*, 265 Neb. 176, 184, 655 N.W.2d 866, 873 (2003) (disapproved of by, *Jill B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017)); *Fu v. State*, 263 Neb. 848, 860, 643 N.W.2d 659, 669 (2002); *Sharkey v. Board of Regents of University of Nebraska*, 260 Neb. 166, 181, 615 N.W.2d 889, 901, (2000) (abrogated by, *A.W. v. Lancaster Cty. School Dist.* 0001, 280 Neb. 205, 784 N.W.2d 907 (2010)); *Nickell v. Russell*, 260 Neb. 1, 13, 614 N.W.2d 349, 358 (2000).

⁴⁷*Thomas v. Board of Trustees of Neb. State Colls.*, 296 Neb. 726, 735, 895 N.W.2d 692, 699 (2017).

⁴⁸*Thomas*, 296 Neb. at 735, 895 N.W.2d at 699-700 (citations omitted).

⁴⁹*E.g., Breedon v. Anesthesia W.*, above (“[T]he risk reasonably to be perceived defines the duty to be obeyed.”).

⁵⁰*Center State Bank v. Dana, Larson, Roubal & Assocs., Inc.*, 226 Neb. 408, 415, 411 N.W.2d 635, 639 (1987) (citation omitted). *Accord* *Drake v. Drake*, 260 Neb. 530, 539, 618 N.W.2d 650, 658 (2000); *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 790, 580 N.W.2d 86, 94 (1998); *Popple by Popple v. Rose*, 254 Neb. 1, 7, 573 N.W.2d 765, 769 (1998), *abrogated by* *A.W., above*; *Lee v. City of Omaha*, 209 Neb. 345, 351, 307 N.W.2d 800, 804 (1981); *Shupe v. Antelope Cty.*, 157 Neb. 374, 380, 59 N.W.2d 710, 715 (1953).

⁵¹Nebraska Evidence Rule 407, Neb. Rev. Stat. § 27-407 (Reissue 2016); *Wollenhaupt v. Andersen Fire*

Footnoted here is a sampling of pre-2010 risk-utility balance cases—cases that may continue to be relevant to the determination of whether the defendant's "conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances."⁵²

E. A DUTY MAY BE IMPOSED BY STATUTE OR ORDINANCE

A duty may be imposed by statute or ordinance.⁵³

F. A DUTY MAY BE IMPOSED BY CONTRACT

A duty may be imposed by contract. For example, the law imposes on every contract the duty to perform with reasonable care.⁵⁴

G. THE SCOPE AND EXTENT OF THE DUTY

"Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. In other words, the necessary complement of duty—the standard of care—must be ascertained."⁵⁵ From the fact that whether a duty exists

Equip. Co., Inc., 232 Neb. 275, 281, 440 N.W.2d 447, 451 (1989) ("The theory underlying the rule excluding evidence of subsequent remedial measures is that because action taken after an incident 'reflects hindsight rather than foresight,' an inference of negligence would be improper.").

⁵²*Riggs*, 281 Neb. at 257, 796 N.W.2d at 188. Remember that, as discussed above, each of the following has been abrogated in part by A.W., above. *Perez v. Stern*, 279 Neb. 187, 192, 777 N.W.2d 545, 551 (2010); *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 811, 774 N.W.2d 370, 380 (2009); *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 27–28, 735 N.W.2d 793, 805 (2007); *Munstermann ex rel. Rowe v. Alegent Health-Immanuel Med. Ctr.*, 271 Neb. 834, 845–47, 716 N.W.2d 73, 83–84 (2006); *Struempfer v. Estate of Kloepping*, 261 Neb. 832, 835, 626 N.W.2d 564, 567 (2001); *Knoll v. Board of Regents of University of Nebraska*, 258 Neb. 1, 4, 601 N.W.2d 757, 761, (1999). See also *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 196, 450 N.W.2d 199, 203 (1990) ("[P]art of

the reason why the risk in this case was 'unreasonable' is that the risk could have been so easily removed by defendant.").

⁵³*E.g.*, *Gonzalez v. Union Pacific Railroad Company*, 292 Neb. 281, 288, 872 N.W.2d 579, 584 (2015) ("[A railroad is] required to exercise that degree of care imposed upon a railroad by federal regulations and its own code of operating instructions . . ."); *Tolbert v. Jamison*, 281 Neb. 206, 212, 794 N.W.2d 877, 883 (2011) ("[A] statute or ordinance may impose a duty on a landlord."); *Kozicki v. Dragon*, 255 Neb. 248, 251, 583 N.W.2d 336, 339 (1998) ("A defendant owes the plaintiff a duty when there is an applicable statute or ordinance."). See also *NJI2d Civ. 3.03, Comment & Authorities. And see generally Chapter 7, below.*

⁵⁴See *NJI2d Civ. 15.01, Comment.*

⁵⁵*Cerny v. Cedar Bluffs Junior/Senior Pub. School*, 262 Neb. 66, 73, 628 N.W.2d 697, 703 (2001). This is discussed above, in part III of this Comment & Authorities.

is a question of law, “[i]t necessarily follows that defining the scope of an existing duty is likewise a question of law.”⁵⁶

H. DUTY TO PREVENT A THIRD PARTY FROM INJURING ANOTHER

With some exceptions, the duty to exercise reasonable care so as not to negligently injure another does not include a duty to control the conduct of a third party so as to prevent the third party from injuring another.⁵⁷

“The failure to rescue or protect another from harm is not conduct creating a risk of harm under [the Restatement (Third) of Torts] § 7 and does not give rise to a duty of care under that section. Under the duty analysis of the Restatement (Third), the conduct creating the risk must be some affirmative act, even though the claimed breach can be a failure to act. When the only role of the actor is failing to intervene to protect others from risks created by third persons, the actor’s nonfeasance cannot be said to have created the risk. Generally speaking, the law does not recognize a duty of care when others are at risk of physical harm for reasons other than the conduct of the actor, even if the actor may be in a position to help. Ordinarily,

⁵⁶*Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 613, 667 N.W.2d 244, 256 (2003).

⁵⁷*See generally*, *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 547–48, 955 N.W.2d 707, 716 (2021) (noting that in this regard the court generally relies on 1 Restatement (Third) of Torts (2010) and 2 Restatement (Third) of Torts (2012) “when considering the duty to control the actions of a third party”); *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 155, 907 N.W.2d 705, 718 (2018); *Rodriguez v. Catholic Health Initiatives (Rodriguez I)*, 297 Neb. 1, 1–17, 899 N.W.2d 227, 235 (2017) (dealing with the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 71-901 to 71-962 (Reissue 2009 & Cum. Supp. 2016), Mental Health Practice Act, Neb. Rev. Stat. §§ 38-2102 to 38-2139 (Reissue 2016), and Psychology Practice Act, Neb. Rev. Stat. §§ 38-3101 to 38-3132 (Reissue

2016) and stating that “[a] mental health practitioner or psychologist is not liable for failing to warn of a patient’s threatened behavior unless the patient has communicated to the practitioner a serious threat of physical violence to a reasonably identifiable victim.”; noting the court’s reliance on Restatement (Second) of Torts § 315(a) at 122, 319 at 129 (Am. Law Inst. 1965) and 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 37, 40, 41 (Am. Law Inst. 2012)).

Other citations include *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1033-34, 809 N.W.2d 487, 492-93 (2012) (Political Subdivision Tort Claims Act); *Ehlers v. State*, 276 Neb. 605, 609, 756 N.W.2d 152, 156 (2008); *Erickson v. U-Haul Intern., Inc.*, 274 Neb. 236, 242, 738 N.W.2d 453, 460 (2007); *Danler v. Rosen Auto Leasing, Inc.*, 259 Neb. 130, 136, 609 N.W.2d 27, 32 (2000); *Merrick v. Thomas*, 246 Neb. 658, 661, 522 N.W.2d 402, 406 (1994).

the failure to act will not be the sort of affirmative conduct that gives rise to a duty under § 7.”⁵⁸

“There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.”⁵⁹

The Court has stated that “[t]he relationship necessary for liability is a custodial relationship.”⁶⁰ “[T]he duty of a custodian to prevent a person in custody from causing harm to others is premised on the degree of

⁵⁸*Bell*, 299 Neb. at 155, 907 N.W.2d at 718 (footnoted citations to the Restatement (Third) of Torts omitted). *Bell* notes that “the ordinary duty of reasonable care under [the Restatement (Third) of Torts] § 7 is expressly conditioned on the actor’s having engaged in conduct that creates a risk of physical harm to another. And, as the comments to § 7 recognize, “[i]n the absence of conduct creating a risk of harm to others, an actor ordinarily has no duty of care to another.” *Bell*, 299 Neb. at 155, 907 N.W.2d at 718 (footnote omitted). See also *id.*, at 154, 907 N.W.2d at 718. “The rationale for the no-duty rule . . . is premised, in part, on a distinction long recognized in the common law of torts between affirmatively creating a risk of harm and merely failing to prevent it.” *Id.* at 149, 907 N.W.2d at 714.

⁵⁹*Ehlers*, 276 Neb. at 609, 756 N.W.2d at 156 (quoting Restatement (Second) of Torts § 315 at 122 (Am. Law Inst. 1965) and noting that the Court has adopted same). Accord *Rodriguez II*, 308 Neb. at 548, 955 N.W.2d at 716–17 (footnoting *Ginapp*, above and 2 Restatement (Third), above at §§ 37, 41(a)); *Bell*, 299 Neb. at 152, 907 N.W.2d at 717 (citing the Restatement (Third) of Torts § 37); *Rodriguez I*, above; *Holloway v. State*, 293 Neb. 12,

29-30, 875 N.W.2d 435, 449 (2016); *Ginapp*, above. See also *Danler*, 259 Neb. at 136, 609 N.W.2d at 32 (“[T]he common law has traditionally imposed liability [for failure to control the conduct of another person] only if the defendant bears some special relationship to the dangerous person or to the potential victim.”) (multiple quotation marks omitted); *Merrick*, 246 Neb. at 661, 522 N.W.2d at 406 (no such duty “absent fraud or other facts establishing a duty”). See also *Rutledge v. City of Kimball*, 304 Neb. 593, 600, 935 N.W.2d 746, — (2019) (Political Subdivision Tort Claims Act).

“The Restatement (Third) . . . cautions that the list [of special relationships] in § 37 is not exclusive; courts may decide to recognize other areas for affirmative duties under § 37, just as they may decide—for reasons of policy or principle—to recognize no-duty rules under § 7.” *Bell*, 299 Neb. at 150, 907 N.W.2d at 716.

⁶⁰*Holloway*, 293 Neb. at 30, 875 N.W.2d at 449). Accord *Rodriguez II*, 308 Neb. at 548, 557, 955 N.W.2d at 716, 722 (“We have twice before recognized that having custody over another person creates a special relationship.” And holding that the court does not adopt “§ 41(b) of the Restatement (Third) [and does not hold]

control afforded to one who takes charge of another.⁶¹ “[T]he first step is to determine whether the actor’s affirmative conduct created a risk of physical harm such that the general duty to exercise reasonable care . . . is applicable. If no such affirmative conduct exists, then the next step is to determine whether any special relationship exists that would impose a recognized affirmative duty on the actor with regard to the risks arising within the scope of that relationship.”⁶²

A custodial relationship ‘need not be a full-time physical custody giving the custodian complete control over the other person. But to the extent that there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control.’⁶³

There is “an exception to the no-duty rule when a court has determined that another recognized affirmative duty is applicable.”⁶⁴ It is true, then, that “[b]usinesses that are open to the public are subject to a duty of reasonable care”⁶⁵ A failure by a proprietor of such a business to exercise reasonable care that leads to foreseeable damage caused by the acts of a third party may render the proprietor liable. This is simply “a general duty based on premises liability.”⁶⁶ This is not the kind of situation addressed in this part of this Comment & Authorities.⁶⁷ Rather, it is addressed at NJI2d Civ. 8.28. *See also* NJI2d Civ. 3.43, Superseding Cause; NJI2d Civ. 3.44, Proximate Cause—Conduct of Nonparty Third Person.

And, on a somewhat related point, *see* NJI2d Civ. 3.03, Comment &

that the relationship between a mental-health professional and patients gives a generalized duty of reasonable care” *Id.* at 548, 955 N.W.2d at 716); *Ehlers*, 276 Neb. at 609-10, 756 N.W.2d at 156-57 (quoting Restatement (Second) of Torts § 319 at 129 (Am. Law Inst. 1965)). *See also* *Ginapp*, 282 Neb. at 1034, 809 N.W.2d at 493.

⁶¹*Rodriguez I*, 297 Neb. at 12, 899 N.W.2d at 235.

⁶²*Bell*, 299 Neb. at 154, 907 N.W.2d at 718.

⁶³*Rodriguez II*, 308 Neb. at 548-49, 955 N.W.2d at 716-17 (internal quotation marks omitted).

⁶⁴*Bell*, 299 Neb. at 150, 907 N.W.2d at 715.

⁶⁵*Pittman v. Rivera*, 293 Neb. 569, 574, 879 N.W.2d 12, 16 (2016).

⁶⁶*Pittman*, 293 Neb. at 574, 879 N.W.2d at 16-17.

And, on a somewhat related point, *see* NJI2d Civ. 3.03, Comment & Authorities regarding the general rule that the violation of the Nebraska statute prohibiting the sale of alcohol to minors is not evidence of negligence on the part of the seller.

⁶⁷*Bell*, 299 Neb. at 156-57, 907 N.W.2d at 719 notes that the Restatement (Third) of Torts § 41 identifies the relationship of “an employer with employees when the employment facilitates the employee’s causing harm to third parties” as a special relationship that creates a duty. *Bell* further notes that our Court had “not expressly adopted [this] special relationship . . . and does] not do so here, because the present facts do not support the existence of a special relationship under that section.”).

Authorities regarding the general rule that the violation of the Nebraska statute prohibiting the sale of alcohol to minors is not evidence of negligence on the part of the seller.

How fraud might create a duty on the part of a third party is discussed elsewhere, at various places, in this book. Other facts that might establish a duty are also discussed elsewhere, at various places, in this book. Bystander recovery for negligent infliction of mental distress, for example, is discussed at NJI2d Civ. 9.04, Comment.

Regarding a person's duty (or lack of duty) to come to the aid of a stranger who is in danger, *see* NJI2d Civ. 3.08 "Duty—Volunteers," below.

Regarding the duty of mental health providers treating patients with mental illness to warn and protect third parties, *see* the Mental Health Practice Act, Neb. Rev. Stat. §§ 38-2102 to 38-2139 (Reissue 2016 & Cum Supp. 2020) and the Psychology Practice Act, Neb. Rev. Stat. §§ 38-3101 to 38-3133 (Reissue 2016 & Cum Supp. 2020). *And see Rodriguez II.*⁶⁸ *See additionally* NJI 2d Civ. 12.01 Comment & Authorities.

I. MISCELLANEOUS DUTIES

"[S]pecial relationships can give rise to a duty."⁶⁹

[I]n negligence cases, an employer stands in a special relationship with its employee who is in imminent danger or injured and thereby helpless, and such employer owes the employee a duty of reasonable care with regard to risks that arise within the scope of the relationship.⁷⁰

The duty "a commercial dealer of used vehicles intended for use on

⁶⁸*Rodriguez II*, 308 Neb. at 551–55, 560, 955 N.W.2d at 718–21, 724 (stating that "the patient must verbally express or convey to the psychiatrist his or her prediction to commit physical violence against himself, herself, or a reasonably identifiable victim or victims." *Id.* "And once such an actual communication has taken place, any duty to warn or protect on the part of the psychiatrist can be discharged by reasonable efforts to communicate the threat to the victim and a law enforcement agency." *Id.* at 560, 955 N.W.2d at 723).

⁶⁹*Martensen v. Rejda Bros.*, 283 Neb. 279, 287, 808 N.W.2d 855, 863

(2012).

⁷⁰*Martensen*, 283 Neb. at 288, 808 N.W.2d at 863. Regarding an employer's duty to an employee who is injured on the job, *see also* *Klawitter v. Lampert*, 248 Neb. 231, 233, 533 N.W.2d 896, 898 (1995).

This is to be distinguished from the statement that our Court "has not expressly adopted" the Restatement Third's rule that an employer has a duty to third parties "when the employment facilitates the employee's causing harm to third parties." *Bell v. Grow With Me Childcare & Preschool*, 299 Neb. 136, 156–57, 907 N.W.2d 705, 719 (2018).

public streets and highways” owes the purchaser of such a vehicle is discussed in *Wilke v. Woodhouse Ford*.⁷¹

A livestock owner’s duty to keep the livestock confined, and to round them up and reconfine them once they have escaped, is discussed in *Hand v. Starr*.⁷²

A jailer’s duty to inmates is discussed in *Goodenow v. State*.⁷³

The torts of fraudulent misrepresentation and concealment are based on a duty not to engage in the relevant fraudulent acts. This is discussed at NJI2d Civ. 9.01 and 9.02 respectively.

Regarding tortious acts, the duty owed by the State of Nebraska and its political subdivisions is discussed in this Comment & Authorities and at NJI2d Civ. 8.72, Comment & Authorities.

The duty owed by one who “attempts a rescue which he had no duty to attempt by virtue of legal obligation or duty fastened on him by his employments,” is discussed in *Rasmussen v. State Farm Mut. Auto. Ins. Co.*⁷⁴

Regarding injuries related to participation in organized sports, see the cases footnoted here,⁷⁵

⁷¹*Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 814, 774 N.W.2d 370, 381 (2009).

⁷²*Hand v. Starr*, 250 Neb. 377, 379-80, 550 N.W.2d 646, 648-49 (1996).

⁷³*Goodenow v. State Dep’t of Corr. Servs.*, 259 Neb. 375, 380, 610 N.W.2d 19, 22-23 (2000).

⁷⁴*Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 294, 770 N.W.2d 619, 625 (2009) (The plaintiff stopped to assist a driver whose car slid into a ditch. In the process of helping, another car slid off the road and hit the first car, the plaintiff, and a second person who had also stopped to help. The plaintiff sued the insurer of the first car. The defendant attempted to argue contributory negligence on the part of the plaintiff. “Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm.” *Id.*

at 295, 770 N.W.2d at 625 (quoting *Moravec v. Moravec*, 216 Neb. 414, 415, 343, N.W.2d 762, 764 (1984)). Also see generally NJI2d Civ. 3.08.

⁷⁵*Hearon v. May*, 248 Neb. 887, 894-96, 540 N.W.2d 124, 130-31 (1995) (in action for negligent supervision or negligent instruction, for injury to instructee proximately caused by instructor, teacher, or coach, proper standard of care is ordinary negligence, i.e., whether defendant acted as a reasonably careful person in a similar circumstance); *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990) (participant in game of contact sport liable in tort action for injury to another participant only if conduct is willful or constitutes reckless disregard for safety of other participant; vigorous participation should not be chilled by threat of litigation); *Ohnstad v. Omaha Pub. School Dist. No. 1 of Douglas Cty.*, 232 Neb. 788, 442 N.W.2d 859 (1989) (ordinary negligence applied in action for negligent

Regarding the duty owed in other specific kinds of cases or situations *see*, among others, the pattern instructions footnoted here.⁷⁶

In these cases, and others, the duty is clear; there is, then, no duty decision for the court to make; the only decision is the one for the trier of fact, *i.e.*, whether the duty has been breached.

J. NONDELEGABLE DUTIES

Nondelegable duties are discussed at NJI2d Civ. 12.01,

IX. NEGLIGENCE VERSUS LIABILITY

“[D]eciding that a party is negligent as a matter of law does not equate to a finding that the defendant is liable.”⁷⁷ “The four essential elements of a negligence action are duty, breach, proximate cause, and damages.”⁷⁸ A finding of negligence as a matter of law equates to a finding that the plaintiff has established the first two of those four elements. However, the issues of causation and damages remain for the jury’s determination “Identifying a defendant’s tortious conduct is crucial to a causal inquiry, but proving tortious conduct is a separate requirement from proving causation.”⁷⁹

X. NEGLIGENCE IS NOT PRESUMED FROM THE EXISTENCE OF AN INJURY OR THE HAPPENING OF AN ACCIDENT

Negligence is not presumed from the existence of an injury or the happening of an accident.⁸⁰

supervision and instruction; judgment for defendant on grounds that decedent’s own actions were the proximate cause of his injuries); *Brahatcek v. Millard School Dist.*, School Dist. No. 17, 202 Neb. 86, 96-98, 273 N.W.2d 680, 686-87 (1979) (negligent supervision by instructor; ordinary negligence).

⁷⁶For example, *see* NJI2d Civ. 3.05 and 8.51 and the duty owed by children; NJI2d Civ. 6.01 and the duty of the principal, the agent, or both to a negligently injured third party; NJI2d Civ. 7.03A and 7.03B and duty as affected by conditions affecting a driver’s visibility; NJI2d Civ. 8.41 and 8.42 and one’s duty when dealing with an ultrahazardous activity; NJI2d Civ. 9.04 and one’s duty regarding the infliction of mental distress on a by-

stander; NJI2d Civ. 12.01 and the duty owed by a health-care provider; NJI2d Civ. 12.04 and the duty owed by a professional other than a health-care provider; NJI2d Civ. 15.01 and contractual duties. For other examples, consult the Index, under Duty of Care.

⁷⁷*Dolberg v. Paltani*, 250 Neb. 297, 300-01, 549 N.W.2d 635, 638 (1996) (citing *Davis v. Phillips*, 215 Neb. 184, 337 N.W.2d 754 (1983) (finding court’s refusal to direct verdict on liability proper when issue of contributory negligence is before jury)).

⁷⁸*See* NJI2d Civ. 2.01, Authorities.

⁷⁹*C.E. v. Prairie Fields Family Medicine P.C.*, 287 Neb. 667, 674, 844 N.W.2d 56, 62 (2014).

⁸⁰*See* NJI2d Civ. 2.01, Authorities.

Res ipsa loquitur is a “qualification” to the general rule that negligence is never presumed.⁸¹

NJI2d Civ. 3.03

EFFECT OF VIOLATION OF STATUTES, ORDINANCES, RULES, OR REGULATIONS

It is claimed that (a statute, an ordinance, an administrative rule, a private safety regulation) was violated. If you find that it was, that does not necessarily prove negligence. The violation of (a statute, an ordinance, an administrative rule, a safety regulation) is evidence that you may consider, along with all of the other facts and circumstances in the case, in deciding whether or not there was any negligence.

COMMENT & AUTHORITIES

I. IN GENERAL

This pattern instruction begins with the words, “It is claimed” Insert in its place something, most likely a name, that identifies the party making the claim—something such as, “John Smith claims”

II. AS A GENERAL RULE, VIOLATION OF A STATUTE, AN ORDINANCE, A REGULATION, OR A RULE IS EVIDENCE OF NEGLIGENCE

The cases footnoted here are among those that support the general rule that violation of a statute an ordinance, a regulation, or a rule is evidence of negligence.¹

As is always the case, instruction that violation of a statute or

⁸¹See NJI2d Civ. 2.13, Comment.

3.03

¹*Scheele v. Rains*, 292 Neb. 974, 981, 874 N.W.2d 867, 872 (2016) (regarding, for one defendant, U.S. Department of Agriculture burn regulations, and, for a second defendant, Federal Motor Carrier Safety Regulations); *Orduna v. Total Const. Servs., Inc.*, 271 Neb. 557, 564–65, 713 N.W.2d 471, 478–79 (2006) (Occupational Safety and Health Administration (OSHA) regulation); *McLain v. Ortmeier*, 259 Neb. 750, 757, 612 N.W.2d 217, 223 (2000) (rules regarding navigation on water); *Goodenow v.*

State Dep’t of Corr. Servs., 259 Neb. 375, 380, 610 N.W.2d 19, 22 (2000) (regulations of the Department of Correctional Services); *Maresh v. State*, 241 Neb. 496, 500, 512, 489 N.W.2d 298, 304 (1992) (Nebraska Department of Roads adoption of the U.S. Department of Transportation’s Manual on Uniform Traffic Control Devices for Streets and Highways (1978)), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 2017 WL 4455257 (2017); *Raben v. Dittenber*, 230 Neb. 822, 825, 826, 434 N.W.2d 11, 13 (1989) (one vehicle passing another within 100 feet of an intersection); *Phillips v. City of Omaha*, 227 Neb. 233, 236, 417

ordinance is evidence of negligence is not appropriate where there is neither pleading nor proof of such a violation.² And, again as always, “[v]iolation of a statute must be a proximate cause of an injury if liability for damages is to be predicated on such violation.”³

Where there is an applicable key-in-the-ignition ordinance, then there is a duty to one injured by a stolen car parked in violation of the ordinance. Whether leaving the key in the ignition was a proximate cause of the subsequent injury, or whether the action of the thief is an efficient intervening cause, is a separate question. There is, however, a duty—a duty created by the statute or ordinance.⁴

By statute, Nebraska prohibits the sale of alcohol to minors. Regarding a minor involved in a subsequent automobile accident, violation of this section is not evidence of negligence on the part of the seller.⁵ “[T]o rule otherwise would thwart the intention of the Legislature,” as

N.W.2d 12, 15 (1987) (vehicle right-of-way); *Bourke v. Watts*, 223 Neb. 511, 518, 391 N.W.2d 552, 556 (1986) (crossing the centerline of the highway); *Tank v. Peterson*, 219 Neb. 438, 448-49, 363 N.W.2d 530, 537 (1985) (FAA regulations); *McGinn v. City of Omaha*, 217 Neb. 579, 582, 352 N.W.2d 545, 547 (1984) (ordinance regarding removal of dead, diseased, or structurally weak tree or tree part); *Schaefer v. McCreary*, 216 Neb. 739, 744, 345 N.W.2d 821, 825 (1984) (reckless driving); *Schutz v. Hunt*, 212 Neb. 228, 235, 322 N.W.2d 414, 418 (1982) (jaywalking ordinance); *Hansmann v. Gosper Cty.*, 207 Neb. 659, 662-63, 300 N.W.2d 807, 808-09 (1981) (statute requiring county highway superintendent to post load capacity signs on bridges); *Fuchser v. Jacobson*, 205 Neb. 786, 790, 290 N.W.2d 449, 452 (1980) (statutory duty to restrain bull); *Florida v. Farlee*, 201 Neb. 39, 42, 266 N.W.2d 204, 206 (1978) (left-turning vehicle's duty to yield to vehicle coming from opposite direction); *Hartman v. Brady*, 201 Neb. 558, 563, 270 N.W.2d 909, 912 (1978) (speed regulation); *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 24, 261 N.W.2d 772, 775 (1978) (duties relating to wide loads); *Piper v. Hill*, 185 Neb. 568, 571-72, 177 N.W.2d 509, 512 (1970) (leaving vehicles standing on traveled

portion of highway); *Hermansen v. Anderson Equip. Co.*, 174 Neb. 325, 329, 117 N.W.2d 791, 793 (1962) (failure to signal turn); *Kennedy v. Chicago, R.I. & P. R. Co.*, 156 Neb. 345, 349, 56 N.W.2d 446, 449 (1953) (operation of trains); *Segebart v. Gregory*, 156 Neb. 261, 268, 55 N.W.2d 678, 683 (1952) (night-lighting of vehicle parked on highway).

See also *Krehnke v. Farmers Union Co-op. Ass'n*, 199 Neb. 632, 643, 260 N.W.2d 601, 608 (1977) (concerning the American National Safety Standard Code adopted, pursuant to specific statutory authority, by the Nebraska Commissioner of Labor).

²*Kluender v. Mattea*, 214 Neb. 327, 331, 334 N.W.2d 416, 419 (1983).

³*Schuyler State Bank v. Cech*, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988).

⁴*Kozicki v. Dragon*, 255 Neb. 248, 251-54, 583 N.W.2d 336, 339-40 (1998) (citing and discussing cases). Regarding intervening criminal acts generally, see *NJI2d Civ. 3.43, Comment & Authorities*.

⁵*Neb. Rev. Stat. § 53-180* (Reissue 2010) See *Pelzek v. American Legion*, 236 Neb. 608, 611, 463 N.W.2d 321, 324 (1990).

expressed in 1935, when it repealed statutory dramshop liability.⁶ “Although selling liquor to a minor is a violation of [law], it is not the proximate cause of any injuries that the minor might suffer. It is the negligent operation of an automobile after the drinking of liquor which causes the injury.”⁷

“A violation of an administrative rule or of a private safety regulation is independent evidence of negligence, under all the circumstances, provided an expert witness incorporates the regulation in his opinion as to an issuable act of negligence and the evidence would probably aid the trier of fact.”⁸

Regarding failure to abide by custom or ordinary practice, see *Hydroflo Corp. v. First Nat’l Bank*.⁹

Regarding violation of “advisory safety standards,” see *Norman v. Ogallala Public School District*.¹⁰

Regarding the lack of a professional license, the court has stated that “the plaintiff does not contend that his treatment by the defendants was improper in any way except that Nurse Gillespie was not licensed to perform the things that she did.”¹¹ The court held that this single allegation of lack of a license is not an allegation of negligence.¹²

However, a conviction for a violation of the Nebraska Rules of the Road is not admissible in a civil action for damages arising out of the same incident. This is discussed in part II of this Comment & Authorities, immediately below.

II. CONVICTION FOR A VIOLATION OF THE NEBRASKA RULES OF THE ROAD IS INADMISSIBLE IN A CIVIL ACTION FOR DAMAGES ARISING OUT OF THE SAME INCIDENT

No evidence of the conviction of any person for any violation of any provision of the Nebraska Rules of the Road shall be admissible in any court in any civil action.” Neb. Rev. Stat. § 60-693 (Reissue 2010). By its terms, this statute applies only to

⁶*Pelzek*, 236 Neb. at 611, 463 N.W.2d at 324.

⁷*Pelzek*, 236 Neb. at 610, 463 N.W.2d at 323.

⁸*Simon v. Omaha Pub. Power Dist.*, 189 Neb. 183, 195-96, 202 N.W.2d 157, 165 (1972). *Accord* *Haselhorst v. State*, 240 Neb. 891, 898, 485 N.W.2d 180, 187 (1992).

⁹*Hydroflo Corp. v. First Nat.*

Bank of Omaha, 217 Neb. 20, 29, 349 N.W.2d 615, 620 (1984).

¹⁰*Norman v. Ogallala Pub. School Dist.*, 259 Neb. 184, 193-94, 609 N.W.2d 338, 346-47 (2000).

¹¹*Turek v. Saint Elizabeth Cmty. Health Ctr.*, 241 Neb. 467, 474-75, 488 N.W.2d 567 (1992).

¹²See generally *Turek*, 241 Neb. at 471-75, 488 N.W.2d at 570-72.

Nebraska state traffic regulations. In line with “the policy underlying [the statute], and the overwhelming weight of authority from other jurisdictions, [the Court has held] that evidence of conviction for a traffic infraction is not admissible in a civil suit for damages arising out of the same traffic infraction.”¹³

This holding is based at least in part on the danger that unfair prejudice will substantially outweigh the probative value of the evidence of conviction of such a relatively minor (i.e., non-felony) crime. Since these infractions are not felonies, they are not subject to the general rule that a final judgment of conviction of a felony “is admissible to prove any fact essential to sustain the judgment.”¹⁴

Regarding the rules of the road, *see generally* chapter 7 and *see particularly* NJI2d Civ. 7.01, Special Note.

III. COURTS OF GENERAL JURISDICTION AND APPELLATE COURTS WILL NOT TAKE JUDICIAL NOTICE OF MUNICIPAL ORDINANCES

On the matter of the creation of a duty by ordinance, be aware that “[c]ourts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts, on appeal.”¹⁵ Regarding judicial notice, *see* the references under that heading in the Index to the pattern civil instructions.

IV. VIOLATION OF A STATUTE, AN ORDINANCE A REGULATION, OR A RULE AND THE BURDEN OF PROOF AND PRODUCTION

“It is axiomatic that the burden of proving negligence is on the party alleging it.”¹⁶

Violation of a statute is evidence of negligence. The Supreme Court has stated this principle somewhat differently in *Tapp v. Blackmore Ranch*.¹⁷ *Tapp* states that proof of violation of a statute creates a prima facie case of negligence. “[I]f a prima facie case is established, in order to create a question of fact for the jury, it becomes incumbent upon the

¹³*Stevenson v. Wright*, 273 Neb. 789, 796, 733 N.W.2d 559, 565 (2007).

¹⁴*Stevenson*, 273 Neb. at 795, 733 N.W.2d at 564. *See also* NJI2d Civ. 7.01, Comment & Authorities.

Regarding the general rule of the inadmissibility of evidence when the danger of unfair prejudice substantially outweighs its probative value, *see* Neb. Evid. R. 403, Neb. Rev. Stat. 27-403 (Reissue 2016).

¹⁵*Hawkins Const. Co. v. Director of City of Omaha Human Relations Dept.*, 240 Neb. 1, 2, 480 N.W.2d 183, 184 (1992).

¹⁶*Kliwer v. Wall Const. Co.*, 229 Neb. 867, 871, 429 N.W.2d 373 (1988). *See* NJI2d Civ. 2.01, Authorities for additional cases.

¹⁷*Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

person charged to present evidence that he or she did not violate the statute.”¹⁸

This is a statement of the self-evident proposition that once the prima facie case of negligence is made, the party charging negligence has put on enough evidence to get this issue to the jury. Here the prima facie case is made with evidence of a violation of a statute. If the party charged with negligence does not produce any evidence opposing or discrediting this point, then that party loses the point: there is credible evidence of negligence and no evidence of non-negligence. If the party charged with negligence does produce evidence opposing or discrediting this point, then the point goes to the jury and the burden of proof stays with the party charging negligence: There is credible evidence of negligence and credible evidence of nonnegligence. As *Tapp* notes, the burden that shifts is the “burden . . . to create a jury question,” that is, the burden of production (not the burden of proof).¹⁹

Regarding this discussion of *Tapp*, be sure to note these three things: (1) Establishing negligence is not the same as establishing liability. Regarding the difference, see NJI2d Civ. 3.02, Comment & Authorities. (2) There are cases that seem to contradict *Tapp*. For example, *Raben v. Dittenber*²⁰ states that the fact that a statute or regulation was violated is evidence of negligence, not negligence per se, and, by itself, will not sustain a directed verdict. Perhaps the real point of that statement was that such evidence is not negligence per se and the no-directed-verdict part of the statement was just gratuitous dictum. There is a lot of evidence that does not establish negligence per se but, if unrebutted, supports a directed verdict. (3) *Tapp* states that if the one charging negligence establishes a prima facie case of violation of a statute, then it becomes incumbent upon the person charged with negligence to overcome “the legal presumption” that the statute was violated. Under the common law, presumptions shifted the burden of production. Under the Nebraska Evidence Rules, presumptions shift the burden of proof. *Tapp*’s “legal presumption” is a common-law presumption, rather than a presumption under the Nebraska Evidence Rules. This part of the law of presumptions is discussed, and authorities are cited, at NJI2d Civ. 2.14A to 2.14D.

The Court revisited and distinguished *Tapp* in *McClure v. Forsman*.²¹ Although a *Tapp*-like instruction is appropriate when there is a dispute as to whether or not the defendant had violated the statute,

¹⁸*Tapp*, 254 Neb. at 53, 575 N.W.2d at 350-51.

¹⁹*Tapp*, 254 Neb. at 54, 575 N.W.2d at 350-51.

²⁰*Raben v. Dittenber*, 230 Neb. 822, 825-26, 434 N.W.2d 11, 13 (1989).

²¹*McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003).

it is reversible error to give such an instruction when “the statutory violation was undisputed.”²²

V. INTERPRETATION OF RULES AND REGULATIONS

“Generally, for purposes of construction, a rule or order of an administrative agency is generally treated like a statute. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.”²³

VI. THE NEBRASKA RULE AND *PROSSER ON TORTS*

The fourth edition of Prosser states that “the great majority of the courts hold that an unexcused violation [of a statute] is conclusive on the issue of negligence, and the court must so direct the jury.”²⁴ While Nebraska’s rule is a “considerable minority,”²⁵ Prosser prefers it to the majority approach, at least in the latter’s extreme form: “The arbitrary classification of all breaches of statute as negligence per se or no negligence at all leaves too little flexibility for the standard of reasonable care.”²⁶ By the fifth edition, either the majority was shifting or the editors were reading the cases to a different conclusion; in the fifth edition, Nebraska’s rule is no longer a minority rule, but is “probably [the rule in] a majority of the courts.”²⁷

NJI2d Civ. 3.04

CARE REQUIRED FOR SAFETY OF CHILD

Recommend no instruction.

COMMENT & AUTHORITIES

I. IN GENERAL

Regarding the duty of a child, *see* NJI2d Civ. 3.05.

If an actor has notice of the actual or likely presence of children or

²² *McClure*, 266 Neb. at 98, 662 N.W.2d 566.

²³ *In re* Petition of Golden Plains Servs. Transp., 297 Neb. 105, 108, 898 N.W.2d 670, 673 (2017).

²⁴ W. Prosser, *Law of Torts* § 36, at 200 (4th ed. 1971).

²⁵ *Id.*, at 201,

²⁶ *Id.*, at 202.

²⁷ Prosser and Keeton *On the Law of Torts* § 36, at 230 (W. Keeton gen. ed. 5th ed. 1984). *See also, id.* at 36 (Supp. 1988). *See generally* 1 Dan B. Dobbs, *The Law of Torts*, § 134, at 315-19 (2001).

if an actor has no such notice, the standard by which the actor's care is judged is the same: that degree of care a reasonable person would exercise under the circumstances. One circumstance relevant to the degree of care a reasonable person would exercise is the person's knowledge regarding the actual or likely presence of children. The actor is not justified in assuming that a young child will manifest the judgment and prudence of the ordinary adult, and the actor must govern his or her actions accordingly by taking such precautions as reasonable care requires under the circumstances of a child's actual or likely presence.

Thus, while the presence of children does not require a higher *standard* of care than reasonable care, their presence is a relevant circumstance and generally requires a greater *degree* of care than would the presence of adults instead of children.

The cases footnoted here support all or part of the above.¹

II. PARENTAL IMMUNITY

Parental immunity from suits brought by their unemancipated minor children is discussed in great detail in *Nolasco v. Malcom*.² *Nolasco's* discussion includes this.

The doctrine of parental immunity, as it has been articulated in Nebraska, provides generally that an unemancipated minor cannot maintain an action against his or her parents, or any other person standing in that relation to the minor, to recover damages for ordinary negligence, but can maintain an action to recover for "brutal, cruel, or inhuman treatment"³

The court states "that the doctrine, as adopted and applied in Nebraska by this court, has always been confined to that class of ordinary negligence claims involving conduct related to parental author-

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¹Ederer v. Van Sant, 184 Neb. 774, 776, 172 N.W.2d 96, 97 (1969) (in addition to generally supporting the above, this case says that "[t]he age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised [ordinary or reasonable] care."); Vacanti v. Montes, 180 Neb. 232, 237, 142 N.W.2d 318, 321 (1966); Odom v. Willms, 177 Neb. 699, 705, 131 N.W.2d 140, 144 (1964); Zoucha v. Northwestern Bell Telephone Co., 176 Neb. 408, 413, 126 N.W.2d 220, 223 (1964); Pullen v. Novak, 169 Neb. 211,

221, 99 N.W.2d 16, 24 (1959); Adams v. Welliver, 155 Neb. 331, 341, 51 N.W.2d 739, 745 (1952); Tews v. Bamrick, 148 Neb. 59, 66, 26 N.W.2d 499, 504 (1947); Kauffman v. Fundaburg, 123 Neb. 340, 344, 242 N.W. 658, 660 (1932); De Griselles v. Gans, 116 Neb. 835, 835-36, 843, 219 N.W. 235, 235, (1928) (the first page referenced in the citation is to the often-quoted syllabus by the court).

²Nolasco v. Malcom, 307 Neb. 309, 949 N.W.2d 201 (2020) (citing and discussing many cases).

³Id. at 312, 949 N.W.2d at ____.

ity, discretion, or decisionmaking in the supervision, care, and treatment of a minor child.”⁴ The rule is designed “to protect ‘the proper exercise of parental authority,’ to recognize that ‘parents are entitled to discretion in how they raise and discipline their children,’ and to protect against ‘tort liability because of a legitimate parental decision.’”⁵ In *Nolasco* the allegations of negligence against the parent

were limited to driving at an unreasonable speed, failing to keep a reasonable lookout, and failing to exercise proper control of vehicle. Because none of this alleged conduct pertains in any respect to the exercise of parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child, the claim falls outside the scope of Nebraska’s modified parental immunity doctrine.⁶

This part of parental immunity is a common law doctrine⁷ and, as such, it may be subject to change by the legislature.

NJI2d Civ. 3.05

NEGLIGENCE—CHILDREN

In the case of a child, negligence is the failure to use the care that would be used by a reasonably careful child of like age, intelligence, and experience under similar circumstances.

COMMENT & AUTHORITIES

It is recommended that when given this instruction be given right after NJI2d Civ. 3.02.

Camerlinck v. Thomas presents an excellent review of Nebraska’s early case law dealing with the negligence of children and concludes that to that date Nebraska’s law on this subject was unsettled.¹ In *Camerlinck*, the Court adopted the following rule: “If the actor is a child, the standard of conduct to which he must conform to avoid being

⁴*Id.* at 327, 949 N.W.2d at ___, ___, ___. —, —.

⁵*Id.* at 328, 949 N.W.2d at ___.
(footnotes omitted).

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⁶*Id.* at 329, 949 N.W.2d at ___.

¹*Camerlinck v. Thomas*, 209 Neb. 843, 845-46, 312 N.W.2d 260, 262-67

⁷*Id.* at 312, 319, 949 N.W.2d at (1981).

negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances,' ”²

*Humphrey v. Burlington N. R.R. Co.*³ includes an extensive review of Nebraska’s law regarding negligence on the part of children, particularly the history of the issues in this state since the Court’s seminal 1981 opinion in *Camerlinck*. *Humphrey* should be consulted in a case regarding either the negligence or contributory negligence of a minor.

In *Camerlinck* the child who inflicted the injury was 6 years and 1 month old. While sliding down a playground slide, he struck a 4½-year-old boy in the eye with a stick. The trial court directed a verdict for defendant and dismissed the petition, holding that, because of his age, the 6-year-old was not capable of actionable negligence.⁴ The Supreme Court reversed and remanded, holding that the case presents a jury question on the issue of the 6-year-old’s capacity for negligence.⁵ “The more recent cases . . . appear to uphold the rule that there is no arbitrary . . . time at which a [minor] . . . may be wholly capable or incapable of understanding and avoiding dangers to be encountered, and that whether or not negligence may be attributed to a minor is usually a matter for the jury.”⁶

“A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances. . . .”⁷ “If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.”⁸ This means that, among other things, relevant evidence might include “the circumstances under which the child has

²*Camerlinck*, 209 Neb. at 858, 312 N.W.2d at 268 (quoting Restatement (Second) of Torts § 283A (Am. Law Inst. 1965)).

³*Humphrey v. Burlington Northern R. Co.*, 251 Neb. 736, 559 N.W.2d 749 (1997),

⁴*Camerlinck*, 209 Neb. at 844-45, 312 N.W.2d at 261.

⁵*Camerlinck*, 209 Neb. at 860-61, 312 N.W.2d at 269.

⁶*Camerlinck*, 209 Neb. at 856, 312 N.W.2d at 267.

⁷*Gonzalez v. Union Pacific Railroad Company*, 292 Neb. 281, 288, 872 N.W.2d 579 (2015) (“[T]he degree of care required [of the other party] increases when [that] actor is dealing with a dangerous activity,” such as a moving train. *Id.* at 288, 872 N.W. 2d at 585).

⁸*Center State Bank v. Dana, Larson, Roubal & Associates, Inc.*, 226 Neb. 408, 414, 411 N.W.2d 635, 639 (1987) (quoting *Camerlinck*, 209 Neb. at 858, 312 N.W.2d at 268).

lived,'” the experience of the child in “‘encountering particular hazards, or the education’” the child has received concerning these hazards.⁹

“A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience. A child may be so young as to be manifestly and utterly incapable of exercising any of those qualities of attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a minor . . . may be quite as capable as an adult of exercising such qualities

“Between the two extremes [—the younger, while not able to be fixed definitely for all cases, probably being somewhere in the vicinity of four years—] there are children whose capacities are infinitely varied. The standard of conduct required of the child is that which it is reasonable to expect of children of like age, intelligence, and experience.”¹⁰

The negligence of a minor is normally a question for the jury; that, however, is not always the case. *Humphrey v. Burlington N. R.R. Co.*¹¹ is “one of those extreme cases . . . wherein the facts show plainly that the minor had the knowledge and appreciation of the danger to be incurred such as to have required the district court to declare as a matter of law that she was guilty of contributory negligence sufficient to bar recovery.”¹²

“[A]lthough the cases in some jurisdictions distinguish between negligence and contributory negligence of minors, Nebraska has been consistent in its holding that the same standards should apply in either situation.”¹³

⁹*Center State Bank*, 226 Neb. at 414, 411 N.W.2d at 639 (quoting *Camerlinck*, 209 Neb. at 859, 312 N.W.2d at 268).

¹⁰*Camerlinck*, 209 Neb. at 858-59, 312 N.W.2d at 268 (quoting Restatement (Second) of Torts § 283A, comment b (Am. Law Inst. 1965)) (bracketed material added from elsewhere on page 859, 312 N.W.2d at 268).

¹¹*Humphrey v. Burlington Northern R. Co.*, 251 Neb. 736, 748, 559 N.W.2d 749, 756 (1997).

¹²*Id.* at 750, 559 N.W.2d at 757.

¹³*Humphrey*, 251 Neb. at 742-43, 559 N.W.2d at 753-54 (quoting *Camerlinck*, 209 Neb. at 856-57, 312 N.W.2d at 267). See also *Suarez By and Through Suarez v. Omaha Public Power Dist.*, 218 Neb. 4, 7, 352 N.W.2d 157, 160 (1984); *Garreans by Garreans v. City of Omaha*, 216 Neb. 487, 495, 345 N.W.2d 309, 315 (1984), *overruled in part, on other grounds* *Bronsen v. Dawes County*, 272 Neb. 320, 336, 722 N.W.2d 17, 29 (2006); *Cullinane v. Interstate Iron & Metal*,

NJI2d Civ. 3.06

“PRESUMPTION” DECEASED EXERCISED DUE CARE

Recommend no instruction.

COMMENT & AUTHORITIES

Regarding presumptions in Nebraska, *see generally* NJI2d Civ. 2.14A through 2.14D and the Authorities cited thereunder.

The rule that absent evidence on the subject, a deceased will be held to have been exercising due care is not a presumption: It is a rule of law. This rule has the effect of determining who should proceed with the evidence and who wins on this point if no evidence is introduced.¹ The rule does not operate when direct or circumstantial evidence of the deceased's due care or lack thereof is introduced. When such evidence is introduced, this so-called presumption disappears.² “ ‘Actionable negligence on the part of a defendant cannot be inferred from a presumption of due care on the part of the deceased. The presumption . . . benefits the defendant as well as the deceased.’ ”³

Because this so-called presumption is in fact a rule of law to be applied by the court, it should not be mentioned in the instructions.⁴

Inc., 216 Neb. 245, 249, 343 N.W.2d 725, 728 (1984); *McFarland By and Through McFarland v. King*, 216 Neb. 92, 96-97, 341 N.W.2d 920, 923 (1983).

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¹G. Michael Fenner, *About Presumptions In Civil Actions*, 17 Creighton L.Rev. 307, 312-14 (1983).

²*E.g.* *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 597, 473 N.W.2d 392, 395 (1991); *Gerhardt v. McChesney*, 210 Neb. 351, 357, 314 N.W.2d 258, 262-63 (1982); *Merritt v. Reed*, 186 Neb. 561, 563, 185 N.W.2d 261, 263 (1971) (stating that the rule also applies where the party's version of the occurrence is unavailable due to disability or loss of memory); *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 127, 181 N.W.2d 253, 256 (1970) (overruled by, *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983)) (“presumption against suicide”), *overruled*

on other grounds by Friedeman v. State, 215 Neb. 413, 339 N.W.2d 67 (1983); *Wolstenholm v. Kaliff*, 176 Neb. 358, 364, 366, 126 N.W.2d 178, 182, (1964); *Nilson v. Chicago, B. & Q.R. Co.*, 84 Neb. 595, 601, 121 N.W. 1128, 1131 (1909); *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 395, 396, 114 N.W. 769, 769 (1908).

³*Koenig v. Frank's Plastering Co.*, 227 F. Supp. 849, 853 (D. Neb. 1964), judgment aff'd, 341 F.2d 257 (8th Cir. 1965) (quoting *Flory v. Holtz*, 176 Neb. 531, 540, 126 N.W.2d 686, 692 (1964)).

⁴*Sheets v. Davenport*, 181 Neb. 621, 624, 150 N.W.2d 224, 228 (1967). To instruct the jury such a “presumption” arises has been held to be reversible error. *Id.* But see *Caradori v. Fitch*, 200 Neb. 186, 190, 263 N.W.2d 649, 652-53 (1978) (stating that such an instruction is never recommended but, as given here, it was not reversible er-

NJI2d Civ. 3.07

INTOXICATION

A person who is voluntarily intoxicated must exercise the same care as a person who is sober.

COMMENT

It is anticipated that this instruction will follow as soon as possible after NJI2d Civ. 3.02.

In addition to the Authorities for this instruction, discussed below, the reader's attention is called to Nebraska Workers' Compensation Act, which states that "[i]f the employee is injured by reason of his or her intentional willful negligence, or *by reason of being in a state of intoxication*, neither he or she nor his or her beneficiaries shall receive any compensation under the Nebraska Workers' Compensation Act."¹

And the reader's attention is called to *Pelzek v. American Legion* where the Court finds that violation of state statute prohibiting sale of liquor to minors is not the proximate cause of injuries the minor suffers in a subsequent automobile accident; rather, negligent operation of automobile is proximate cause.² See NJI2d Civ. 3.03, Comment & Authorities regarding the general rule that the violation of the Nebraska statute prohibiting the sale of alcohol to minors is not evidence of negligence on the part of the seller.

This instruction is quoted in *Dukat v. Leiserv, Inc.*³ The court notes that the instruction was not given at trial but concludes it would not have been proper to give it. The evidence in *Dukat* was that the relevant party had consumed "three beers at an unspecified 'pace' during a 3-hour timeframe."⁴ This was the only evidence on the point; there was no evidence of the effect of these intoxicants; impairment cannot be inferred from these facts; therefore, it would not have been proper to submit this instruction.

AUTHORITIES

Remmenga v. Selk quotes the following from C.J.S. and states that it is the correct rule:

ror); *Albrecht v. Morris*, 91 Neb. 442, 447-48, 136 N.W. 48, 50 (1912); *Chase v. Chicago, B. & Q. Ry. Co.*, 91 Neb. 81, 88, 135 N.W. 430, 433 (1912).

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¹Neb. Rev. Stat. § 48-127 (Reissue 2010) (emphasis added).

²*Pelzek v. American Legion*, 236 Neb. 608, 609-10, 463 N.W.2d 321, 323 (1990). See NJI2d Civ. 3.03, Comment and Authorities for more.

³*Dukat v. Leiserv, Inc.*, 6 Neb. App. 905, 578 N.W.2d 486 (1998), *aff'd*, 255 Neb. 750, 587 N.W.2d 96 (1998).

⁴*Id.* at 919, 578 N.W.2d at 495.

"The care required of a person who has become intoxicated voluntarily is the same as that required of one who is sober. If he fails to exercise that degree of care for his own safety which an ordinarily prudent sober person would exercise under the same or similar circumstances, and such failure contributes as a proximate cause to the injury of which he complains, he is guilty of contributory negligence. The fact that a person was intoxicated is a circumstance which may be considered in determining whether he exercised such care, but the mere fact that he was intoxicated at the time he was injured does not of itself constitute contributory negligence. Inability to exercise the care which an ordinarily prudent sober person would exercise under the same or similar circumstances, although due to intoxication, must nevertheless contribute as a proximate cause to the injury complained of. Thus a person is not guilty of contributory negligence where, although intoxicated, he exercises for his own safety the care which an ordinarily prudent person would have exercised under like circumstances, or where the circumstances were such that a sober man could not, by the exercise of ordinary care, have avoided injury."⁵

*Caldwell v. Heckathorn*⁶ approves the following instructions: "whether the plaintiff was intoxicated or not in no way defeated his right of recovery;" intoxication is "only a circumstance to be considered . . . in determining whether the plaintiff exercised the degree of care that a reasonably prudent man would exercise under the circumstances"; intoxication does "not of itself constitute contributory negligence."⁷

*Raskey v. Hulewicz*⁸ approved this instruction:

Any evidence you find of the drinking of intoxicants by either the plaintiff or the defendant shall not, by itself, be considered as negligence . . . , but is a circumstance which may be considered by you together with all other facts and circumstances in the case in determining the existence or non-existence of negligence

⁵*Remmenga v. Selk*, 150 Neb. 401, 409-10, 34 N.W.2d 757, 763-64 (1948) (quoting 45 C.J.S., *Negligence* § 551, and citing *Nichols v. Havlat*, 142 Neb. 534, 7 N.W.2d 84 (1942)).

⁶*Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964).

⁷*Id.* at 710-11, 127 N.W.2d at 186. *Accord Hines v. Pollock*, 229 Neb. 614, 617, 428 N.W.2d 207, 209 (1988) (intoxication does not constitute con-

tributory negligence; "the care required of a person who has voluntarily become intoxicated is the same as that required of one who is sober."); *Phillips v. City of Omaha*, 227 Neb. 233, 238, 417 N.W.2d 12, 15 (1987) ("[I]ntoxication in and of itself does not constitute contributory negligence.").

⁸*Raskey v. Hulewicz*, 185 Neb. 608, 613, 177 N.W.2d 744, 748 (1970).

Fortin v. Hike sums up the court's opinions on the drinking of alcohol by drivers as follows: Where there is evidence that a driver had been drinking, but neither evidence from which the jury might conclude that the drinking affected his or her safe driving nor evidence of any other negligent act, consumption of alcohol as a negligent act should not be submitted to the jury. Where there is evidence of drinking and evidence from which the jury could conclude that this drinking has impaired the driver's ability to drive as would an ordinarily prudent and cautious driver, intoxication is submissible as an independent act of negligence contributing to the accident. Where neither of the two situations just discussed applies, but there is evidence of both drinking and other relevant negligent acts, drinking may not be submitted as an independent act of negligence; however, it may be considered by the jury together with evidence of other acts or omissions from which negligence may be inferred.⁹

Each of the above cases involved drivers, passengers, or pedestrians. *Webber v. City of Omaha* involved a plaintiff arrested for intoxication, jailed, and placed into a cell with other inmates. The plaintiff's request not to be put in that particular cell was disregarded. While incarcerated, the plaintiff sustained serious injury. The Court affirmed the following jury instruction: "The care required of a person who has become intoxicated voluntarily is the same as that required of one who is sober."¹⁰ The Court went on, however, to reverse the trial court for having instructed the jury that plaintiff would be guilty of contributory negligence if he was intoxicated. In the process, the court quotes the first half of the above quotation from *Remmenga v. Selk*.

On the subject of this instruction, Dean Harvey Perlman has stated: "The court's view of intoxication is correct although it makes tough public relations to explain it. People are not negligent because of their status, *i.e.* drunk. They are negligent in their actions. At the same time the drunk is held to the standard of a sober person so he does not *benefit* from intoxication."¹¹

⁹*Fortin v. Hike*, 205 Neb. 344, 349-50, 287 N.W.2d 681, 684-85 (1980). See also *Beebe v. Sorensen Sand and Gravel Co.*, 209 Neb. 559, 570-71, 308 N.W.2d 829, 835 (1981) (in accord regarding all three of the situations just stated); *Hoffman v. Crawford*, 207 Neb. 380, 382, 299 N.W.2d 179, 180 (1980) (in accord regarding the first of the three situations just stated).

¹⁰*Webber v. City of Omaha*, 190 Neb. 678, 680-82, 211 N.W.2d 911 (1973).

¹¹Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law*, Nebraska Tort Law 1987-88, Review and Comments 9 (1988).

See generally Prosser and Keeton On the Law of Torts¹² and the Restatement (Second) of Torts.¹³

NJI2d Civ. 3.08

DUTY—VOLUNTEERS

(A) had no duty to come to the aid of (B). If (he, she) voluntarily did so, however, (he, she) was obligated to use the same care as a reasonably careful person would have used under similar circumstances.

COMMENT

Keep in mind these two things: (1) The general rule is that a person has no duty to come to the aid of a stranger who is in danger. See the Authorities to this instruction, below. (2) Whether a duty exists is a question of law dependent on the particular facts involved. See NJI2d Civ. 3.02, Comment & Authorities, part VIII(B). This instruction may only be used when the absence of a duty is determined as a matter of law, and the factual issue is whether one party, (A), voluntarily came to the aid of another, (B), a stranger who was in danger. See the Authorities, below.

This instruction does not apply where the Good Samaritan Act applies:

No person who renders emergency care at the scene of an accident or other emergency gratuitously, shall be held liable for any civil damages as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for medical treatment or care for the injured person.¹

Nebraska's Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2010), which did have some application to the situation covered by this instruction, has been repealed. 2010 Neb. Laws, L.B. 216. See NJI2d Civ. 7.50A, Special Note, for more information about the repeal of this statute.

¹²Prosser and Keeton On the Law of Torts § 32, at 178 (W. Keeton gen. ed. 5th ed. 1984).

¹³Restatement (Second) of Torts § 283C (Am. Law Inst. 1965).

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¹The Good Samaritan Act, Neb.

Rev. Stat. § 25-21,186 (Reissue 2010). See *Drake v. Drake*, 260 Neb. 530, 540, 618 N.W.2d 650, 659 (2000) (statute applies to those who render care "gratuitously"; it does not apply to police officers (and others) who have a duty to render care).

Related to the duty of the volunteer, and included here in the interest of completeness, is the rescue rule:²

It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value of the advantage to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment.³

AUTHORITIES

A person has no duty to come to the aid of a stranger who is in danger. A person who voluntarily does so, however, must use the same care as a reasonably careful person would use under similar circumstances.⁴

Until *Dowis v. Continental Elevator Co.*⁵ the only direct authority for this instruction was the fact that a version thereof was included in the 1969 first-edition of *NJI*. The instruction seems to be no more than a specific recognition of two general principles of tort law. The first principle is that tort liability does not lie against one who had no duty

²203 Neb. 684, 687-88, 279 N.W.2d 855, 858 (1979)

³*Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 687-88, 279 N.W.2d 855, 858 (1979) (citation omitted). *Accord* *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 294-299, 770 N.W.2d 619, 625-27 (2009) (lengthy discussion); *Moravec v. Moravec*, 216 Neb. 412, 414-15, 343 N.W.2d 762, 764 (1984); *Lave v. Neumann*, 211 Neb. 97, 101, 317 N.W.2d 779, 782 (1982). "The rescue doctrine is shorthand for a public policy that imposes a duty of care owed to rescuers. . . . [It] defines a particular standard of conduct and recognizes a duty of the rescued person whose conduct has placed the rescuer in

peril." *Rasmussen*, 278 Neb. at 298-99, 770 N.W.2d at 626-27 (multiple internal quotation marks and paragraph break omitted). *Buchanan*, *Moravec*, and *Lave*, contrast the "rescue rule" with the firefighter's rule. Regarding the firefighter's rule, see *NJI*2d Civ. 8.11, Authorities.)

⁴*Dowis v. Continental Elevator Co., Inc.*, 241 Neb. 207, 214-15, 486 N.W.2d 916, 920-21 (1992). *Prosser and Keeton On the Law of Torts* § 56 (W. Keeton gen. ed. 5th ed. 1984 & Supp. 1988); *Restatement (Second) of Torts* §§ 314, 324 (Am. Law Inst. 1965).

⁵*Dowis v. Continental Elevator Co., Inc.*, 241 Neb. 207, 214-15, 486 N.W.2d 916, 920-21 (1992).

to the one asserting liability.⁶ The second principle is the definition of negligence, *i.e.*, the general requirement that one act with ordinary care.⁷

In the few situations where this instruction is requested and applicable—*see* the Comment, above, regarding limits on its applicability, including that it does not apply to situations covered by the Good Samaritan Act—the Committee advises that it be given. Such specific instruction clears up any confusion the jurors might have about the legal relationship between two persons who are strangers to one another and one of whom is in danger.

For a discussion of the concept of duty, including one's duty to prevent a third party from injuring another, *see* NJI2d Civ. 3.02, Comment & Authorities.

NJI2d Civ. 3.09

SUDDEN EMERGENCY

Recommend no instruction.

COMMENT & AUTHORITIES

Though the 1969 version of this work (the first edition) contained an instruction on Sudden Emergency, the Committee believes that such instruction is not necessary and should not be given. Such instruction is nothing more than a specific statement of this general rule: The standard of care is that care a reasonably careful person would exercise under similar circumstances.¹

Among the circumstances to be considered in a negligence action is the fact that one was responding or reacting to an emergency. Such a circumstance may be argued to the jury whether this instruction is given or not. The instruction adds nothing to the general standard of

⁶*See* NJI2d Civ. 3.02, Comment & Authorities.

⁷NJI2d Civ. 3.02. *See generally* Prosser and Keeton *On the Law of Torts and the Restatement*, above.

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¹*See, e.g.*, NJI2d Civ. 3.02; *McClymont v. Morgan*, 238 Neb. 390, 394, 470 N.W.2d 768, 771-72 (1991); *Bourke v. Watts*, 223 Neb. 511, 519, 391 N.W.2d 552, 557 (1986) (“Sudden Emergency Doctrine . . . does not

provide an affirmative defense; it requires . . . that one demean himself as an ordinary, careful and prudent person would have done under like circumstances”) (multiple quotation marks and citation omitted); *Kiser v. Christensen*, 163 Neb. 155, 159-60, 78 N.W.2d 823, 826 (1956); *Frish v. Swift & Co.*, 97 Neb. 707, 709, 151 N.W. 165, 166 (1915); *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 337, 55 N.W. 872, 873 (1893).

care in NJI2d Civ. 3.02, except emphasis. In the Committee's view, the problem with the instruction is that singling out this one aspect of the general standard of care may give it undue emphasis and, in turn, may unduly emphasize one party's argument regarding this part of the standard of care.²

Recognizing that such instruction is not to be given will help avoid problems with fine-line, sometimes fallacious, distinctions between cases wherein such instruction is properly given and cases where it is not—distinctions that often invite appeals.³ It will also help avoid arguable departures from the rule such as the departure in *Kiser v. Christensen*⁴ where the Court applied the rule in favor of a defendant who arguably brought about the emergency.

"The giving of an independent sudden emergency instruction is not warranted in a negligence action, and to the extent that *Bedke v. Kucera*, holds to the contrary, it is overruled."⁵

In the interest of completeness, the Committee offers this brief footnoted discussion of the doctrine of sudden emergency.⁶

²*McClymont*, 238 Neb. at 394, 470 N.W.2d at 771-72 (1991) (discussing and adopting the Comment to NJI2d Civ. 3.09).

³*Compare, e.g.,* *Maurer v. Harper*, 207 Neb. 655, 658, 300 N.W.2d 191, 194 (1981) *with* *Stanek v. Swierczek*, 209 Neb. 357, 360, 307 N.W.2d 807, 809-10 (1981). *See also* *Kraft v. Fundum*, 175 Neb. 821, 826-27, 124 N.W.2d 225, 229-30 (1963).

⁴*Kiser*, above (overruling *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978) (overruled by, *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991))).

⁵*McClymont*, 238 Neb. at 394, 470 N.W.2d at 772 (1991) (discussing and adopting the Comment to NJI2d Civ. 3.09) (overruling *Bedke v. Kucera*, 200 Neb. 380, 263 N.W.2d 830 (1978) (overruled by, *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991))). *Accord* *Kozeny v. Miller*, 243 Neb. 402, 406, 499 N.W.2d 75, 79 (1993).

⁶The doctrine of sudden emergency applied to a person who, upon first becoming aware of an emergency and faced with a rapid choice of alter-

native courses, selected a course that mature judgment and deliberation would show to be erroneous or negligent. *E.g.* *Maloney v. Kaminski*, 220 Neb. 55, 67, 368 N.W.2d 447, 457 (1985); *Oban v. Bossard*, 201 Neb. 243, 248, 267 N.W.2d 507, 510 (1978); *Watson Bros. Transp. Co. v. Jacobson*, 168 Neb. 862, 867-69, 97 N.W.2d 521, 526 (1959); *Kiser*, 163 Neb. at 159-60, 78 N.W.2d at 826; *Johnson v. Griepentstroh*, 150 Neb. 126, 134, 33 N.W.2d 549, 554 (1948); *Roby v. Auken*, 149 Neb. 734, 740, 32 N.W.2d 491, 495 (1948). "Emergency" is commonly defined as an unforeseen combination of circumstances calling for immediate action. *Coyle v. Stopak*, 165 Neb. 594, 604, 86 N.W.2d 758, 767 (1957); *Hilzer v. Farmers Irr. Dist.*, 156 Neb. 398, 406-07, 56 N.W.2d 457, 463 (1953); *Roby v. Auken*, above.

The doctrine could not be invoked unless either there was a real danger or the circumstances were such as might have created apprehension of danger in the mind of the reasonably careful person. *Kiser*, 163 Neb. at 169, 78 N.W.2d at 826, and an absence of opportunity for mature deliberation. *Maloney*, above; *Coyle*, above; *Hilzer*,

NJI2d Civ. 3.10

WILLFUL AND MALICIOUS CONDUCT—A SPECIAL FINDING IN A NEGLIGENCE CASE

Recommend no instruction.

COMMENT & AUTHORITIES

NJI Civ (1969), the first edition of this book, contained an instruction entitled "Willful and Malicious Conduct—Definition." The instruction was to be used "in a case wherein the court has directed the jury to find a special verdict ["special finding"?] in order to prevent a bankruptcy discharge of the resultant judgment."¹ This was in reference to The Bankruptcy Act, which provides that a bankrupt shall not be discharged with respect to any debt arising from a willful and malicious injury to the person or property of another.²

The Committee has deleted this instruction because, in the Committee's judgment, the pleadings necessary to raise the issue of willful and malicious conduct in a negligence case would be inconsistent and not allowed under Nebraska law. The conclusion that it is impossible to raise this issue in the fashion suggested in the 1969 instruction is evidenced by the fact that there are no reported Nebraska cases on the subject.

Regarding the duty of an owner or a possessor of land to refrain from willful or wanton acts, see Chapter 8, particularly NJI2d Civ. 8.02.³

above; *Kiser*, above. Nor could the doctrine be invoked by one who created the emergency or who did not use due care to avoid it. *E.g.*, *Maloney*, above; *Stanek*, 209 Neb. at 360, 307 N.W.2d at 810; *Maurer*, 207 Neb. at 658, 300 N.W.2d at 194; *Coyle*, 165 Neb. at 607, 86 N.W.2d at 768-69. *But see Kiser*, above (applying the sudden emergency rule in favor of defendant who arguably brought about the emergency).

Furthermore, the qualifications just mentioned were required to be included in any statement of the rule presented to the jury. *Watson Bros.*

Transp. Co., 168 Neb. at 869, 97 N.W.2d at 526-27; *Johnson*, 150 Neb. at 134, 33 N.W.2d at 554 (finding that failure to include these qualifications was prejudicial error and constituted grounds for reversal); *McClelland*, 142 Neb. at 450, 6 N.W.2d at 391.

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¹Comment, NJI 3.10 (1969).

²11 U.S.C.A. § 523(a)(6). *See also* 8A C.J.S., *Bankruptcy* § 332 (1988); 9B Am.Jur.2d *Bankruptcy* §§ 3362, 3387-91 (1999).

³*See also* NJI2d Civ. 8.71.

NJI2d Civ. 3.11**EXTRAORDINARY FORCE OF NATURE**

See NJI2d Civ. 2.02C.

NJI2d Civ. 3.12**ASSUMPTION OF RISK**

See NJI2d Civ. 2.02B.

NJI2d Civ. 3.13**COMPARATIVE NEGLIGENCE**

See NJI2d Civ. 2.02A and the instructions in chapter 5, particularly the Comment to NJI2d Civ. 5.04.

NJI2d Civ. 3.23**LAST CLEAR CHANCE**

Recommend no instruction.

COMMENT & AUTHORITIES

The Committee believes that in some cases the last clear chance doctrine is argued in situations that really raise no issues beyond proximate cause. Outside of what are really proximate-cause cases, the Committee believes that the last clear chance doctrine has been subsumed by comparative negligence. The most recent Nebraska case affirming a trial court's use of the doctrine was decided in 1949. The Committee believes that instruction on the doctrine is no longer appropriate. In dicta, the Nebraska Supreme Court has cited this Comment and noted that the Comment recommends that trial courts not give an instruction on last clear chance.¹

The doctrine of the last clear chance developed at a time when contributory negligence was an absolute bar to any recovery by the plaintiff. It was developed as a way to avoid the harshness of that rule by allowing the negligent plaintiff to recover damages when the defendant had the last clear opportunity to avoid the harm. The doctrine, however, has

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406, 499 N.W.2d 75, 80 (1993).

¹Kozeny v. Miller, 243 Neb. 402,

an equivalent harshness of its own: it transfers from the plaintiff to the defendant an entire loss that in most cases really is due to the fault of both. The irony is that, because it seems unfair to stick the whole loss to the plaintiff, this doctrine sticks it to the defendant.

Last clear chance first appeared in Nebraska in 1892.² One-hundred years later the legislature created a different way of dealing with the harshness of contributory negligence as an absolute bar to recovery when it passed our current comparative negligence statute.³ With the development of comparative negligence, facts that otherwise would have called for the application of the last-clear-chance doctrine are better handled as circumstances to be considered in connection with comparative negligence. Each was created to do the same thing: soften the harshness of the rule that any contributory negligence on plaintiff's part completely bars plaintiff's recovery. The last clear chance doctrine was transitional between the absolute bar of contributory negligence and the apportionment of damages under comparative negligence.⁴ The Nebraska comparative negligence statute logically subsumes last clear chance in this situation. It does so without so stating.⁵

Pursuing the relationship between last clear chance and contribu-

²Union Pac. R. Co. v. Mertes, 35 Neb. 204, 211, 52 N.W. 1099, 1101 (1892), *aff'd*, 39 Neb. 448, 58 N.W. 105 (1894).

³Neb. Rev. Stat. §§ 25-21, 185, *et seq.* (Reissue 2016). *See particularly* the discussion at the Comments to NJI2d Civ. 2.02A and 5.04.

⁴Prosser and Keeton On the Law of Torts §§ 66, 67, at 464, 469 (W. Keeton gen. ed. 5th ed. 1984).

Even in a cause of action that accrued prior to the effective date of Nebraska's comparative negligence statute (*see* NJI2d Civ. 5.04, Comment), where the plaintiff and the defendant both were negligent but the damages were not to be apportioned because either the plaintiff's negligence was more than slight or the defendant's was less than gross, the last clear chance doctrine does not make sense. With last clear chance, the following situation might arise. When the plaintiff is more than slightly negligent, or the defendant's negligence is less than gross, the last clear chance doctrine could apply and the plaintiff might recover the full amount of his damages. When the

plaintiff is less negligent (slight) and the defendant is more negligent (gross), then comparative negligence would apply and the plaintiff's recovery would be reduced. In other words, the plaintiff could have stood to recover more money when he or she is more negligent and the defendant is less negligent. The defendant could have had to pay more money when plaintiff's negligence is greater and his or her own is less. This makes no sense as a matter of policy. In addition, it is logically inconsistent for a jury to find for the plaintiff under the last clear chance doctrine and then to reduce the plaintiff's damages because that plaintiff's negligence was more than slight as compared to that of the defendant's.

⁵W. Prosser, *Law of Torts* § 67, at 439 (4th ed. 1971). *See also, e.g.,* V. Schwartz, *Comparative Negligence* § 7.2 (3rd ed. 1994); *Alvis v. Ribar*, 85 Ill. 2d 1, 28, 52 Ill. Dec. 23, 35, 421 N.E.2d 886, 898 (1981) (the need for last clear chance disappears with the adoption of pure comparative negligence). *But see Baldwin v. City of Omaha*, 259 Neb. 1, 15, 607 N.W.2d 841, 851 (2000) ("Assuming without

tory negligence a bit further, it is useful to compare last clear chance and superseding cause. Last clear chance really is often a specialized application of superseding cause. Superseding cause is a tool of a defendant who argues that because of the intervening negligence of some third party, that third party should be responsible for all of plaintiff's damages. Last clear chance is a tool of a plaintiff who argues that because of defendant's intervening negligence, defendant should be responsible for all of plaintiff's damage. A last clear chance not taken is a superseding cause except that the "superseding actor" is the defendant. Last clear chance is to contributory negligence what superseding cause is to negligence.⁶

Pursuing further the relationship between last clear chance and causation, the Nebraska Supreme Court had said that one of the elements of last clear chance was that " 'the negligence of the party imperiled is neither active *nor a contributing factor* in the accident.' " ⁷ If it was not a contributing factor, then it cannot have been a proximate cause. "The first explanation given [for the last clear chance doctrine], and the one which still is most often stated, is that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a 'proximate cause' of the result."⁸ This "explanation" really says nothing more than this: If plaintiff's negligence was not a proximate cause of plaintiff's damage, then contributory negligence does not bar plaintiff's recovery. In this situation, the doctrine of last clear chance adds nothing to NJI2d Civ. 2.02A's instruction regarding contributory negligence and defendant's burden of proof. Separate instruction on last clear chance would do no more than unduly emphasize a part of the proximate cause argument of one of the parties.

It will not work, however, to say that last clear chance is just a proximate cause problem.

No very satisfactory reason for the [last clear chance] rule ever has been suggested. The first explanation given, and the one which still is most often stated, is that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a "proximate cause" of the result. While this coincides rather well with the attempt made in an older day to

deciding that the last clear chance doctrine has continuing validity in our present comparative fault system . . .").

⁶See 57B Am. Jur. 2d *Negligence* § 905 (2004) ("[T]he principle embodied in [last clear chance] is that of superseding cause.").

⁷Bush v. James, 152 Neb. 189,

195, 40 N.W.2d 667, 672 (1950) (emphasis added) (quoting *Carter v. Zdan*, 151 Neb. 185, 187, 36 N.W.2d 781, 782 (1949)).

⁸Prosser and Keeton *On the Law of Torts* § 66, at 463 (W. Keeton gen. ed. 5th ed. 1984). Accord 57B Am. Jur. 2d *Negligence* § 903 (2004).

fix liability upon the “last human wrongdoer,” it is quite out of line with the evolving ideas of proximate cause. In such a case the negligence of the plaintiff undoubtedly has been a cause, and a substantial and important one, of his own damage, and it cannot be said that injury through the defendant’s negligence was not fully within the risk which the plaintiff has created. If the injury should be to a third person, such as a passenger in the defendant’s vehicle, the plaintiff’s negligence would clearly be recognized as a responsible cause, and it is an utterly artificial distinction which applies any other rule when the plaintiff himself is injured.⁹

Let us look at that latter situation for a moment, the situation involving three persons: the negligent plaintiff who causes a situation of peril; the negligent defendant whose conduct is the immediate cause of the accident; and the innocent third party who is injured. Plaintiff negligently abandons his unlighted truck on the highway; defendant negligently runs into it; third-party bystander is injured. In that situation, liability and damages as between the plaintiff and the defendant are questions of proximate cause and of comparative negligence; no need for last clear chance here. As between the third party and either the plaintiff or the defendant, liability and damages are questions of proximate cause and negligence (in the hypothetical, the third party is assumed not to be negligent); the situation may also have elements of superseding cause (which really is just an aspect of proximate cause), NJI2d Civ. 3.43, and it may involve the conduct of a nonparty third person as the proximate cause, NJI2d Civ. 3.44. But, no one could claim that the innocent third party had the last clear chance. Otherwise, we would be right back to comparative negligence. As between the third party and the other two, there still is no need for last clear chance.

While last clear chance is more than just a part of proximate cause, it is often true that when last clear chance is discussed, proximate cause is what is meant. In those situations, the proximate cause instruction is the only one needed. Outside of the situation where last clear chance is confused with proximate cause, then comparative negligence logically subsumes last clear chance.

The key to when Nebraska’s 1969 pattern instruction on last clear chance was appropriate seemed to be in its requirement that the jury find “that the active negligence of the plaintiff had ceased and was not a contributing factor to the accident.”¹⁰ The Nebraska Supreme Court has stated that “A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and

⁹Prosser and Keeton *On the Law of Torts* § 66, at 463 (W. Keeton gen. ed. 5th ed. 1984) (emphasis added).

¹⁰NJI 3.23 (1969); *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 96, 352 N.W.2d 589, 549 (1984).

continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrines.”¹¹

Nebraska’s last clear chance doctrine only applies to those cases where a party’s negligence was a contributing factor but was not active, and which fall into the crack between proximate cause and comparative negligence, or, if an innocent bystander is involved, the crack between “a” proximate cause and “the” proximate cause (*see* the Comment & Authorities to N.JI2d Civ. 3.43). The Committee sees no such cracks.

One can argue that the question of whether the last clear chance doctrine bars the plaintiff from any recovery at all must be addressed before the questions of contributory and comparative negligence are addressed.¹² The last clear chance instruction in the 1969 version of this work took that approach. It said that the jury should consider last clear chance first and then proceed to contributory and comparative negligence only if they reject last clear chance. Today, however, comparative negligence has subsumed last clear chance and, therefore, that sequence, and instruction on last clear chance at all, is no longer appropriate.

The Committee’s belief that, with the development of comparative negligence, instruction on last chance is not appropriate is further supported by the fact that since 1949 every Nebraska Supreme Court case involving last clear chance has been an affirmation of the trial court’s refusal to submit the doctrine to the jury.¹³

For Nebraska cases on the last clear chance doctrine, in addition to those cited above, *see, e.g.*, those cited in this footnote.¹⁴

¹¹*Bezdek v. Patrick*, 170 Neb. 522, 530-31, 103 N.W.2d 318, 325 (1960).

¹²*See* 57A Am.Jur.2d *Negligence* §§ 889-939 (2004) (last clear chance).

¹³*E.g.* *Baldwin v. City of Omaha*, 259 Neb. 1, 15, 607 N.W.2d 841, 851-52 (2000); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). The most recent case actually affirming a use of the doctrine is *Armer v. Omaha & Council Bluffs Street Ry. Co.*, 151 Neb. 431, 441, 37 N.W.2d 607, 612 (1949) (Involving a possibly negligent 11-year-old plaintiff who was struck by defendant’s speeding bus).

¹⁴*Laird by Laird v. Kostman*, 229 Neb. 114, 425 N.W.2d 607 (1988);

Jershin v. Becker, 217 Neb. 645, 651-52, 351 N.W.2d 48, 53 (1984); *Maricle v. Spiegel*, 213 Neb. 223, 225-27, 329 N.W.2d 80, 83-84 (1983); *Muirhead v. Gunst*, 204 Neb. 1, 3, 281 N.W.2d 207, 209 (1979); *Malcom v. Dox*, 169 Neb. 539, 543, 100 N.W.2d 538, 540-41 (1960); *Benedict v. Andersen*, 162 Neb. 735, 741, 77 N.W.2d 320, 324 (1956); *Pope v. Tapelt*, 155 Neb. 10, 13, 50 N.W.2d 352, 355 (1951). *And see generally* *Prosser and Keeton On the Law of Torts* §§ 66-67 (W. Keeton gen. ed. 5th ed. 1984); *Restatement (Second) of Torts* §§ 479-480 (Am. Law Inst. 1965); V. Schwartz, *Comparative Negligence* §§ 7.1, 7.2 (3rd ed. 1994).

NJI2d Civ. 3.24

CONTRIBUTORY NEGLIGENCE—CHILD

Recommend no separate instruction.

COMMENT & AUTHORITIES

NJI2d Civ. 3.05, the instruction on negligence of children, should be sufficient instruction on the concept of negligence as it applies to children, whether it be contributory negligence or otherwise. “[A]lthough the cases in some jurisdictions distinguish between negligence and contributory negligence of minors, Nebraska has been consistent in its holding that the same standards should apply in either situation.”¹ See NJI2d Civ. 3.05, Comment & Authorities.

NJI2d Civ. 3.25

PARENT AND CHILD—NEGLIGENCE OF CHILD NOT IMPUTED TO PARENT

Other than as discussed in the Comment & Authorities, below, no instruction is recommended.

COMMENT & AUTHORITIES

I. IMPUTED NEGLIGENCE DEFINED

Imputed negligence is the “[n]egligence of one person charged to another; negligence resulting from a party’s special relationship with another party who is originally negligent”¹ A special relationship is required.

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¹Humphrey v. Burlington Northern R. Co., 251 Neb. 736, 742-43, 559 N.W.2d 749, 754 (1997) (quoting Camerlinck v. Thomas, 209 Neb. 843, 856-57, 312 N.W.2d 260, 267 (1981)).

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¹Black’s Law Dictionary (10th ed. 2014), found at [https://1.next.westlaw.com/Document/I025cf75d808511e4b391a0bc737b01f9/View/FullText.html?originationContext=document&contextData=\(sc.DocLink\)&cacheScope=undefined&transitionType=DocumentIte](https://1.next.westlaw.com/Document/I025cf75d808511e4b391a0bc737b01f9/View/FullText.html?originationContext=document&contextData=(sc.DocLink)&cacheScope=undefined&transitionType=DocumentIte)

[m&searchWithinQuery=%22imputed%2520negligence%22&chunkSize=XX&L&docSource=a6906df1967f4f309d67171058053c35&needToInjectTerms=False&searchWithinHandle=i0ad6248d0000016ae686c815f398fc1f](#) (last visited May 23, 2019). “A is negligent, B is not. ‘Imputed negligence’ means that, by reason of some special relationship existing between A and B, the negligence of A is to be charged to B although B has played no part in it” Prosser and Keeton On Torts § 69, at 499 (W. Keeton gen. ed. 5th ed. 1984); see generally *id.* at ch. 7.

II. THE GENERAL RULE THAT THE NEGLIGENCE OF A CHILD IS NOT IMPUTED TO HIS OR HER PARENT.

The general rule in Nebraska is that the negligence of a child is not imputed to the child's parents just by reason of the parent child relationship.² The negligence of a child can be imputed to a parent if the parent and child have some other special relationship, such as employer and employee, but "[t]he relation of parent and child is not the determining factor."³ (Regarding the reverse situation, the negligence of the parent not imputed to the child, see NJI2d Civ. 3.26A and 3.26B.)

In a damage action by a parent and a child where it is alleged that the child was negligent, and which does not call for the application of a theory of imputed negligence, it may be advisable to instruct the jury on the negative of imputed negligence. Such instruction would be called for only in a situation where there is some danger that otherwise the jury might impute the child's negligence to the parent. Such instruction could take the following form:

"The negligence, if any, of a child may not be imputed to (his, her) parents. By that I mean that negligence on the part of the child does not relieve the defendant of liability for injuries or damages suffered by the parent."

Further instruction in this regard might be based upon the pattern in NJI2d Civ. 3.26A or 3.26B.⁴

III. SITUATIONS THAT MUST BE DISTINGUISHED FROM IMPUTED NEGLIGENCE

There are cases that either impute a child's negligence to his or her parent or seem to do so, but the parent-child relationship is just a

²Craig v. Chicago, St. P., M. & O. Ry. Co., 97 Neb. 586, 589-90, 150 N.W. 648, 649-50 (1915). See also Restatement (Second) of Torts §§ 485, et seq. (Am. Law Inst. 1965); 2 F. Harper & F. James, *The Law of Torts* § 23.3 (1956).

³Craig, 97 Neb. at 589-90, 150 N.W. at 649-50. See also Restatement (Second) of Torts §§ 485, et seq. (Am. Law Inst. 1965); 2 F. Harper & F. James, *The Law of Torts* § 23.3 (1956).

⁴However, regarding the non-imputation of negligence generally, keep in mind that often "[t]o require the jury to be instructed that no negligence of a third party could be imputed to the plaintiff would require instruc-

tions on an issue which was not presented by the pleadings or evidence. It would . . . [be] a negative instruction on a nonexistent issue." *McCauley v. Briggs*, 218 Neb. 403, 409, 355 N.W.2d 508, 512 (1984) (quoting *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 701-02, 211 N.W.2d 914, 916-17 (1973)). Such an instruction would be no more than an elaboration of the basic instructions on defendant's liability and plaintiff's theory of negligence. This does not necessarily mean that it would be erroneous to give such an instruction in such a circumstance, but it does mean that the trial judge has the discretion to refuse to do so. *McCauley*, above.

coincidence. It is not the basis for the imputation. Here are some situations where that may be the case.

A. THE PARENT'S OWN NEGLIGENCE

Parents sometimes have a common-law duty to control the conduct of their children. And parents sometimes take upon themselves the duty to control their own children.⁵ Either duty can create liability on the part of the parents for the acts of the child. A parent who negligently entrusts a vehicle to his or her child might be liable for damages caused by the child while driving the vehicle.⁶ In each of these situations, however, it is the parent's negligent failure to exercise his or her own duty—the parent's failure to exercise reasonable care—that creates the parent's liability. It is not imputed negligence, but the parent's own negligence.⁷

B. THE PARENT AND THE CHILD WHO HAVE AN ADDITIONAL SPECIAL RELATIONSHIP

The negligence of a child can be imputed to one who happens to be his or her parent when the two have a business relationship. If the

⁵Take for example *Boker v. Luebbe*, 198 Neb. 282, 252 N.W.2d 297 (1977), involving a driver who was the owner's minor child driving on a learner's permit and in the company of the owner. "Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct or has the power to direct the operation of the automobile and to exercise control over it." *Boker*, 198 Neb. at 286, 252 N.W.2d at 299 (quoting *Kremlacek v. Sedlacek*, 190 Neb. 460, 464, 209 N.W.2d 149, 153 (1973)). *Boker* speaks in terms of negligence imputed to the owner, but it involves a situation where the owner was himself negligent. He either directed the driver in a negligent manner, or negligently failed to exercise his power to direct the driver. This negligence—his own negligence—is what bars or diminishes his recovery.

⁶See NJI2d Civ. 7.62, Negligent Entrustment.

⁷Under the Restatement (Second) of Torts, the parent-child relationship is a special relationship that can

require parents in some circumstances to control the conduct of their child." *Sinsel v. Olsen*, 279 Neb. 38, 42, 777 N.W.2d 54, 57 (2009) (footnoting Restatement (Second) of Torts § 315 (Am. Law Inst. 1965); see also *id.* at § 316). "[P]arents can be liable for failing to exercise reasonable care to prevent injury to others only when their child has a dangerous habit of causing harm to others and the parents know of the child's 'habitual dangerous propensity.'" *Sinsel*, 279 Neb. at 43; 777 N.W.2d at 58. See also *Sinsel*, 279 Neb. at 43, 777 N.W.2d at 58 ("In *Popple v. Rose*, 254 Neb. 1, 9, 573 N.W.2d 765, 770 (1998)], the evidence showed that the parents knew their son had a history of physically violent behavior. But they did not know he had a habitual propensity to commit a sexual assault or sexual abuse. We concluded that the parents had no duty to warn of an unknown dangerous sexual propensity."). Duty (a question for the trier of law) and foreseeability (a question for the trier of fact) are discussed at length at NJI2d Civ. 3.02, Comment & Authorities, above.

child is an employee, a partner, or an agent of the parent, it may be possible to impute the child's negligence to the parent, but if it is imputed it is because of the business relationship, not the parental relationship. In such a case, consult the instructions dealing with whichever business relationship is involved. See NJI2d Civ. chapter 6.

C. STATUTES IMPOSING PARENTAL LIABILITY FOR THE ACTION OR INACTION OF THE CHILD

Nebraska statutes provide that parents are "jointly and severally liable for the willful and intentional infliction of personal injury to any person or destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons." Recoverable damages are limited to "the extent of hospital and medical expenses incurred but not to exceed the sum of one thousand dollars for each such occurrence," whichever is larger.⁸ The parent's liability here is not created by imputation, but, rather, by statute.

This statute does not abrogate a parent's own, personal common-law duties regarding the acts of their children.⁹

D. A PARENT'S SUIT FOR THE WRONGFUL DEATH OF THE CHILD

The negligence of a deceased child may bar the parents' recovery in a wrongful death action. In such an action, if the deceased, had he or she survived, would have been barred by his or her own negligence from recovering damages from the other party, then the party who does bring the action will be barred from recovering for the wrongful death of the deceased. This is not because of imputed negligence, but because the cause of action is derivative.¹⁰ And this is the case whether the deceased was a child or not. Note once again that while the parent-child relationship may be the basis for allowing the parent to sue for the wrongful

⁸Neb. Rev. Stat. § 43-801 (Reissue 2016). See *Sinsel*, above; *Popple*, above.

⁹*Sinsel*, 279 Neb. at 42-44, 777 N.W.2d at 57-58 (discussing the parents' duty to exercise reasonable care); *Popple*, 254 Neb. at 5, 573 N.W.2d at 768-69 (discussing the parents' duty to warn).

¹⁰Neb. Rev. Stat. § 30-809 (Reissue 2016); *Seyfer v. Otoe Cty.*, 66 Neb. 566, 574, 92 N.W. 756, 759 (1902) (interpreting the predecessor to the above cited statute, which is alike in all relevant respects); Restatement

(Second) of Torts § 494 (Am. Law Inst. 1965). See also *McDonald v. Wright*, 125 Neb. 871, 873, 252 N.W. 411, 412 (1934).

Where a claim is derivative, it "stands no better than it would in the hands of the injured person from whom it was derived . . . [Generally, it has] all the infirmities it had while in the hands of the original owner." 2 F. Harper & F. James, *The Law of Torts* § 23.8, at 1278 (1956). Accord *id.* (Os-car Gray ed., Lexis Publishing 1996). See generally, *id.* at chapter 23 (both editions).

death of the child, it is the derivative form of the action, rather than that relationship, that causes the negligence of the deceased to bar recovery by the survivor.

If this situation arises, it may be necessary to draft a specially tailored instruction or, perhaps, to tailor NJI2d Civ. 2.02A or the appropriate instruction in chapter 5 to meet the situation.

IV. CROSS REFERENCES

Regarding wrongful death generally, *see* NJI2d Civ. 4.60. Regarding imputation of negligence in the parent-child relationship, *see also* NJI2d Civ. 3.25, 3.26A, and 3.26B. Regarding comparative negligence, *see* NJI2d Civ. 5.04, Special Note and Comment, and, as regards wrongful death, particularly part X of that Comment. Regarding negligence and contributory negligence in children, *see* NJI2d Civ. 3.05.

The negligence of a driver is not imputed to a passenger by reason of the latter's status as a passenger. *See* NJI2d Civ. 7.61.

NJI2d Civ. 3.26A

TWO CAUSES OF ACTION—TWO PARENTS AND A CHILD—NEGLIGENCE OF PARENT NOT IMPUTED TO CHILD

This case involves two causes of action. One is brought by (name of person bringing suit on behalf of child), on behalf of (name of child), for (injuries, damages) allegedly suffered by the child. The other cause of action is brought by the child's parents, for damages allegedly personally suffered by them, the parents, by reason of injuries to their child.

Regarding the first cause of action, the one brought on behalf of the child, negligence on the part of a parent may not be imputed to a child. By that I mean that negligence on the part of a parent does not relieve the defendant of any liability the defendant may have to the child for injuries or damages suffered by the child. In this case, if you find any negligence on the part of the parents, you must not consider it in deciding the damages, if any, to which the child is entitled.

Regarding the second cause of action, the one brought by the parents on their own behalf, if a parent has personally suffered any damages by reason of injuries to his or her child, whether that parent was negligent or not is relevant to whether that parent may recover for such damage personally suffered. In this case, the parents claim that they suffered personal damages by reason of injuries to their child. If you find that either parent has suffered some personal dam-

age and that that parent was negligent, then Instruction No. — the general instruction on contributory and comparative negligence, governs whether or not that parent can recover for his or her personal damages. If one parent was negligent and the other was not, the negligence of the one does not affect the recovery of the other, the non-negligent parent.

COMMENT

When a person sues on his or her own behalf, that person's own negligence affects his or her recovery. When a person brings suit as a representative of another, it is the other's negligence that affects recovery, and not the negligence of the representative who only files the suit. *See* NJI2d Civ. 3.25, Comment.

This instruction applies when the case involves two separate causes of action, one on behalf of the child, claiming damages for his or her own injury, and one by both parents, claiming damages personally suffered by them by reason of the child's injury. In a case involving only one cause of action, this instruction will have to be modified.

When only one parent sues for damages personally suffered by reason of injury to his or her child, *see* NJI2d Civ. 3.26B.

Regarding imputing the negligence of the child to the parent, *see* NJI2d Civ. 3.25.

AUTHORITIES

This rule is an old one.¹ The negligence of the parent is not attributed to the child so as to affect the child's recovery from a third party.² Negligence on the part of the parent must be considered, however, with regard to any damage that parent allegedly suffered personally on ac-

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¹*Huff v. Ames*, 16 Neb. 139, 143, 19 N.W. 623, 625 (1884).

²*Connelly v. City of Omaha*, 284 Neb. 131, 144, 816 N.W.2d 742, 755-56 (2012) ("long-established precedent"); *Worth v. Kolbeck*, 273 Neb. 163, 170, 728 N.W.2d 282, 290 (2007) ("This rule has been applied not only in cases in which separate actions were filed by the parent and the child, but also to actions filed solely on behalf of a child for personal injuries."); *Owen v. Moore*, 166 Neb. 226, 237-38, 88 N.W.2d 759,

767 (1958); *Wilson v. Thayer Cty. Agricultural Soc.*, 115 Neb. 579, 585, 213 N.W. 966, 969 (1927); *Tucker v. Draper*, 62 Neb. 66, 76, 86 N.W. 917, 921 (1901); *Huff v. Ames*, above. *See also* *In re Mueller's Estate*, 166 Neb. 376, 380, 89 N.W.2d 137, 140 (1958); *Eden v. Klaas*, 166 Neb. 354, 356-57, 89 N.W.2d 74, 78 (1958) (holding that the parent's negligence is not imputable to the child in child's capacity as guest in parents car). *See also* the discussion in the Comment to NJI2d Civ. 3.25.

count of injuries to the child.³ Just as is the case anytime a plaintiff is personally negligent and that negligence is a proximate cause of his or her own injuries, plaintiff's negligence can bar or diminish his or her own recovery.⁴

The negligence of one parent does not ordinarily affect a non-negligent parent's recovery for his or her personal damages resulting from injuries to the child.⁵

Regarding a wrongful death action in Nebraska, see Neb. Rev. Stat. §§ 30-809, 30-810 (Reissue 2016) and NJI2d Civ. 4.60.

NJI2d Civ. 3.26B

TWO CAUSES OF ACTION—ONE PARENT AND A CHILD—NEGLIGENCE OF PARENT NOT IMPUTED TO CHILD

This case involves two causes of action. One is brought by (name of person bringing suit on behalf of child), on behalf of (name of child), for injuries allegedly suffered by the child. The other cause of action is brought by (name of mother), the child's mother, for damages allegedly suffered by her, by reason of injuries to her child.

Regarding the first cause of action, negligence on the part of a parent may not be imputed to a child. By that I mean that negligence on the part of a parent does not relieve the defendant of any liability the defendant may have to the child for injuries or damages suffered by the child. In this case, if you find any negligence on the part of a parent, you must not consider it in deciding the damages, if any, to which the child is entitled.

³*Owen v. Moore*, above; *Jones v. Union Pac. R.R. Co.*, 141 Neb. 112, 122, 4 N.W.2d 875, 875 (1942) (addendum to original opinion); *Wilson v. Thayer Cty. Agric. Soc.*, above; *Tucker v. Draper*, above; *Huff v. Ames*, above. See also *Eden v. Klaas*, above; *Crandall v. Ladd*, 142 Neb. 736, 742-43, 7 N.W.2d 642, 646 (1943) (involving negligence on the part of both the husband, who was the driver, and the wife, who was the guest passenger). See also *Weber v. Southwest Nebraska Dairy Suppliers, Inc.*, 187 Neb. 606, 611-12, 193 N.W.2d 274, 277 (1971) (the administrator of the wife's estate filed suit; the only pecuniary loss was sustained by the negligent husband of

the deceased; the husband's negligence barred recovery).

⁴See NJI2d Civ. 3.25, Comment.

⁵*Pratt v. Western Bridge & Construction Co.*, 116 Neb. 553, 557, 218 N.W. 397, 398 (1928). See also *Richardson v. State, Dept. of Roads*, 200 Neb. 225, 232-33, 263 N.W.2d 442, 447 (1978), opinion supplemented, 200 Neb. 781, 265 N.W.2d 457 (1978) (involving a possibly negligent driver and his passenger-child suing defendant over the wrongful death of a third passenger who was both the driver's wife and the child's mother); Restatement (Second) of Torts § 493 (Am. Law Inst. 1965).

Regarding the second cause of action, the one brought by the mother on her own behalf, if she has personally suffered any damages by reason of injuries to her child, whether she was negligent or not is relevant to whether she may recover for such damage personally suffered. In this case the mother claims that she has suffered personal damages by reason of injuries to her child. If the mother did suffer some personal damage and if you find that she was herself negligent, then Instruction No. —, the general instruction on contributory and comparative negligence, governs whether or not she can recover for her personal damages.

COMMENT & AUTHORITIES

This instruction applies when the case involves two separate causes of action, one on behalf of the child, claiming damages for his or her own injury, and one by a parent of the child, claiming damages personally suffered by that parent by reason of the child's injury. The instruction is arbitrarily drafted for the case where the plaintiff-parent is the mother: choosing one parent or the other made the pattern much easier to follow. If the plaintiff-parent is the father, then, of course, the instruction will have to be adapted accordingly. In a case involving only one cause of action, this instruction will also have to be modified.

See also NJI2d Civ. 3.26A and its Comment and Authorities regarding the lawsuit where both parents sue for damages personally suffered by reason of injury to their child. *See generally* the discussion of imputed negligence at NJI2d Civ. 3.25, Comment & Authorities, above.

NJI2d Civ. 3.41

PROXIMATE CAUSE

A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.

COMMENT

In any negligence action there must be some reasonable connection between the act or omission in question and the damage sued upon. The law discusses that connection in terms of proximate cause.¹

Some states are dropping the concept of proximate cause from their jury instructions. Florida, for example, uses "legal cause" rather than

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¹*See generally* Prosser and

Keeton On the Law of Torts Ch. 7 (W. Keeton gen. ed. 5th ed. 1984).

“proximate cause.”² Colorado has dropped the word proximate, and instructs the jury on the meaning of “[t]he word ‘cause’ as used in these instructions. . . .”³ In 1966, Kansas dropped the word proximate. “The word ‘direct’ was suggested for use by any judges who could not completely depart from traditional instructions.”⁴ In 1977, stating that “attempts to define causation make the meaning more obscure,” Kansas took the next step and “recommend[ed] that no instruction be given defining causation.”⁵

California first recognized proximate as “‘an unfortunate word, which places entirely wrong emphasis upon the factor of physical or mechanical closeness’” but felt compelled by precedent to retain a proximate cause instruction.⁶ Later the California Supreme Court changed its position, abandoned that precedent, disapproved its proximate cause instruction, and dropped the word “proximate” from its instruction on causation.⁷ In place of the proximate cause instruction, California now uses the following: “The law defines cause in its own particular way. A cause of [injury] [damage] [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury] [damage] [loss] [or] [harm].”⁸

As discussed in the Authorities, below, Nebraska precedent also compels such an instruction. The Committee, while not recommending the end of that line of cases, does suggest this as a topic for consideration by the bench and bar of the State of Nebraska.

AUTHORITIES

I. DUTY TO INSTRUCT

When there is conflicting evidence, “[d]etermination of causation is ordinarily a question for the trier of fact.”⁹

Where the pleading and the evidence put proximate cause in issue,

²Fla. Stand. Jury Inst. 5.1 (1974).

³CJI—Civ.2d 9:26 (1989).

⁴Comment, PIK2d 5.01 (1977).

⁵*Id.*

⁶Comment, California BAJI No. 3.75 (7th ed. 1986) (quoting “Prosser on Torts [4th ed.], p. 244.”)

⁷Mitchell v. Gonzales, 54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991).

⁸Eric J. Horowitz, *Clarifying Causation*, Trial, Nov. 1992, at 80.

⁹Same quotation: King v. Crowell Memorial Home, 261 Neb. 177, 182,

622 N.W.2d 588, 594 (2001); Baldwin v. City of Omaha, 259 Neb. 1, 16, 607 N.W.2d 841, 852 (2000). *Accord*, e.g., Hynes v. Good Samaritan Hosp., 291 Neb. 757, 770, 869 N.W.2d 78, 89 (2015); Maclovi-Sierra v. City of Omaha, 290 Neb. 443, 459, 860 N.W.2d 763, 775 (2015); Hughes v. School District of Aurora, 290 Neb. 47, 54, 858 N.W.2d 590, 595 (2015); Wilke v. Woodhouse Ford, Inc., 278 Neb. 800, 815, 774 N.W.2d 370, 382 (2009); Staley v. City of Omaha, 271 Neb. 543, 550, 713 N.W.2d 457, 466 (2006) (“ . . . in the face of conflicting evidence . . . ”); Stahlecker v. Ford Motor Co., 266 Neb. 601, 617, 667 N.W.2d 244, 258 (2003)

the court must instruct on the issue.¹⁰ Where proximate cause is one of the principal issues in the case it may be reversible error not to give the instruction even though no party objected to its omission and it was not assigned as error on appeal.¹¹ Use of the word “proximate,” however, may not be necessary.¹²

Instruction defining proximate cause is not necessary where there is no real question of causation. “That is to say, the definition has no materiality and no place in the trial judge’s instructions where, under the facts of the case, the legal causation is clear, obvious and unmistakable.”¹³

Regarding the duty to instruct generally, and the principle that the court must instruct the jury on all issues raised by the pleadings and the evidence, see NJI2d Civ. 2.01, Authorities.

II. THE DEFINITION

“Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public.”¹⁴ The

(“Although the determination of causation is ordinarily a question of fact, where only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury.”); Tapp v. Blackmore Ranch, Inc., 254 Neb. 40, 49, 575 N.W.2d 341, 348 (1998) (citing cases) (where, however, only one inference can be drawn, the issue is for the court); World Radio Laboratories, Inc. v. Coopers & Lybrand, 251 Neb. 261, 279-80, 557 N.W.2d 1, 13 (1996).

¹⁰*Enyeart v. Swartz*, 218 Neb. 425, 426-27, 355 N.W.2d 786, 788 (1984); *Danielsen v. Eickhoff*, 159 Neb. 374, 379-80, 66 N.W.2d 913, 916 (1954); *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 536-37, 259 N.W. 373, 374 (1935).

¹¹*Enyeart v. Swartz*, above.

¹²*E.g.*, *Danielsen*, 159 Neb. at 379, 66 N.W.2d at 916 (“‘In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient

relative to proximate cause, where there is no question of a remote or intervening cause.’”) (quoting *Shiman Bros. & Co. v. Nebraska Nat. Hotel Co.*, 146 Neb. 47, 56, 18 N.W.2d 551, 557 (1945), in turn quoting *Oliver v. Nelson*, 128 Neb. 160, 163, 258 N.W. 69, 71 (1934)); *Triplett v. Lundeen*, 132 Neb. 434, 439, 272 N.W. 307, 310 (1937) (stating that is “is not indispensable that the term ‘proximate cause’ should be used,” the Court followed with the familiar “rule that the instructions to the jury must be considered together, and if, when construed as a whole, they properly state the law it is sufficient”; finding that this jury was sufficiently instructed on “proximate cause” without the use of the word “proximate.”).

¹³*Danielsen v. Eickhoff*, 159 Neb. 374, 379, 66 N.W.2d 913, 915-16 (1954) (quoting *Kielley v. McCauley*, 139 Neb. 60, 63-64, 296 N.W. 437, 439 (1941)). *Accord* *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 443-44, 106 N.W.2d 710, 717-18 (1960).

¹⁴*Danielsen v. Eickhoff*, 159 Neb. 374, 377, 66 N.W.2d 913, 915 (1954).

preferred lay definition of proximate—"next, nearest," 8 O.E.D. 1532 (1933)—is much different than the law's definition.

"A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred."¹⁵ "To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the 'but for' rule or 'cause in fact'; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause."¹⁶

A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct."¹⁷

"A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the

¹⁵*Ewers v. Saunders Cty.*, 298 Neb. 944, 957, 906 N.W.2d 653, 663 (2018).

¹⁶*Roskop Dairy, L.L.C. v. GEA Farm Technologies, Inc.*, 292 Neb. 148, 171, 871 N.W.2d 776, 794 (2015) (footnotes omitted). *Accord*, e.g. *Ecker v. E & A Consulting Group*, 302 Neb. 578, 584, 924 N.W.2d 671, 676 (2019); *Strode v. City of Ashland*, 295 Neb. 44, 68, 886 N.W.2d 293, 310 (2016) (regarding inverse condemnation: "The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred."); *Hughes v. School District of Aurora*, 290 Neb. 47, 53-54, 858 N.W.2d 590, 595 (2015); *Latzel v. Bartek*, 288 Neb. 1, 14, 846 N.W.2d 153, 163 (2014); *Radiology Servs., P.C. v. Hall*, 279 Neb. 553, 560, 780 N.W.2d 17, 24 (2010); *Wilke v. Woodhouse Ford, Inc.*, 278 Neb. 800, 815, 774 N.W.2d 370, 382 (2009); *Amanda C. ex rel. Richmond v. Case*, 275 Neb. 757, 770-71, 749 N.W.2d 429, 440 (2008) (civil rights action under 42 U.S.C. § 1983); *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 145, 149, 738 N.W.2d 434, 447, (2007); *Worth v. Kolbeck*, 273 Neb.

163, 170, 728 N.W.2d 282, 290 (2007) ("A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct."); *Smith v. Colorado Organ Recovery Sys., Inc.*, 269 Neb. 578, 584, 694 N.W.2d 610, 618 (2005); *Brandon ex rel. Estate of Brandon v. Cty. of Richardson*, 261 Neb. 636, 667, 624 N.W.2d 604, 627 (2001); *Staley v. City of Omaha*, 271 Neb. 543, 551, 713 N.W.2d 457, 466 (2006); *Baldwin v. City of Omaha*, 259 Neb. 1, 16-17, 607 N.W.2d 841, 852-53 (2000); *Johnson By and Through Johnson v. School Dist. of Millard*, 253 Neb. 634, 639, 573 N.W.2d 116, 120 (1998); *World Radio Laboratories, Inc. v. Coopers & Lybrand*, 251 Neb. 261, 276-77, 557 N.W.2d 1, 11 (1996); *Union Pacific R. Co. v. Kaiser Agr. Chemical Co.*, 229 Neb. 160, 173, 425 N.W.2d 872, 881 (1988) (citing cases and authorities).

¹⁷*Ewers v. Saunders Cty.*, 298 Neb. 944, 957, 906 N.W.2d 653, 663 (2018) ("[A] defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them." *Id.* at 956, 906 N.W.2d at 663.)

instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.”¹⁸

In *Kopecky v. National Farms, Inc.* the trial court gave NJI2d Civ. 3.41 and added, “It need not, however, be the immediate cause; it may be enough that the acts complained of set in motion a series of events through which it produced damage;” The Supreme Court found the additional sentence to be an accurate statement of law; the combination was not misleading; and there was no error.¹⁹

“[T]he test of causation is not that the particular injury could be anticipated, but whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omission.”²⁰

“[I]t is a logical fallacy to assume that temporal correlation equals causation.”²¹

The proximate-cause definition quoted above can be broken down into three parts: causation in fact; natural and probable result; and lack of superseding cause. This instruction covers that entire definition. Regarding superseding cause, or the conduct of a nonparty third person as the proximate cause, see NJI2d Civ. 3.43 and NJI2d Civ. 3.44.

See also the subheading “Subsequent Injury to the Claimant,” below in these Authorities.

A. CAUSATION IN FACT—“A” PROXIMATE CAUSE

A proximate cause need not be the sole cause. It need only be “a” proximate cause.²²

¹⁸Same quotation: *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 770, 869 N.W.2d 78, 89 (2015); *Smith v. Colorado Organ Recovery Sys., Inc.*, 269 Neb. 578, 584, 694 N.W.2d 610, 618 (2005).

¹⁹*Kopecky v. National Farms, Inc.*, 244 Neb. 846, 861, 510 N.W.2d 41, 52 (1994).

²⁰*Brown ex rel. Watts v. Social Settlement Ass’n*, 259 Neb. 390, 394, 610 N.W.2d 9, 12 (2000) (quoting *Woollen v. State*, 256 Neb. 865, 883, 593 N.W.2d 729, 742 (1999)).

²¹*McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 238, 959 N.W.2d 251, 277–78 (2021) (“Simply because the façade demonstrated deterioration after

McGill performed its work does not mean” that *McGill* was a proximate cause of the deterioration. “It is well settled that a causation opinion based solely on a temporal relationship is unreliable, because it is not derived from the scientific method. Such an opinion is also unreliable because it is not based upon sufficient facts or data.”)

²²See, e.g., *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 76–78, 917 N.W.2d 435, 464–65 (2018); *Maclovi-Sierra v. City of Omaha*, 290 Neb. 443, 457, 860 N.W.2d 763, 774 (2015); *Amanda C. ex rel. Richmond v. Case*, 275 Neb. 757, 771, 749 N.W.2d 429, 441 (2008); *Meyer v. State*, 264 Neb. 545, 550, 650 N.W.2d 459, 463 (2002) (State Tort Claims Act); *Fackler*

A proximate cause must be a cause in fact.²³ It must be a cause from which the damage sued for naturally flows and without which that damage would not have been sustained. It need not, however, be the immediate cause: It may be enough that the act complained of set in motion a series of events through which it produced the damage.²⁴

B. THE SUBSTANTIAL FACTOR TEST

A proximate cause must be a cause in fact of the damage but need not be the sole cause. *See* just above. It is enough if the act or omission is a substantial factor in bringing about the damages.

Under certain circumstances, when multiple causes act to pro-

v. Genetzky, 263 Neb. 68, 71-72, 638 N.W.2d 521, 526 (2002); Reimer v. Surgical Servs. of Great Plains, P.C., 258 Neb. 671, 677, 605 N.W.2d 777, 781 (2000); Kudlacek v. Fiat S.p.A., 244 Neb. 822, 823, 509 N.W.2d 603, 606 (1994); Pendleton Woolen Mills v. Vending Assocs., Inc., 195 Neb. 46, 51-52, 237 N.W.2d 99, 103 (1975) ("This court . . . has employed both the 'substantial factor' test, and the 'but for' test for determining causation in fact in negligence cases."); Travelers Indem. Co. v. Center Bank, 202 Neb. 294, 299, 275 N.W.2d 73, 76 (1979); Landmesser v. Ahlberg, 184 Neb. 182, 186, 166 N.W.2d 124, 127 (1969) (citing Restatement (Second) of Torts § 433 (Am. Law Inst. 1965)) ("substantial factor"); Welstead v. Jim Ryan Const. Co., 160 Neb. 87, 97, 69 N.W.2d 308, 314 (1955) ("only required to prove . . . that such negligence was a proximate cause"); Bell v. Rocheford, 78 Neb. 304, 110 N.W. 646 (1907) (opinion on motion for rehearing) ("the proximate cause is the dominant cause . . ."). *See also* NJI2d Civ. 3.42, Concurrent Cause, and the Comments and Authorities thereto. And, regarding the negligence of a third person as the sole proximate cause, *see* NJI2d Civ. 2.01A and its Special Note, Comment, and Authorities. (The next subheading of these Authorities discusses that "substantial factor" test, a test mentioned in the parenthetical explanations of some of the cases cited above.)

See also Ewers v. Saunders Cty., 298 Neb. 944, 957, 906 N.W.2d 653,

663 (2018) ("A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.").

²³*See, e.g.,* Greening by Greening v. School Dist. of Millard, 223 Neb. 729, 737, 393 N.W.2d 51, 58 (1986) (holding that to impose liability on employer for negligent entrustment of work to incompetent employee, plaintiff must show not only that employer negligently hired employee, but also that conduct of employee was a proximate cause of injury claimed); Ricker v. Danner, 159 Neb. 675, 680, 68 N.W.2d 338, 342 (1955) (finding that a negligently parked truck was a circumstance of accident 300 feet away, but no causal connection).

²⁴*E.g.,* Meyer v. State, 264 Neb. 545, 550, 650 N.W.2d 459, 463 (2002); Coyle v. Stopak, 165 Neb. 594, 607, 86 N.W.2d 758, 768-69 (1957); Colvin v. John Powell & Co., 163 Neb. 112, 119, 77 N.W.2d 900, 907 (1956); Kroeger v. Safranek, 161 Neb. 182, 187, 72 N.W.2d 831, 838 (1955); Kopecky v. National Farms, Inc., 244 Neb. 846, 861, 510 N.W.2d 41, 52 (1994) (approving a jury instruction so worded and added as a second sentence to NJI2d Civ. 3.41); St. Joseph & G.I.R. Co. v. Hedge, 44 Neb. 448, 458, 62 N.W. 887, 889-90 (1895). *See also* Ellick v. Wilson, 58 Neb. 584, 589, 79 N.W. 152, 154 (1899).

duce a single injury or when the active negligence of a third person is also a substantial factor in bringing about the harm, the standard proximate cause instruction may be insufficient. *See Reimer v. Surgical Servs. of the Great Plains, P.C.*, 258 Neb. 671, 605 N.W.2d 777 (2000). Under such circumstances, an instruction that a defendant's conduct is a cause of an event if it was a substantial factor in bringing it about is appropriate. *Id.* The "substantial-factor rule" was developed primarily for cases in which application of the "but for" rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result. *Id.* at 677, 605 N.W.2d at 781.²⁵

C. THE NATURAL AND PROBABLE RESULT

The damage sued upon must have been the natural, probable, and reasonable consequence of the negligent act sued upon.²⁶ It is not necessary, however, that the specific injury sued upon have been foreseeable;

²⁵*Smith v. Colorado Organ Recovery Sys., Inc.*, 269 Neb. 578, 590–91, 694 N.W.2d 610, 623 (2005) (substantial factor instruction not warranted in this case). *See additionally* *Amanda C. ex rel. Richmond v. Case*, 275 Neb. 757, 771, 749 N.W.2d 429, 441 (2008) (holding, in a civil rights action under 42 U.S.C. § 1983, that "an act need not be the sole cause" but just "a substantial factor in bringing about the injury"); *Reimer v. Surgical Servs. of Great Plains, P.C.*, 258 Neb. 671, 677, 605 N.W.2d 777, 781 (2000) (discussing the "substantial factor test" and when a substantial-factor instruction is appropriate); *Pendleton Woolen Mills v. Vending Assocs., Inc.*, 195 Neb. 46, 51–52, 237 N.W.2d 99, 103 (1975) ("This court . . . has employed both the 'substantial factor' test, and the 'but for' test for determining causation in fact in negligence cases."); *Travelers Indem. Co. v. Center Bank*, 202 Neb. 294, 299, 275 N.W.2d 73, 76 (1979) (holding that the negligent conduct must be a "substantial factor in bringing about the harm"); *Landmesser v. Ahlberg*, 184 Neb. 182, 186, 166 N.W.2d 124, 127 (1969) (citing Restatement (Second) of Torts

§ 433 (Am. Law Inst. 1965)) ("substantial factor").

²⁶*See, e.g., Amanda C. ex rel. Richmond v. Case*, 275 Neb. 757, 770, 749 N.W.2d 429, 440 (2008); *Travelers Indem. Co. v. Center Bank*, 202 Neb. 294, 300, 275 N.W.2d 73, 76–77 (1979) (rejected by, *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 788 F. Supp. 1184 (D. Utah 1992)); *Brahatscek v. Millard School Dist., School Dist. No. 17*, 202 Neb. 86, 97, 273 N.W.2d 680, 687 (1979); *Bringewatt v. Mueller*, 201 Neb. 736, 739, 272 N.W.2d 37, 39 (1978); *Daniels v. Andersen*, 195 Neb. 95, 102, 237 N.W.2d 397, 402 (1975) (citing 57 Am.Jur.2d *Negligence* § 164 (1971)); *Jensen v. Hawkins Const. Co.*, 193 Neb. 220, 223–24, 226 N.W.2d 346, 349 (1975); *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 75, 173 N.W.2d 516, 519 (1970); *Beranek v. Petracek*, 184 Neb. 516, 521, 169 N.W.2d 275, 279 (1969); *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 466, 126 N.W.2d 477, 480 (1964); *Warren v. Bostock*, 170 Neb. 203, 208–09, 102 N.W.2d 55, 58 (1960). *See also* most of the cases cited in the final paragraph of these Authorities.

it suffices if what occurred was one of the kind of consequences reasonably foreseeable.²⁷

D. SUBSEQUENT INJURY TO THE CLAIMANT OR TO ANOTHER

Where a person is stunned by the negligent act of the defendant and, while stunned, inflicts further injury on him- or herself or injury on another, the negligent act of the defendant may be the proximate cause of both the original and the subsequent injury.²⁸

This aspect of causation is sometimes discussed by reference to "subsequent injury" or "reinjury."

"[A] tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of [either] the injured person, or . . . a third person."²⁹

E. INTERVENING CRIMINAL ACTS

Intervening criminal acts are discussed at NJI2d 3.43, Comment &

²⁷*Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 879, 347 N.W.2d 99, 105 (1984); *Morse v. Gray*, 166 Neb. at 565, 89 N.W.2d at 847 and *McClelland v. Interstate Transit Lines*, 142 Neb. at 445-46, 6 N.W.2d at 389 (stating that it suffices if some injury to another was reasonably foreseeable); *Jensen v. Hawkins Constr. Co.*, 193 Neb. at 225, 226 N.W.2d at 350 (referring to contributory negligence); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801, 205 N.W.2d 523, 529 (1973) (referring to the foreseeability of an intervening negligent act).

²⁸*Coyle v. Stopak*, 165 Neb. at 607, 86 N.W. at 769. See also *Kroeger v. Safranek*, 161 Neb. at 187, 72 N.W.2d at 838 (stating that a jury question regarding the proximate cause of a wrongful death was raised by following facts: after a nighttime collision with defendant's truck, the decedent, walking from wreck toward highway, was electrocuted by power

lines knocked down by accident).

²⁹*Borland v. Gillespie*, 206 Neb. 191, 195-96, 292 N.W.2d 26, 29-30 (1980) (regarding a two-car collision, appellee left scene and, knowing her vehicle to be damaged, appellant gave pursuit, lost control of her car, and hit a tree; appellant's acts intervened and appellee was not liable for injuries sustained in appellant's second collision) (quoting *Watkins v. Hand*, 198 Neb. 451, 453, 253 N.W.2d 287, 289 (1977) (regarding a plaintiff driving to therapy prescribed as a result of injuries suffered in an automobile accident 10 months earlier, who blacked out, her car hit a tree, and she suffered further injuries, the evidence did not support her claim that injuries from the first collision caused the blackout; the cause of her "subsequent injur[ies]" was held to be an independent act of the plaintiff) (quoting Annot., 31 A.L.R.3d 1000, 1003 (1970) and citing Restatement (Second) of Torts § 460 (Am. Law Inst. 1965)).

Authorities. Regarding the intervening acts of a thief (as opposed to the acts of the owner of the property stolen) as the proximate cause of damage to a plaintiff, see *Gerken v. Hawkins Constr. Co.*³⁰

F. SUPERSEDING CAUSE

If there is an intervening negligent act that constitutes a new and independent proximate cause and that might not reasonably have been foreseen as a consequence of the original act, then the original act is not a proximate cause. See NJI2d Civ. 3.43, Authorities.

While Nebraska cases discuss superseding cause as an element of proximate cause, it needn't always be included in the instruction in a negligence action: it needn't be included where there is no question of a superseding cause.³¹ And, in the Committee's opinion, it need never be stated as a separate instruction.³²

III. FORSEEABILITY

What is or is not foreseeable goes into the decision of what is or is not reasonable care under the circumstances, which is a question for the jury.³³ Whether a duty *exists* is a question of law dependent on the facts in the particular case. If a duty does exist, whether that duty has been *breached* is a question of fact dependent on the facts of the particular case.³⁴

IV. BURDEN OF PROOF

The claimant has the burden of proving (by the greater weight of

³⁰*Gerken v. Hawkins Const. Co.*, 243 Neb. 157, 160, 498 N.W.2d 97, 99 (1993).

³¹*Danielsen v. Eickhoff*, 159 Neb. 374, 379, 66 N.W.2d 913, 916 (1954); *Triplett v. Lundeen*, 132 Neb. 434, 439-40, 272 N.W. 307, 310-11 (1937); *Oliver v. Nelson*, 128 Neb. 160, 163, 258 N.W. 69, 71 (1934).

³²See NJI2d Civ. 3.43, Comment.

³³A.W., 280 Neb. at 218, 784 N.W.2d at 918.

³⁴*Pittman v. Rivera*, 293 Neb. 569, 574-75, 879 N.W.2d 12, 17 (2016) (affirming the trial court's grant of summary judgment because no reasonable person could have found for the plaintiff on the element of foreseeability; *id.* at 475, 879 N.W.2d at 17); *McReynolds v. RIU Resorts and Hotels, S.A.*, 293 Neb. 345, 350, 880 N.W.2d

43, 47 (2016); *A.W. v. Lancaster Cty. School Dist.* 0001, 280 Neb. 205, 206, 210-11, 218, 784 N.W.2d 907, 911, 913, (2010) (adopting "the duty analysis contained in the Restatement (Third) of Torts, § 7," *id.* at 218, 784 N.W.2d at 918).

The fact that foreseeability is a question for the trier of fact is discussed at length in the Comment & Authorities at NJI2d Civ. 3.02, above. See generally NJI2d Civ. 3.02, Comment & Authorities. See particularly, *id.* at part IX. See also *Ewers v. Saunders Cty.*, 298 Neb. 944, 957, 906 N.W.2d 653, 663 (2018) ("A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.").

the evidence) that the negligence alleged was a proximate cause of his or her damages.³⁵ The burden of tying the negligence to the damage claimed remains on the claimant even when the other party is guilty of negligence as a matter of law and the court directs a verdict on liability.³⁶

Regarding proximate cause: "A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that injury occurred in the manner claimed."³⁷

In the context of a medical malpractice case, the Court has stated, "Expert testimony is almost always required to prove proximate cause."³⁸

Saab v. Omaha & C.B. St. Ry. discusses the burden of proof and "what may be regarded as an exception to this rule under circumstances where a passenger is injured upon or while leaving a vehicle of public transportation."³⁹

NJI2d Civ. 3.42

CONCURRING CAUSE

Where the independent negligent acts [or failures to act] of more than one person combine to proximately cause the same (injury, damage), each such act [or failure to act] is a proximate cause, and each such person may be held responsible for the entire (injury, damage).

³⁵*E.g.*, *Zeller v. Howard Cty.*, 227 Neb. 667, 671, 419 N.W.2d 654, 657 (1988); *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 428-29, 390 N.W.2d 503, 505 (1986); *Corbet, Inc. v. Pawnee Cty.*, 219 Neb. 622, 625, 365 N.W.2d 437, 440 (1985); *Fletcher v. State, Dept. of Roads*, 216 Neb. 342, 348, 353-54, 344 N.W.2d 899, 903, (1984); *Burrows v. Jacobsen*, 209 Neb. 778, 782, 311 N.W.2d 880, 883-84 (1981); *Beebe v. Sorensen Sand and Gravel Co.*, 209 Neb. 559, 563, 308 N.W.2d 829, 832 (1981) (proving it by direct or circumstantial evidence); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 481, 283 N.W.2d 25, 35 (1979).

³⁶*Beavers v. Christensen*, 176 Neb. at 166-67, 125 N.W.2d at 554; *Cooper v. Hastert*, 175 Neb. 836, 839-40, 124 N.W.2d 387, 389 (1963); *Cover v. Platte Val. Pub. Power and Irr. Dist.*, 162 Neb. 146, 154, 75 N.W.2d 661, 668 (1956).

³⁷*McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 462, 466 N.W.2d 499, 508 (1991). *Accord* *World Radio Laboratories, Inc. v. Coopers & Lybrand*, 251 Neb. 261, 277, 557 N.W.2d 1, 11 (1996); *Vredevelde v. Clark*, 244 Neb. 46, 51, 504 N.W.2d 292, 296 (1993).

³⁸*E.g.*, *Ewers v. Saunders Cty.*, 298 Neb. 944, 958, 906 N.W.2d 653, 664 (2018) ("In the absence of expert testimony on causation, the finder of fact would be left to resort to guess, speculation, or conjecture as to the issue."). For a complete discussion of this point, see NJI2d Civ. 12.10. Regarding professional negligence generally, see NJI2d Civ. 12.04.

³⁹*Saab v. Omaha & Council Bluffs Street Ry. Co.*, 170 Neb. 198, 202, 102 N.W.2d 59, 62 (1960).

This is true though some may have been more negligent than others. [It is no defense that all those who might have been held responsible are not parties to this case.]

COMMENT

Those parts of the instruction that are in brackets should be given only where appropriate to the particular facts of the case on trial. Regarding the bracketed final sentence, see *Kluender v. Mattea*, where the court found “no support in the record for the giving of” the bracketed sentence, and went on to state that “[g]enerally, the trial court is not required to instruct negatively.”¹

One problem in the area of concurrent negligence involves the situation where two acts concur to cause an event but are not simultaneous—where the effect of the first act lay in wait until the second actor added whatever was necessary to cause the injury in question. What about the first act, sometimes called the “remote cause,” as a concurrent cause? Many of these cases are discussed as straight proximate cause cases, see NJI2d Civ. 3.41, and many are discussed as superseding cause cases, see NJI2d Civ. 3.43.

Some of these cases speak in terms of whether the first act was a cause or a condition.² But these cases, too, really turn upon whether the first act was “a” proximate cause or the second act, “the” sole proximate cause. Talk of conditions versus causes is really incidental to analysis of proximate and superseding cause. For example, one of the earliest cases to speak of conditions was really addressing proximate and superseding causes: “Two acts. . . are not concurrent in causing an injury, if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. In such case the latter and not the former is the proximate cause of such injury.”³ Rather, the accident was the result of an “efficient intervening cause.”⁴

On this subject of conditions versus causes, the court has stated:

3.42

¹*Kluender v. Mattea*, 214 Neb. 327, 333, 334 N.W.2d 416, 420 (1983).

²*E.g.*, *Havlicek v. Desai*, 225 Neb. 222, 226-27, 403 N.W.2d 386, 389-90 (1987); *C.S. v. Sophir*, 220 Neb. 51, 54, 368 N.W.2d 444, 447 (1985); *Childers v. LCW Apartments*, 214 Neb. 291, 294, 333 N.W.2d 677, 680 (1983); *Weiseth v. Karlen*, 206 Neb. 724, 295 N.W.2d 103, 106 (1980); *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 74, 173 N.W.2d 516, 519 (1970);

Jarosh v. Van Meter, 171 Neb. 61, 68-70, 105 N.W.2d 531, 536-37 (1960) and the cases cited therein. See generally, NJI2d Civ. 3.43, Comment.

³*Johnson v. Mallory*, 123 Neb. 706, 713, 243 N.W. 872, 875 (1932).

⁴*Id.* See also *Steenbock v. Omaha Country Club*, 110 Neb. 794, 796, 195 N.W. 117, 118 (1923) (finding that a flagpole placed by defendant across its driveway “furnished a condition” that was not “the proximate cause of the accident”).

[Where] we have made a distinction between condition and cause, there were two alleged negligent parties. The rule in such a case is: "[W]here the negligence charged furnishes only a condition by which the injury is made possible, and a subsequent independent act of a third party causes the injury, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury ["and without more "the plaintiff [is] not entitled to an instruction on concurring cause identical to that found in NJI 3.42 [(1969)]."]

[In the case at bar, the] defendant's reliance on this rule is misplaced. The distinction between condition and cause has no application where . . . there is no subsequent independent act of a third party which causes the injury.⁵

To the extent that discussion of conditions versus causes is helpful, it should be continued. To the extent that it only confuses the real issues, it should be avoided. In any event, recognizing that the real issue is proximate, superseding cause, or both, can minimize the difficulties encountered with many of these cases.

In *Hahn v. Weber & Sons Co.* the court stated: "Where the injury is the result of two separate, independent causes, and the defendant is responsible for only one of the causes, the plaintiff must establish that the entire damage would have occurred from the cause for which the defendant is liable or establish the amount of damage directly caused by the defendant's negligence."⁶ There are two reasons why this statement is not inconsistent with this instruction.

■ First, the two possible causes in *Hahn* were the defendant's spraying of pesticide and the plaintiff's own failure to water the crop. At the most, *Hahn* stands for the proposition that where your own acts combine with those of someone else to cause you damage, your recovery is limited by your own negligence, NJI2d Civ. 2.02A, or assumption of the risk, NJI2d Civ. 2.02B. The concept of concurring causes does not apply when one cause is the injured person's own act.

■ Second, apparently the plaintiff in *Hahn* did not prove the defendant's spraying of pesticide was a proximate cause of damage to the former's crop. "[T]here was vapor drift from the defendant's field onto the plaintiff's soybeans [and] the plaintiff failed to irrigate at the proper time and the plants which were watered produced beans in

⁵Havlicek v. Desai, 225 Neb. 222, 226-27, 403 N.W.2d 386, 389-90 (1987) (citations omitted) (bracketed quotation from *id.* at 226, 403 N.W.2d at 389) (other quotation from Connolley

v. Omaha Pub. Power Dist., 185 Neb. 501, 508, 177 N.W.2d 492, 496 (1970)).

⁶*Hahn v. Weber & Sons Co.*, 223 Neb. 426, 429, 390 N.W.2d 503, 506 (1986).

substantially a normal manner.”⁷ The Court stated that one would have to guess as to whether vapor drift or lack of water or both proximately caused the damage to plaintiff’s crop.⁸ Certainly there was no proof that the two causes were concurring. (And, as noted in the Authorities, below, this instruction, and the rule of law it expresses, does not apply to acts that occur at the same time but cause separate injury.)

This instruction does not apply in a contribution action; the purpose of such an action is to divide the damages among those who are liable, so it makes no sense to tell the jury that each person may be held liable for the entire amount.⁹ Regarding an action for contribution, see NJI2d Civ. 2.04, 15.01, and 15.02 and the Comment & Authorities to 6.02.

AUTHORITIES

I. IN GENERAL

A concurrent causes instruction advises a jury that where the independent negligent acts or omissions of more than one person combine to proximately cause the same injury or damages, each such act or omission is a proximate cause, and each such person may be held responsible for the entire injury or omission, even though some may have been more negligent than others.¹⁰

“Where separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result.”¹¹

“Every joint tort-feasor is liable for all damages to which his or her conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person.”¹²

Generally, a litigant is entitled to instruction only upon theories

⁷*Hahn*, 223 Neb. at 428, 390 N.W.2d at 505.

⁸*Id.*

⁹See *Smith v. Kellerman*, 4 Neb. App. 178, 188, 541 N.W.2d 59, 67 (1995).

¹⁰*McLaughlin v. Hellbusch*, 251 Neb. 389, 393, 557 N.W.2d 657, 660 (1997). *Accord* *Smith v. Colorado Organ Recovery Sys., Inc.*, 269 Neb. 578, 591–92, 694 N.W.2d 610, 623 (2005).

¹¹*Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 78, 917 N.W.2d 435, 465 (2018); Contrast this with the situation where there is more than one actor involved, but it is not necessary to combine the acts of more than one to assign proximate cause to a single actor. In this situation, see NJI2d Civ. 3.43, below.

¹²*Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177, 204, 691 N.W.2d 116, 138 (2005).

presented by both the pleadings and the evidence.¹³ Where the evidence supports instruction on concurrent negligence, however, such instruction must be given, even if the issue is not pled or no such instruction is requested, or both.¹⁴

In addition, as a general rule failure to give a requested instruction is not reversible error unless the appellant shows, among other things, the instruction appellant tendered is a correct statement of the law.¹⁵ Where the evidence supports instruction on concurrent negligence, however, the trial judge must properly instruct the jury on that issue, and this is so even if the appellant requested an instruction on the issue that incorrectly stated the law.¹⁶

[W]hen the evidence is sufficient to raise a jury question as to whether a defendant's or a third person's negligence proximately caused or proximately contributed to a plaintiff's injuries, then a trial court must inform the jury that the plaintiff is entitled to recover damages, if any, from the defendant if the jury finds that the defendant is guilty of negligence which solely or in concurrence with a third person proximately caused or contributed to the plaintiff's injuries.¹⁷

II. CONCURRING CAUSE IN CAUSES OF ACTION THAT ACCRUED ON OR AFTER FEBRUARY 8, 1992

For causes of action accruing before February 8, 1992, there was

¹³*E.g.*, *McLaughlin v. Hellbusch*, 251 Neb. 389, 392, 557 N.W.2d 657, 660 (1997). See generally Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above; NJI2d Civ. 2.01, Authorities, and cross-references therein.

¹⁴*McLaughlin*, 251 Neb. at 394, 557 N.W.2d at 661; *Worth v. Kolbeck*, 273 Neb. 163, 172, 728 N.W.2d 282, 291 (2007); *Weiseth v. Karlen*, 206 Neb. 724, 728, 295 N.W.2d 103, 105 (1980); *Barry v. Moore*, 172 Neb. 57, 64, 108 N.W.2d 401, 405 (1961). See generally NJI2d Civ. 2.01, Authorities. (*Weiseth*, in dictum, quotes the Comment to the first edition of this book, that is, NJI 3.42 (1969), as follows: "The jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants even

though the issue is not pleaded and no instruction is requested. *Barry v. Moore* [above].” *Weiseth’s* quotation of the 1969 Comment is accurate, but *Barry v. Moore* does not support the statement for which that Comment cites it. *Barry v. Moore*, referring to concurrent negligence, states the following. “The trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error.”).

¹⁵See generally Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, which precedes chapter 1, above.

¹⁶*McLaughlin*, 251 Neb. at 394-95, 557 N.W.2d at 661.

¹⁷*Worth*, 273 Neb. at 172, 728 N.W.2d at 292.

joint and several liability for both economic and noneconomic damages.¹⁸ For causes of action accruing on or after that date, and involving independent acts that alone would not have caused the injury, there is joint and several liability for economic damages, but only several liability for

¹⁸This footnote discusses some of Nebraska law concerning concurring cause prior to February 8, 1992, that is, before the effective date of Nebraska's comparative negligence statute. Regarding the comparative negligence statute, see NJI2d Civ. 5.01-5.05, and particularly NJI2d Civ. 5.04, Comment.

Prior to February 8, 1992, if separate, independent acts of negligence by more than one person combined to proximately cause a single injury, whether or not those independent acts would alone have caused the injury, all or any number of the negligent actors were liable for the resulting damage. It is no defense that injuries were dependent upon the concurring misconduct of another person. This is so even though there was no common duty, common design, or concerted action. *E.g.*, *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 833, 509 N.W.2d 603, 612 (1994); *Janssen v. Trennepohl*, 228 Neb. 6, 10-11, 421 N.W.2d 4, 7 (1988); *O'Neil v. Behrendt*, 212 Neb. 372, 376, 322 N.W.2d 790, 792 (1982); *Lindgren v. City of Gering*, 206 Neb. 360, 367-68, 292 N.W.2d 921, 926 (1980).

Each separate, independent act of negligence must have been a proximate cause. The concurrence of one negligent act that is not a proximate cause of the injury, with another that is, was not enough. *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N.W. 673, 675-76 (1937); *Steenbock v. Omaha Country Club*, 110 Neb. 794, 796-97, 195 N.W. 117, 119 (1923); *Johnson v. City of Omaha*, 108 Neb. 481, 494-96, 188 N.W. 122, 128 (1922).

Not only must an act have been a concurrent proximate-cause, but also, of course, it must itself have been negligent. For example, when a party's

negligence was derivative only, resting on a respondeat superior theory, and not upon independent negligence by the employer, the employer could not have been held liable for actions of an employee who has been relieved of all liability. See NJI2d Civ. 6.02, Comment & Authorities.

A plaintiff did not have to join all tortfeasors as defendants in an action for damages where the cause of action accrued before February 8, 1992; the entire damage could be assessed against the one made a party. *Hopwood v. Voss*, 174 Neb. 304, 117 N.W.2d 778 (1962), *overruled on other grounds by* *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *Fick v. Herman*, 161 Neb. 110, 72 N.W.2d 598 (1955).

This body of law does not apply to acts that occur at the same time but cause separate injuries. Both Prosser and the Restatement of Torts use the example of two defendants coincidentally shooting the plaintiff at the same time, one wounding plaintiff's leg and the other his arm. Those are two separate injuries; the coincidence in time does not make the two wounds a single wrong. Though some elements of the damages may not be subject to logical division, that is not sufficient reason to hold one defendant liable for the damage inflicted by the other. Prosser and Keeton *On the Law of Torts* § 52 (W. Keeton gen. ed. 5th ed. 1984); Restatement (Second) of Torts § 433A (Am. Law Inst. 1965).

On a related point, an "extraordinary force of nature" was no defense then (as it is no defense now) if defendant's negligence concurred with an extraordinary force of nature to cause the plaintiff's injuries. See NJI2d Civ. 2.02C, Authorities.

noneconomic damages—several liability to the extent of each negligent actors' proportionate share of the total negligence.¹⁹

For causes of action accruing on or after that date and involving independent acts each of which alone would have caused the injury, presumably each negligent act stands as a sole proximate cause and each actor could be held liable for all of the damages, both economic and noneconomic. The statute, which applies to all actions to which contributory negligence is, in the abstract, a defense, reads, in part, as follows:

In any other action involving more than one defendant, [other than one where the defendants were acting in concert as "part of a common enterprise or plan,"] the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to the defendant in direct proportion to the defendant's percentage of negligence ²⁰

If each independent act alone would have caused the injury, then is the defendant's negligence 100%? That is, is the proportionate share of a defendant's negligence measured against the negligence it took to cause the injury in question, in which case defendant-number-one's negligence is 100%, and defendant-number-two's is 100%, and so on? Or, is the proportionate share of a defendant's negligence measured against some pooling together of everyone's negligent acts, to the end of determining just how bad were the acts of each of the 100%-responsible actors? The answer seems to be the former. There may not be joint liability in this case, but several liability would be liability for 100% of the damage. And if more than one tortfeasor is independently responsible for 100% of the negligence, any sharing of the loss among or between them is just that: among or between them.

In this regard, *see* NJI2d Civ. 5.04, Comment.

The first footnote in this part (part II) of these Authorities discusses the law before February 9, 1992. It ends as follows: "On a related point, an 'extraordinary force of nature' is no defense if defendant's negligence was a concurrent cause of the plaintiff's injuries. NJI2d Civ. 2.02C, Authorities." Presumably this is still true under Nebraska's new comparative negligence statute. First, the new statute's limitation of liability for noneconomic damages to several liability (as opposed to joint

¹⁹*See generally* NJI2d Civ. 5.04, Comment, discussing Nebraska's new comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185, *et seq.* (Reissue 2016).

²⁰Neb. Rev. Stat. § 25-21,185.10 (Reissue 2016).

and several liability) applies only to actions involving more than one defendant²¹ or one defendant and at least one other potential defendant who has been discharged from liability by a release or similar agreement.²² The extraordinary force of nature is neither one of the above. Therefore, it would not turn defendant's liability for noneconomic damages from joint and several liability into only several liability. Second, the allocation of noneconomic damages is based on the defendant's or released person's share of the negligence; an extraordinary force of nature is not an act of negligence, so when defendant's negligence combines with an extraordinary force of nature, then defendant's share of the negligence is 100%.²³

NJI2d Civ. 3.43

SUPERSEDING OR INTERVENING CAUSE

The Supreme Court has disapproved of separate instruction on superseding or intervening cause.

COMMENT & AUTHORITIES

I. SEPARATE INSTRUCTION DISAPPROVED

Superseding cause, sometimes called either intervening cause or efficient intervening cause, is a label sometimes applied to some kinds of proximate cause or concurring cause problems; all the jury instruction needed is found in the instruction on proximate cause, NJI2d Civ. 3.41, the instruction on concurring cause, NJI2d Civ. 3.42, and the instruction on the conduct of a nonparty third person as the sole proximate cause, NJI2d Civ. 3.44. The rest is for the argument of counsel. In addition to this Comment & Authorities, *see* the Comments to NJI2d Civ. 3.41, 3.42, and 3.44.

"[T]he practice of instructing juries regarding 'efficient intervening' cause should henceforth be discontinued by the trial courts of this state."¹ "[T]rial courts [are] to discontinue the practice of separately instructing juries on 'efficient intervening cause' in favor of the more

²¹Neb. Rev. Stat. 25-21,185.10 | authorities.
(Reissue 2016)

²²NJI2d Civ. 5.04, Comment.

²³*See also* NJI2d Civ. 2.02C, Au-

¹*Sacco v. Carothers*, 253 Neb. 9, 17, 567 N.W.2d 299, 305 (1997).

direct and clear instructions based on the concept of proximate or concurring cause, depending on the facts of a particular case.”²

For the following reasons, we determine that the practice of instructing juries regarding “efficient intervening” cause should henceforth be discontinued by the trial courts of this state.

.....

[T]he question of efficient intervening causation is, in essence, one of proximate causation. The concepts of negligence and proximate cause are sufficient to encompass notions of efficient intervening causation without the attendant confusion.

[T]he concept of efficient intervening cause is subsumed by our concepts of proximate cause [NJI2d Civ. 3.41] and concurrent cause [NJI2d Civ. 3.42].

.....

When the concept of intervening or superseding cause is properly addressed in jury instructions as a part of the plaintiff’s proof of proximate or concurring cause, a separate instruction on “efficient intervening” cause is confusing to lay jurors and distracts the jurors from a more direct assessment of whether the defendant’s actions have proximately caused the plaintiff’s injury ³

In any negligence action the plaintiff must prove that the incident under litigation was “a” proximate cause of his or her injury. When the trier of fact decides that a “superseding” cause is “the” proximate cause, it has decided that the plaintiff has not met this burden of proof—has not proved that the incident under litigation was “a” proximate cause. Approaching it from the other direction, the plaintiff has the burden of proving that the defendant’s acts were a proximate cause; if the plaintiff does that, then he or she has proved that subsequent acts were not the sole proximate cause. If there was a so-called superseding cause, then the act under litigation was not a proximate cause. However you look at it, the burden is on the plaintiff.⁴

Regarding the proposition that lack of efficient intervening cause is

²*Sacco*, 253 Neb. at 18, 567 N.W.2d at 306.

³*Sacco*, 253 Neb. at 17-18, 567 N.W.2d at 305-306.

The rule of the *Sacco* case is prospective only. It does not apply in cases where the instruction was given

before *Sacco* was decided. *Tapp v. Blackmore Ranch, Inc.*, 254 Neb. 40, 50, 575 N.W.2d 341, 349 (1998).

⁴*Johnson By and Through Johnson v. School Dist. of Millard*, 253 Neb. 634, 639, 573 N.W.2d 116, 120 (1998) (stating that to establish proxi-

part of the plaintiff's burden, *see also* the part of the Authorities to NJI2d Civ. 3.41 which discusses the three things required to prove causation, including this: "(3) that there is no efficient intervening cause." *See* part III of this Comment & Authorities. Proving the lack of an efficient intervening cause is a part of the burden of the party attempting to prove causation. If that is so, then, of course, this is not an affirmative defense.

On a somewhat related point, *see* NJI2d Civ. 3.03, Comment & Authorities regarding the general rule that the violation of the Nebraska statute prohibiting the sale of alcohol to minors is not evidence of negligence on the part of the seller for the subsequent acts of the minor.

II. THE POSSIBILITY THAT INTERVENING CAUSE INSTRUCTION SHOULD BE GIVEN IN ONE LIMITED SITUATION

It remains *possible* that intervening cause can be an affirmative defense if the defendant pleads it as such. That is, defendants do not have this burden, but perhaps defendants take this burden upon themselves if they plead intervening cause as an affirmative defense. The lesson here: Absent extraordinary circumstances, do not plead superseding or intervening cause as a defense.

III. GENERAL LAW ON THE SUBJECT

While the Supreme Court has disapproved of separate instruction on the point, "efficient intervening cause" does remain part of the vocabulary of the court.⁵ With that in mind, the Committee offers the following.

The first edition of this book, NJI 3.43 (1969), and some of the cases and authorities cited herein discuss "intervening cause" and "efficient intervening cause." Other authorities use "intervening force" and "superseding cause," respectively: A subsequent act that is a proximate cause of the plaintiff's damage is an intervening force; an intervening force that is the proximate cause of the plaintiff's damage is a superseding cause.⁶

A subsequent act that proximately causes the plaintiff's injury is an

mate cause, a plaintiff must show "that there is no efficient intervening cause." *Accord*, e.g. *Latzel v. Bartek*, 288 Neb. 1, 14, 846 N.W.2d 153, 164 (2014) (citing and discussing efficient-intervening-cause cases).

⁵It is part of the vocabulary of proximate cause, as in the statement that to establish proximate cause, a plaintiff must show "that there is no efficient intervening cause." *Johnson By and Through Johnson v. School*

Dist. of Millard, 253 Neb. 634, 639, 573 N.W.2d 116, 120 (1998) (*see* NJI2d Civ. 3.41). *Accord*, e.g. *Latzel v. Bartek*, 288 Neb. 1, 14, 846 N.W.2d 153, 164 (2014) (citing and discussing efficient-intervening-cause cases).

⁶Some cases, e.g., *Worth v. Schillereff*, 233 Neb. 628, 629, 447 N.W.2d 480, 482 (1989), use the words "intervening cause" and "efficient intervening cause" interchangeably.

intervening force. An intervening force that was not a normal response to the stimulus created by the first act is a superseding cause. In other words, an intervening cause that is a new and independent act, as opposed to one set in motion by or flowing from the first act, and that was not, and might not reasonably have been, foreseen as a consequence of the original act, is a superseding cause. A superseding cause relieves the defendant of responsibility for the injury.⁷ This is so not because the defendant can prove a superseding cause, but because the plaintiff will not be able to prove that the defendant's act was a proximate cause.⁸

⁷*E.g.*, *Malolepszy*, 273 Neb. at 320–24, 729 N.W.2d at 675–77; *Willet*, 271 Neb. at 575, 713 N.W.2d at 488; *Anderson/Couvillon v. Neb. Dept. of Soc. Servs.*, 248 Neb. 651, 659, 538 N.W.2d 732, 738 (1995) (finding that once the defendant had duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability); *Vredevelde v. Clark*, 244 Neb. 46, 52, 504 N.W.2d 292, 297 (1993) (“An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.”); *Miles v. Box Butte Cty.*, 241 Neb. 588, 601–02, 489 N.W.2d 829, 839–40 (1992) (defining intervening cause and distinguishing it from continuing acts of negligence blended with negligence of a third party and multiple independent contributing acts of negligence); *Maresh v. State*, 241 Neb. 496, 514–15, 489 N.W.2d 298, 311–12 (1992) (defining intervening cause and discussing foreseeability of a third party's negligent act), *overruled on other grounds* by *Davis v. State*, 297 Neb. 955, 209 N.W.2d 165 (2017); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801–02, 205 N.W.2d 523, 530 (1973) (quoting Restatement (Second) of Torts § 442 (Am. Law Inst. 1965) for the considerations that are important when deciding whether an intervening act is a superseding cause); *Brown v. Kaar*, 178 Neb. 524, 531, 134 N.W.2d 60, 66 (1965) (holding that an animal's normal response to a situation proximately caused by defendant's negligence is not a superseding cause); *St.*

Joseph & G.I. R.R. v. Hedge, 44 Neb. 448, 458, 62 N.W. 887, 889 (1895).

An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. Thus, an intervening act that is reasonably foreseeable by the defendant does not preclude the defendant's liability.

Kozicki, 255 Neb. at 253, 583 N.W.2d at 340 (citations omitted). *Accord* *Latzel v. Bartek*, 288 Neb. 1, 14, 846 N.W.2d 153, 164 (2014) (citing and discussing cases); *Wilke v. Woodhouse Ford*, 278 Neb. 800, 816–17, 774 N.W.2d 370, 383–84 (2009); *Malolepszy v. State*, 273 Neb. 313, 320, 729 N.W.2d 669, 675 (2007); *Willet v. Cty. of Lancaster*, 271 Neb. 570, 576, 713 N.W.2d 483, 488 (2006); *Fuhrman v. State*, 265 Neb. 176, 187, 655 N.W.2d 866, 875 (2003).

⁸*See* *Delaware v. Valls*, 226 Neb. 140, 144, 409 N.W.2d 621, 624 (1987) (“We have defined [superseding cause] as a new independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury It is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate” *Delaware* uses the words “intervening negligence.” In the

Regarding superseding cause, *see generally* the Restatement (Second) of Torts.⁹ *Also see generally* Prosser and Keeton On the Law of Torts.¹⁰ And in Nebraska, *see Sacco v. Carothers* and the rest of the discussion in parts I and II of this Comment.

The issue of whether an intervening force is a superseding cause is a question for the trier of fact,¹¹ And the question is still for the trier of fact, but now it is as a question of proximate or, sometimes, concurring cause or nonparty third-person cause.¹² The defendant need not prove superseding cause; the plaintiff must prove proximate cause and, in the case of a superseding cause, the plaintiff will not be able to do so. However, as always, where reasonable minds cannot differ on the issue, the question is one for the court.¹³ In a trial under the Tort Claims Act

opinion of the Committee, the word was used to place the discussion in the context of the *Delaware* case, and not as an indication that only a negligent act can be a superseding cause.)

A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, [the former] is the dominant cause. Because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the merits.

Jacobs Engr. Group v. ConAgra Foods, 301 Neb. 38, 76, 917 N.W.2d 435, 464 (2018) (footnotes omitted). In other words, the former's act is a proximate cause and the latter's act is. The jury's role here is covered by the proximate cause instruction. Contrast that with this: "Where separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone

could not have caused the result." *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 78, 917 N.W.2d 435, 465 (2018); Here the proximate cause is a combination of the acts of two or more actors. In this situation, *see* NJI2d Civ. 3.42, above.

⁹Restatement (Second) of Torts §§ 440-453, particularly § 442 (Am. Law Inst. 1965).

¹⁰Prosser and Keeton On the Law of Torts § 44, at 301-19 (W. Keeton gen. ed. 5th ed. 1984).

¹¹*E.g.*, *Kozicki v. Dragon*, 255 Neb. 248, 253, 583 N.W.2d 336, 340 (1998); *Shahan v. Hilker*, 241 Neb. 482, 487, 488 N.W.2d 577, 580 (1992); *Union Pacific R. Co. v. Kaiser Agr. Chemical Co.*, 229 Neb. 160, 175, 425 N.W.2d 872, 882 (1988); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801-02, 205 N.W.2d 523, 530 (1973); *Kitchen v. Carter*, 47 Neb. 776, 788, 66 N.W. 855, 858 (1896); *St. Joseph & G.I.R. Co. v. Hedge*, 44 Neb. 448, 458, 62 N.W. 887, 890 (1895).

¹²*See* NJI2d Civ. 3.41, 3.42, 3.43, and 3.44, respectively.

¹³*Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 711-12, 83 N.W.2d 523, 532 (1957) (abrogated by, *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986)); *Wax v. Co-operative Refinery Ass'n*, 154 Neb. at 51, 46 N.W.2d at 774.

or the Political Subdivision Tort Claims Act the trier of fact is the judge; those actions are tried to the court without a jury.¹⁴

For an act to be a superseding cause, it must have been unforeseeable.¹⁵ An intervening act is not a superseding cause where the likelihood of the act is itself one of the hazards that made defendant's conduct negligent.¹⁶

Part I of this Comment & Authorities notes that there should not ever be a separate superseding or efficient intervening cause instruction. Is it always error when such an instruction is given? Two things about that: (1) Were such an instruction to put the burden of proof on the defendant it would be prejudicial error.¹⁷ (2) It is "plain error" for a defendant to argue that the acts of another person were a superseding

¹⁴See N.J.I2d Civ. 8.72.

¹⁵*E.g.*, *Latzel*, 288 Neb. at 15-16, 846 N.W.2d at 164-65 (citing and discussing cases); *Malolepszy*, 273 Neb. at 320-24, 729 N.W.2d at 675-77; *Willett*, 271 Neb. at 575, 713 N.W.2d at 488 *Fuhrman v. State*, 265 Neb. 176, 187, 655 N.W.2d 866, 875 (2003) (disapproved of by, *Jill B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017)) ("Any action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence." (citation and internal quotation marks omitted)); *Nickell v. Russell*, 260 Neb. 1, 13, 614 N.W.2d 349, 358 (2000); *Baldwin v. City of Omaha*, 259 Neb. 1, 17, 607 N.W.2d 841, 853 (2000); *Haselhorst v. State*, 240 Neb. 891, 900, 485 N.W.2d 180, 187 (1992); *Johnson*, 253 Neb. at 639, 573 N.W.2d at 120; *Sacco v. Carothers*, 253 Neb. 9, 15, 567 N.W.2d 299, 304 (1997).

¹⁶*Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 652, 573 N.W.2d 739, 746 (1998) (One customer in a bar shot another customer, the plaintiff. The plaintiff sued the bar. The lack of due care alleged was bar's failure to protect the plaintiff from the likelihood that this particular other patron, known to the bar to be violent, would assault the plaintiff *Id.* at 643, 573 N.W.2d at 742.), *overruled on other grounds by Knoll v. Bd. of Regents*, 258 Neb. 1,

601 N.W.2d 757 (1999), *abrogated on other grounds by A.W. v. Lancaster Cty. Sch. Dist.* 0001, 280 Neb 205, 784 N.W.2d 907 (2010); *Sacco*, 253 Neb. at 15, 567 N.W.2d at 304; *Wollenhaupt v. Andersen Fire Equip. Co.*, 232 Neb. 275, 279, 440 N.W.2d 447, 450 (1989) (In a suit against a company that serviced fire extinguishing equipment, the Court stated, "If a defendant has a duty to foresee a particular type of harmful force, such as a fire, and guard others against the harm that the force can do, and the defendant fails in his duty, the cause of the fire is irrelevant to the liability of the defendant. The plaintiff therefore does not have the burden of proving what caused the fire, nor does he have the burden of negating his negligence as a cause of the fire."); *Looney v. Pickering*, 232 Neb. 32, 39-40, 439 N.W.2d 467, 471-72 (1989). In *Ratigan*, another customer in a bar shot the plaintiff. The alleged lack of due care was the bar's failure to protect the plaintiff from the likelihood that this particular other patron, known to the bar to be violent, would assault the plaintiff. *Ratigan*, 253 Neb. at 643, 573 N.W.2d at 742.

¹⁷See *Kirchner v. Wilson*, 251 Neb. 56, 60, 554 N.W.2d 782, 785 (1996) and other cases cited in part VIII(b) of the Introductory Comment & Authorities, above (preceding Chapter 1) for.

cause when the acts of that other person were part of a nondelegable duty owed by the defendant.¹⁸

Regarding intervening criminal acts, *see* the cases footnoted here.¹⁹

IV. CONDITIONS VERSUS CAUSES

Many of the cases that discuss concurring or superseding cause make distinctions between causes and conditions. Many of these cases are merely saying that the so-called condition was not a proximate cause of the injury, that a defendant was not negligent, or that the defendant had no duty to the plaintiff. Discussion of conditions versus causes is discouraged.²⁰ A discussion of the Nebraska cases on the subject follows.

Under the law, a condition cannot be a cause and, therefore, cannot be a superseding cause relieving an actor from liability.²¹ Things that

¹⁸Long v. Hacker, 246 Neb. 547, 555, 520 N.W.2d 195, 201 (1994) (finding, in a case where the head surgeon argued that acts of member of surgical team were an efficient intervening cause, that, because the head surgeon is ultimately liable for the negligence of those assisting in surgery, instruction on efficient intervening cause is error; because such instruction would cause miscarriage of justice or would damage integrity, reputation, and fairness of judicial process if not corrected, it is plain error; in fact, jury should have been instructed that head surgeon was liable for negligence of assistants in operation as well as any negligence of his own).

¹⁹Stahlecker v. Ford Motor Co., 266 Neb. 601, 610–15, 667 N.W.2d 244, 254–57 (2003) (regarding a criminal assault on a victim stranded by the failure of a Firestone tire on a Ford vehicle, finding that this “do[es] not present the type of knowledge concerning a specific individual’s criminal propensity, or right of control over premises known to have been the scene of prior criminal activity, upon which we have recognized a tort duty to protect another from criminal acts,” and holding as a matter of law that the acts of Ford and Firestone were not the proximate cause of the harm

to the victim); Kozicki v. Dragon, 255 Neb. 248, 583 N.W.2d 336 (1998) (car thief; *see* NJI2d Civ. 3.03, Comment); Anderson/Couvillon v. Neb. Dept. of Social Servs., 248 Neb. 651, 538 N.W.2d 732 (1995); Gerken v. Hawkins Constr. Co., 243 Neb. 157, 498 N.W.2d 97 (1993); Shelton v. Bd. of Regents, 211 Neb. 820, 320 N.W.2d 748 (1982); Daniels v. Andersen, 195 Neb. 95, 237 N.W.2d 397 (1975); Hersh v. Miller, 169 Neb. 517, 99 N.W.2d 878 (1959).

²⁰Prosser and Keeton On the Law of Torts § 42, at 277-78 (W. Keeton gen. ed. 5th ed. 1984) has this to say on the subject: “‘Causes’ and ‘conditions’ still find occasional mention in the decisions; but the distinction is now almost entirely discredited.” In Delaware, By and Through Delaware v. Valls, 226 Neb. 140, 142-45, 409 N.W.2d 621, 623-24 (1987), the court reviewed some Nebraska cases making this distinction, discussed the criticisms of the distinction, concluded that “there may be merit in the criticisms,” and noted that it “need not examine the validity of that distinction in this case.”

²¹Bringewatt v. Mueller, 201 Neb. 736, 740, 272 N.W.2d 37, 39 (1978) (“[T]he existence or activities of inanimate things[, here a fence,] are usually mere conditions and not causes.”); Lock v. Packard Flying Service, Inc.,

impair or block the vision of drivers, are conditions, not causes.²² Drivers have a duty to exercise a degree of care commensurate with the conditions that affect a street or highway and a driver with impaired or blocked vision may be required to stop driving until he can see, or to reduce speed so that, if necessary, an immediate stop is possible.²³ After all, the definition of "[n]egligence is doing something that a reasonably careful person would not do *under similar circumstances*, or failing to do something that a reasonably careful person would do under similar circumstances."²⁴ Where a driver has blocked or impaired vision, it may be necessary for the court to give an instruction such as the following:

"Conditions, such as dust, are not superseding causes and do not excuse a driver. A driver is required to exercise a degree of care commensurate with the circumstances. When a driver's vision is obscured, the law requires that the driver either stop

185 Neb. 71, 74, 173 N.W.2d 516, 519 (1970) (finding that removal of an airplane rudder and a failure to give a warning was a condition that a pilot is reasonably expected to discover); Guynan v. Olson, 178 Neb. 335, 338, 133 N.W.2d 571, 574 (1965) (finding that frost known to the defendant to be covering the deck of bridge is a condition); Bruno v. Gunnison Contractors, Inc., 176 Neb. 462, 466-67, 126 N.W.2d 477, 480 (1964) (finding that the alleged insufficiency of barricades warning of road construction was a condition); Knuth v. Singer, 174 Neb. 182, 187, 190, 116 N.W.2d 291, 295, (1962) (regarding an automobile stopped on highway as a condition); and the cases cited in the remaining paragraphs of this Comment. Regarding causes versus conditions in the context of concurring cause, see NJI2d Civ. 3.42, Comment.

²²E.g., Floyd v. Worobec, 248 Neb. 605, 611, 537 N.W.2d 512, 516 (1995) (parked truck blocking the view of traffic); Stanek v. Swierczek, 209 Neb. 357, 359-60, 307 N.W.2d 807, 810 (1981) (finding the van ahead of the defendant and the slush on street to be conditions); Central Const. Co. v. Republican City School Dist. No. 1, 206 Neb. 615, 617, 294 N.W.2d 347, 349 (1980) (dust); C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 746, 255 N.W.2d 272, 276 (1977) (blowing

snow); Dort v. Swift & Co., 193 Neb. 606, 609-10, 228 N.W.2d 588, 590 (1975) (pile of dirt); McClellen v. Dobberstein, 189 Neb. 669, 673-74, 204 N.W.2d 559, 563 (1973) (blinding lights); Newkirk v. Kovanda, 184 Neb. 127, 130-31, 165 N.W.2d 576, 579 (1969) (icy and slippery street); Willey v. Parriott, 179 Neb. 828, 833, 140 N.W.2d 652, 656 (1966) (spray of water thrown up by truck); Stevens v. Shaw, 179 Neb. 34, 39-40, 136 N.W.2d 169, 172 (1965) (blizzard); Guerin v. Forburger, 161 Neb. 824, 833-35, 74 N.W.2d 870, 877 (1956) (dark, blustery, misty night); Shields v. Buffalo Cty., 161 Neb. 34, 44-45, 71 N.W.2d 701, 709 (1955) (oncoming headlights); Harding v. Hoffman, 158 Neb. 86, 97-98, 62 N.W.2d 333, 340-41 (1954) (shelterbelt near intersection); Haight v. Nelson, 157 Neb. 341, 344-45, 59 N.W.2d 576, 579 (1953) (rain); Fairman v. Cook, 142 Neb. 893, 896-97, 8 N.W.2d 315, 318 (1943) (snow and frost on windshield); Long v. Crystal Refrigerator Co., 134 Neb. 44, 50, 277 N.W. 830, 834 (1938) (wind); Anderson v. Byrd, 133 Neb. 483, 485, 275 N.W. 825, 826 (1937) (smoke).

²³E.g., C.C. Natvig's Sons, Inc., above; Stevens v. Shaw, above; Harding v. Hoffman, above.

²⁴NJI2d Civ. 3.02 (emphasis added).

until he can see or reduce his speed to where he can stop within his field of vision.”²⁵

Regarding automobile accidents, ice on the highway may be considered the proximate cause of an accident if it is evident that the accident would have happened even if all of the participants had been free from negligence.²⁶

NJI2d Civ. 3.44

PROXIMATE CAUSE—CONDUCT OF NONPARTY THIRD PERSON

The defendant claims that (insert name of or phrase identifying nonparty third person)’s conduct was the only proximate cause of the (occurrence, accident, collision, fall, et cetera). By doing so, the defendant is simply denying that (his, her, its) conduct was a proximate cause of the (occurrence, accident, collision, fall, et cetera). Remember, the plaintiff must prove that the defendant’s negligence was a proximate cause of the (occurrence, accident, collision, fall, et cetera).

COMMENT

The sort of claim described by this instruction is not an affirmative defense. It imposes no burden on the defendant. And it is appropriate to make such a claim under a general denial.

Precedent approves such an instruction, but does not compel it. The cases state that in an appropriate case some where in the instructions the jurors “should be advised” of the following: if they find that the sole proximate cause of the accident was the negligence of someone other than the defendant, then their verdict should be for the defendant. It is ordinarily sufficient, however, if the jurors are so advised through a proper statement-of-the-case instruction, including proper instruction on the defendant’s denials and the burden of proof. In other words,

²⁵See, e.g., *Reeder v. Rinne*, 183 Neb. 734, 738, 164 N.W.2d 203, 205-06 (1969) (“The failure of the trial court to instruct in regard to the effect of conditions which obscure the vision of a driver and the duty of a driver whose vision is obscured requires . . . reversal[all]”); *Harding v. Hoffman*; above; NJI2d Civ. 7.03B, below.

²⁶*Bramhall v. Adcock*, 162 Neb. 198, 209, 75 N.W.2d 696, 703 (1956); *Barney v. Adcock*, 162 Neb. at 192, 75

N.W.2d at 692-93. *But see Kuffel v. Kunch*, 181 Neb. at 773, 150 N.W.2d at 909-10 (stating that ice is in any event a condition and not a superseding cause). “[I]f the presence of ice or snow upon the road surface is known or should have reasonably been anticipated, the snow and ice are considered conditions[, not causes].” *Edgerton v. Lawry*, 235 Neb. 100, 102, 453 N.W.2d 743, 744 (1990).

where the statement of the case instruction is proper, this instruction is not mandatory and failure to give this instruction is not prejudicial error. The cases supporting these points are discussed in the Authorities, below.

“The comments to NJI2d Civ. 3.44 clarify that this instruction is appropriate when the defendant claims that ‘the negligence of someone other than the defendant’ is the sole proximate cause of the plaintiff’s damages.”¹ The Committee believes that when the jury is otherwise properly instructed, this instruction is repetitive; it singles out and emphasizes one aspect of the plaintiff’s burden and the defendant’s general denial. Therefore, even in those cases in which the law in this instruction applies the Committee discourages its routine use. “[I]f a third person is the sole proximate cause of an innocent plaintiff’s injuries, the plaintiff’s recovery from a defendant is barred because the plaintiff’s injuries are not attributable to the defendant’s negligence.”² In other words, in such a situation the defendant’s negligence is not a proximate cause of the plaintiff’s injuries. A proper statement of the case instruction, including proper instruction on the defendant’s denials and the burden of proof, should adequately instruct the jury on this point and this instruction—NJI2d Civ. 3.44—would be cumulative, would single out, and thereby emphasize, one aspect of the plaintiff’s burden and the defendant’s general denial, and, therefore, is generally both unnecessary and unwise

In *Worth v. Kolbeck*, the Court stated the following:

In *Barry v. Moore*, this court held that a trial court must inform the jury of “the respective legal rights and liabilities of the [parties] in the event that negligence of the defendant was found which was the proximate cause which cause was proximately contributed to by [the third person].” Specifically, the trial court must explain that “[i]f [the defendant] was guilty of negligence which solely, or in concurrence with [the third person], or which proximately contributed to the accident, the plaintiff being in nowise responsible for it, the plaintiff was entitled to a recovery of her damages, if any, from him.”

Failure to give this instruction is reversible error, even if not requested, when the evidence raises a jury question as to whether (1) the defendant’s negligence was the sole cause of the plaintiff’s injuries, (2) a third person’s negligence was the sole cause of the plaintiff’s injuries, (3) negligence of the defendant and a third person concurred to cause the plaintiff’s injuries; and (4) negligence of a third person or the defendant

3.44

ing this book).

¹Worth v. Kolbeck, 273 Neb. 163, 169, 728 N.W.2d 282, 290 (2007) (quot-

²Worth, 273 Neb. at 170, 728 N.W.2d at 290.

proximately cause the injuries, but the other's negligence contributed to the injuries.

In other words, when the evidence is sufficient to raise a jury question as to whether a defendant's or a third person's negligence proximately caused or proximately contributed to a plaintiff's injuries, then a trial court must inform the jury that the plaintiff is entitled to recover damages, if any, from the defendant if the jury finds that the defendant is guilty of negligence which solely or in concurrence with a third person proximately caused or contributed to the plaintiff's injuries.³

In the second paragraph of this quotation, the Court states that "[f]ailure to give this instruction is reversible error, even if not requested, when the evidence raises a jury question as to whether . . . a third person's negligence was the sole cause of the plaintiff's injuries . . ." The Committee does not take this part of the quotation to mean that NJI2d Civ. 3.44 must be given. As discussed above in this Comment, this concept is adequately covered if the jury is otherwise properly instructed.

In a somewhat related vein, the Court has stated "that the third person's negligence is not imputed to an innocent plaintiff by a sole proximate cause instruction."⁴

This pattern is drafted for use in a negligence case. If it is appropriate in any other sort of case, it will have to be tailored.

Regarding a property owner's liability for the acts of third person on the property, *see* NJI2d Civ. 8.24. Regarding a landlord's liability for injury to a tenant from the criminal acts of third persons, *see* NJI2d Civ. 8.31, Comment.

See also the Comments to NJI2d Civ. 3.41 and 3.42 and the Comment & Authorities to 3.43.

AUTHORITIES

The cases on this subject say that in the situation presented here, "some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident . . . was the negligence of [another] then its verdict should be for the defendant."⁵ However, the court's instruction that the defendant denied the alleged negligence and its instruction on the elements and burden of proof was

³Worth, 273 Neb. at 172, 728 N.W.2d at 291-92 (footnotes omitted).

⁴Worth v. Kolbeck, 273 Neb. 163, 171, 728 N.W.2d 282, 291 (2007).

⁵Whittington v. Nebraska Natural Gas Co., 177 Neb. 264, 280, 128 N.W.2d 795, 805 (1964) (multiple quotation marks omitted) (quoting

sufficient, and the refusal to give an instruction similar to the one set out above was not prejudicial error.⁶

“Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff’s cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue.”⁷

Three members of the Court specifically approved of this instruction in a concurring opinion in *Tapp v. Blackmore Ranch*.⁸

An employer is not liable in tort for injuries to employees who are covered by the Nebraska Workers’ Compensation Act. Nonetheless, the employer can be the sole proximate cause of such an employee’s injuries, and a defendant (non-employer) in a tort action can argue that the plaintiff’s employer was the sole proximate cause of the injuries in question. If there is sufficient evidence that the employer was the sole proximate cause, then this instruction should be given.⁹

Regarding the particular wording of the final sentence of this pattern instruction, see *Barta v. Betzer*.¹⁰ That sentence should not be reworded without reference to that case.

In addition to some of the cases cited above, NJI 2.01A (1969), the similarly worded predecessor to this instruction, is cited in *Burrows v.*

Welstead v. Jim Ryan Constr. Co., 160 Neb. 87, 95, 69 N.W.2d 308, 314 (1955), in turn quoting *Styskal v. Brickey*, 158 Neb. 208, 219, 62 N.W.2d 854, 857 (1954)). *Accord Burhoop v. Brackhan*, 164 Neb. 382, 392, 82 N.W.2d 557, 565 (1957).

⁶*Yunker v. Peter Kiewit Sons Co.*, 180 Neb. 835, 837, 146 N.W.2d 202, 204 (1966).

⁷Same quotation, e.g., *Wollenhaupt v. Andersen Fire Equip. Co., Inc.*, 232 Neb. 275, 278, 440 N.W.2d 447, 449 (1989) (quoting *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 702-03, 211 N.W.2d 914, 917 (1973)) *Schmidt v. Johnson*, 184 Neb. 643, 648-49, 171 N.W.2d 64, 67 (1969); *Whittington v. Neb. Natural Gas Co.*, above at 281, 128 N.W.2d at 805; *Welstead v. Jim Ryan Constr. Co.*, 160 Neb. at 95, 69 N.W.2d at 313-14; *Comment NJI*

2.01A, at 27 (1969). *Accord Burhoop v. Brackhan*, 164 Neb. at 392, 82 N.W.2d at 565. *See also Buhrman v. Smollen*, 164 Neb. 655, 667, 83 N.W.2d 386, 396 (1957).

⁸*Tapp v. Blackmore Ranch, Inc.*, 254 Neb. 40, 58-59, 575 N.W.2d 341, 353-54 (1998) (Gerrard, J. concurring) (“[C]ombined with the instructions on proximate cause and concurring cause, [NJI2d Civ. 3.44] does not unduly emphasize the alleged negligence of either the defendant or a nonparty third person, but leaves the determination of proximate cause fairly in the hands of the jury.”).

⁹*Steele v. Encore Mfg. Co., Inc.*, 7 Neb. App. 1, 7-8, 579 N.W.2d 563, 568 (1998) (issue of first impression in Nebraska).

¹⁰*Barta v. Betzer*, 190 Neb. 752, 754, 212 N.W.2d 352, 355 (1973).

*Jacobsen*¹¹ and *Weiseth v. Karlen*.¹²

¹¹*Burrows v. Jacobsen*, 209 Neb. 778, 782, 311 N.W.2d 880, 883 (1981).

¹²*Weiseth v. Karlen*, 206 Neb. 724, 729, 295 N.W.2d 103, 106 (1980).

CHAPTER 4

DAMAGES

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A. INTRODUCTION

1. The Court's Duty

It is the trial court's duty to instruct the jury correctly regarding those elements of damages they are to consider. *See, e.g., Omaha Mining Co., Inc. v. First Nat'l Bank*, 226 Neb. 743, 746–47, 415 N.W.2d 111, 113 (1987); *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 492–93, 260 N.W.2d 193, 196 (1977); *Bass v. Boetel & Co.*, 191 Neb. 733, 739–40, 217 N.W.2d 804, 808 (1974). The court has the duty to so instruct whether requested to do so or not. *See, e.g., Ranchland Auto, Inc. v. Cleveland*, 188 Neb. 804, 805, 199 N.W.2d 702, 703 (1972); *Main v. Sorgenfrei*, 174 Neb. 523, 538–39, 118 N.W.2d 648, 657 (1962); *Singles v. Union Pac. R.R. Co.*, 173 Neb. 91, 95–96, 112 N.W.2d 752, 755 (1962); *Hickman-Williams Agency v. Haney*, 152 Neb. 219, 228, 40 N.W.2d 813, 819 (1950). (Regarding the court's general duty to instruct correctly, see *Authorities to NJ12d Civ. 1.01 and 2.01.*)

Trial and appellate courts may use the theory of damages upon which the case is tried, whether or not it is the correct measure of damages. *Third Party Software, Inc. v. Tesar Meats, Inc.*, 226 Neb. 628, 631, 414 N.W.2d 244, 246 (1987); *Smith v. Erftmier*, 210 Neb. 486, 491, 315 N.W.2d 445, 450 (1982); *Jacobs v. Korst*, 175 Neb. 639, 642–43, 122 N.W.2d 760, 762 (1963). If, however, there is a timely objection to an incorrect theory of damages and there is evidence to support the correct theory, the court must submit the latter to the jury. *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 738, 131 N.W.2d 155, 158–59 (1964); *White v. Longo*, 190 Neb. 703, 711–12, 212 N.W.2d 84, 89 (1973). Timely objection may be in the form of objection to the pleadings or the evidence, motion for a directed verdict, or tender of an appropriate instruction. *Beveridge v. Miller-Binder, Inc., supra*; *ARL Corp. v. Hroch*, 201 Neb. 422, 425–26, 268 N.W.2d 101, 104 (1978).

An instruction that misleads the jury into twice awarding damages for the same loss is prejudicially erroneous. *Pierson v. Cleven*, 182 Neb. 816, 817, 157 N.W.2d 408, 409 (1968); *Lemieux v. Sanderson*, 180 Neb.

311, 315, 142 N.W.2d 557, 561 (1966). On the other hand, redundant instruction is not erroneous so long as it still implies a single award for the item. *Pierson v. Cleven*, *supra*.

The trial court has no duty to give negative damage instruction. That is, there is no duty to instruct the jury on a party's inability to recover damages for which no recovery is allowed. *Enterprise Co. v. Sanitary Dist. No. One*, 176 Neb. 271, 274, 125 N.W.2d 712, 714 (1964) (while a requested instruction that uncertain, conjectural, or speculative damages cannot be recovered does correctly state the law, "there is no duty upon a trial court to instruct the jury concerning damages that cannot be recovered"); *Main v. Sorgenfrei*, *supra* (while such language may be included, "its omission is ordinarily not considered prejudicial error."). *See also* *Springer v. Smith*, 182 Neb. 107, 113-14, 153 N.W.2d 300, 304 (1967) (when the court is instructing on the allowance of damages for past pain and suffering, it need not negate the allowance of future pain and suffering).

2. The Measure of Damages

a. How Damages are Measured

"The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he or she would have been had there been no injury or breach of duty, that is, to compensate for the injury actually sustained." Same quotation: *J.D. Warehouse v. Lutz Co.* 263 Neb. 189, 195, 639 N.W.2d 88, 92 (2002); *O'Connor v. Kaufman*, 260 Neb. 219, 232, 616 N.W.2d 301, 311 (2000). *Accord Steele v. Sedlacek*, 267 Neb. 1, 6, 673 N.W.2d 1, 8 (2003); *Allemang v. Kearney Farm Ctr., Inc.*, 251 Neb. 68, 73, 554 N.W.2d 785, 789 (1996); *Keitges v. VanDermeulen*, 240 Neb. 580, 588-89, 483 N.W.2d 137, 142-43 (1992); *Chlopek v. Schmall*, 224 Neb. 78, 86, 396 N.W.2d 103, 109 (1986); "L" Invs., Ltd. v. Lynch, 212 Neb. 319, 327, 322 N.W.2d 651, 656 (1982); *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975).

The proper measure of damages is a question of law. The amount of damages is a question of fact. *E.g.*, *TNT Cattle Co. v. Fife*, 304 Neb. 890, 922, 937 N.W.2d 811, 836 (2020) ("The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved."); *Funk v. Lincoln-Lancaster County Crime Stoppers, Inc.*, 294 Neb. 715, 731, 885 N.W.2d 1, 13 (2016); *Griffith v. Drew's LLC*, 290 Neb. 508, 515, 860 N.W.2d 749, 758 (2015); *Connelly v. City of Omaha*, 284 Neb. 131, 140, 816 N.W.2d 742, 753 (2012); *Tolliver v. Visiting Nurse Ass'n.*, 278 Neb. 532, 538, 771 N.W.2d 908, 914 (2009). *See also TNT Cattle Co.*, 304 Neb. at 922, 937 N.W.2d at 836 ("Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.").

"The proper measure of damages in a negligence action is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence." *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 280, 557 N.W.2d 1, 13 (1996). *Accord* *McWhirt v. Heavey*, 250 Neb. 536, 550, 550 N.W.2d 327, 336 (1996) (cited in *World Radio*); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 920, 473 N.W.2d 94, 100 (1991) (cited in *World Radio*); *Stansbery v. Schroeder*, 226 Neb. 492, 496, 412 N.W.2d 447, 450 (1987).

Where the law provides a definite measure of damages, the court should specifically instruct the jury as to how the damages are to be assessed. The court must "fully and fairly inform the jury as to the various items of damage which should be taken into consideration in arriving at the verdict." *Enterprise Co. v. Sanitary Dist. No. One*, 176 Neb. 271, 274, 125 N.W.2d 712, 714 (1964). *Accord* *Main v. Sorgenfrei*, 174 Neb. 523, 538-39, 118 N.W.2d 648, 657 (1962) (citing cases).

A damage instruction stating a general principle that is broader than called for and that is not qualified by other instructions is erroneous. *Hickman-Williams Agency v. Haney*, 152 Neb. 219, 227-28, 40 N.W.2d 813, 819 (1950). Such an overly broad damage instruction is not reversible error, however, unless the complaining party requests more specific instruction. *White v. Longo*, 190 Neb. 703, 712, 212 N.W.2d 84, 89 (1973); *Nebraska Bottled Gas & Appliance Co. v. Aetna Cas. & Surety Co.*, 173 Neb. 146, 150-51, 112 N.W.2d 740, 742 (1962); *Henry v. Omaha Packing Co.*, 81 Neb. 237, 243, 115 N.W. 777, 780 (1908); and the cases therein cited. *See also* *Main v. Sorgenfrei*, *supra*; *Nebraska Bottled Gas & Appliance Co.*, *supra*; and *Singles v. Union Pac. R.*, 173 Neb. 91, 95-96, 112 N.W.2d 752, 755 (1962), which state that this request for more specific instruction is only necessary where the damage instruction given is too general and not where it is either incorrect or omitted altogether.

In this regard, *Colvin v. John Powell & Co.*, 163 Neb. 112, 133-34, 77 N.W.2d 900, 914 (1956) quotes C.J.S. as follows:

"Where there is more than one method of ascertaining damages, that method which is most definite and certain should be adopted. No one method is exclusive, where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, that measure must be adopted which is less expensive to defendant."

Where the law does not provide an accurate measure of damages, the amount to be awarded "rests in the sound discretion of the fact finder." *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 618, 260 N.W.2d 488, 491 (1977). *Accord* *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 129, 900 N.W.2d 732, 744 (2017); *Roth v. Wiese*, 271 Neb. 750, 768, 716 N.W.2d 419, 435 (2006); *Anson v. Fletcher*, 192 Neb. 317, 327, 220

N.W.2d 371, 377 (1974); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 353–54, 215 N.W.2d 105, 110–11 (1974).

“[T]he amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation. It is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence.” *Cohan*, 297 Neb. at 129, 900 N.W.2d at 744 (footnote omitted). See also NJI2d Civ. 4.00, Comment.

On a related matter: A “Golden Rule” argument is one that tells the jurors to put themselves in the place of the injured party and asks them “to award the amount they would charge to undergo equivalent disability, pain and suffering.” *Anderson v. Babbe*, 304 Neb. 186, 197, 933 N.W.2d 813, — (2019) (noting that the Golden Rule argument typically (but not exclusively) occurs during closing argument) (multiple quotation marks omitted). Such an argument is improper. It “is improper because it asks the jurors to place themselves or their loved ones in the plaintiff’s position, effectively urging them to become advocates for the plaintiff.” *Id.* While such an argument “is improper . . . , it is not a ground for a reversal unless the jurors were prejudicially affected by the remark.” *Id.*

Regarding the measure of damages in a contract action, see NJI2d Civ. 4.40, Comment and Authorities. Regarding the measure of damages insofar as it is controlled by the Uniform Commercial Code, see the cross references at NJI2d Civ. 4.40, Comment.

Regarding special or consequential damages, see NJI2d Civ. 4.59.

b. The Fact Finder’s Discretion

“The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder’s decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damaged proved.” Same quotation: *McGill Restoration, Inc. v. Lion Place Condo. Ass’n.*, 309 Neb. 202, 223, 959 N.W.2d 251, 269 (2021); *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 80, 917 N.W.2d 435, 466 (2018). *Accord*, e.g., *U.S. Pipeline v. Northern Nat. Gas Co.*, 303 Neb. 444, 464, 930 N.W.2d 460, — (2019); *Pan v. IOC Realty Specialist*, 301 Neb. 256, 276, 918 N.W.2d 273, 291 (2018). *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 724, 731, 885 N.W.2d 1, 13 (2016); *Eicher v. Mid Am. Fin. Inv. Corp.*, 275 Neb. 462, 468, 748 N.W.2d 1, 9 (2008); *Lowman v. State Farm Mut. Auto Ins. Co.*, 292 Neb. 882, 884, 874 N.W.2d 470, 472 (2016); *Griffith v. Drew’s LLC*, 290 Neb. 508, 515, 860 N.W.2d 749, 758 (2015) (“While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.”); *Richardson v. Children’s Hosp.*, 280 Neb. 396, 410, 787 N.W.2d 235, 246 (2010); *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 386, 388, 778 N.W.2d 433, 450, 451 (2010); *Tolliver v. Visiting Nurse Ass’n.*, 278 Neb. 532, 538, 771 N.W.2d 908, 914 (2009); *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43,

59, 680 N.W.2d 128, 142 (2004); *Brandon v. County of Richardson*, 264 Neb. 1020, 1024, 653 N.W.2d 829, 834 (2002); *McDonald v. Miller*, 246 Neb. 144, 155, 518 N.W.2d 80, 86 (1994) (citing cases).

"[T]he fact finder's determination of damages is given great deference on appeal." *Seeber v. Howlette*, 255 Neb. 561, 571, 586 N.W.2d 445, 452 (1998). *Accord Lowman*, 292 Neb. at 884, 874 N.W.2d at 472; *Fickle v. State*, 273 Neb. 990, 1011, 735 N.W.2d 754, 773 (2007), *clarified at* 274 Neb. 267, 759 N.W.2d 113 (2007); *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 59, 680 N.W.2d 128, 141 (2004); *Carlson v. Okerstrom*, 267 Neb. 397, 422, 675 N.W.2d 89, 111 (2004).

"With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard." *Funk*, 294 Neb. at 731, 885 N.W.2d at 13.

The finder of fact is not required to accept a party's damage evidence at face value even when it is not contradicted by evidence adduced by the opposing party. *O'Connor v. Kaufman*, 260 Neb. 219, 233, 616 N.W.2d 301, 312 (2000).

c. Setting Aside a Fact Finder's Excessive Damage Award

There are two remedies for an excessive damage award—a new trial and a remittitur. A new trial is appropriate when "the substantial rights" of a party were "materially" affected by an award of "excessive damages, appearing to have been given under the influence of passion or prejudice." Neb. Rev. Stat. § 25-1142 (Reissue 2016). *See also*, many of the cases cited above.

Excessive damages "may be corrected by remittitur where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury." *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 80, 917 N.W.2d 435, 466 (2018) ("[T]he error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. A request for remittitur is generally made in lieu of a request for a new trial. An appellate court should order remittitur only when the award is contrary to all reason." (footnotes omitted)).

A damage award may be excessive. It may also be inadequate. "[T]he rule in this state has long been that where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such a verdict." *O'Neil v. Behrendt*, 212 Neb. 372, 377, 322 N.W.2d 790, 793 (1982). *Accord Springer v. Bohling*, 263 Neb. 802, 812, 643 N.W.2d 386, 395 (2002); *Sanwick v. Jenson*, 244 Neb. 607, 609, 508 N.W.2d 267, 269 (1993).

When the trial court sets aside a damage award as excessive, that court's determination is "accorded significant discretion." *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 108, 629 N.W.2d 511, 521 (2001)

(discussing the issue at length, *id.* at 108–115, 629 N.W.2d at 511–525, and, to the extent they hold otherwise, disapproving of prior cases, *id.* at 115, 629 N.W.2d at 525). It is “‘give[n] the benefit of every doubt.’” *Id.* at 109, 629 N.W.2d at 521 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438–39, 116 S. Ct. 2211, 2225, 135 L. Ed. 2d 659, 681 (1996)). “[T]he clear weight of authority, from this jurisdiction and others, holds that a trial court’s ruling [setting aside a damage award as excessive and granting a new trial on the issue of damages] will not be disturbed on appeal absent an abuse of discretion, i.e., where the record reveals no tenable grounds for the ruling.” *Holmes*, 262 Neb. at 114, 629 N.W.2d at 525 “The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.” *Id.* at 108, 262 N.W.2d at 521. It is for these reasons that the trial judge is “the primary buffer against verdicts not supported by the evidence.” *Id.* See also *Bradley T. v. Central Catholic High School*, 264 Neb. 951, 960, 653 N.W.2d 813, 820 (2002). (Regarding the “abuse of discretion” standard, see generally *NJI2d Civ. 1.42, Comment & Authorities.*)

“An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. . . . If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.”

Holden v. Wal-Mart Stores, 259 Neb. 78, 86, 608 N.W.2d 187, 193–94 (2000) (quoting *Woollen v. State*, 256 Neb. 865, 890, 593 N.W.2d 729, 745 (1999)). *Accord, e.g.*, *Neb. Rev. Stat. § 25-1142* (Reissue 2016) (a new trial shall be granted when “the substantial rights” of a party were “materially” affected by an award of “excessive damages, appearing to have been given under the influence of passion or prejudice.”); *Poppe v. Siefker*, 274 Neb. 1, 11, 735 N.W.2d 784, 792 (2007); *Roth v. Wiese*, 271 Neb. 750, 768, 716 N.W.2d 419, 435 (2006); *Shipler v. General Motors Corp.*, 271 Neb. 194, 233, 710 N.W.2d 807, 840 (2006); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 851, 560 N.W.2d 451, 457 (1997) (A verdict will not be set aside as excessive “unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.”); *Nelson-Holst v. Iverson*, 239 Neb. 911, 915–17, 479 N.W.2d 759, 762–63 (1992) (discussing cases); *Peacock v. J.L. Brandeis & Sons*, 157 Neb. 514, 519–20, 60 N.W.2d 643, 647–50 (1953).

“If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.” *Fickle v. State*, 273 Neb. 990, 1012, 735 N.W.2d 754, 773 (2007), *clarified at* 274 Neb. 267, 759 N.W.2d 113 (2007).

On a related matter, “The giving or refusing to give a cautionary instruction that the jury is not to allow sympathy or prejudice to control or affect its finding is within the discretion of the trial court.” *Anderson v. Babbe*, 304 Neb. 186, 193, 933 N.W.2d 813, — (2019) (involving the “Golden Rule” argument).

“When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.” *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 116, 629 N.W.2d 511, 526 (2001) (citing cases).

“[A] motion for new trial is a prerequisite to obtaining appellate review of the issue of excessive damages” *Pierce v. Landmark Management Group, Inc.*, 293 Neb. 890, 900, 880 N.W.2d 885, 896 (2016). *See also id.* at 910.

d. The Loss-of-Chance Doctrine

Nebraska has not adopted the loss-of-chance doctrine. *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 125, 126, 900 N.W.2d 732, 742 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98.

This doctrine would allow damages if the defendant’s negligence “increases the risk of future harm to the plaintiff.” *Id.* at 121, 900 N.W.2d at 739 (quoting Restatement (Second) of Torts § 323 (1965)). This doctrine involves the situation when “‘the loss of a chance of [the plaintiff] avoiding some adverse result or achieving some favorable result either is completely redressed or is denied, depending on the likelihood, destroyed by the defendant’s tortious conduct, of avoiding or achieving the particular result,’ for example, a recurrence of or death from cancer.” *Id.* at 121, 900 N.W.2d at 740 (quoting Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1354-54 (1981)).

Situations involving this doctrine arise when you have an allegedly negligent defendant, on trial for damages resulting from the alleged negligence; you have a plaintiff who asks the court to include in any damages awarded an amount to compensate for the chance that he or she will suffer future damage from the “loss of chance,” for example, the loss of the chance to live longer; to do that would require the trier of fact to speculate on what may or may not happen in the future.

It would “reduce the standard of causation to a mere possibility rather than a preponderance of the evidence [W]e choose not to lower the well-established standard of causation.” *Id.* at 125, 900 N.W.2d at 741.

Cohan contains a lengthy and scholarly discussion of why Nebraska

does not recognize that doctrine. *Id.* at 120–127, 900 N.W.2d at 739–743.

Regarding awarding damages based on speculation, guess, or conjecture, *see generally* part 3(b) and (c) of this Introduction to chapter 4.

Regarding the burden of proof, *see also* Part 3(b) of this Introduction, below.

3. Pleadings and Proof

The only elements of damages properly considered by the trier of fact are those that are both presented by the pleadings and supported by the evidence.

a. The Pleadings

The general rule is that damages must be pled. *See, e.g.,* Neb. R. Pldg. in Civ. Actions 8, 9(g); *J.D. Warehouse v. Lutz Co.* 263 Neb. 189, 195, 639 N.W.2d 88, 92 (2002) (“Damages, like any other element of a plaintiff’s cause of action, must be pled and proved . . .”); *Evergreen Farms v. First Nat’l Bank & Trust*, 250 Neb. 860, 871, 553 N.W.2d 728, 735 (1996) *Miller v. Stan Ortmeier Constr. Co.*, 229 Neb. 259, 266, 426 N.W.2d 272, 276 (1988); *Nebraska Truck Serv. and Sales, Inc. v. U.S. Fire Ins. Co.*, 213 Neb. 755, 757, 331 N.W.2d 266, 268 (1983); *Settell’s, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 30, 305 N.W.2d 896, 898–99 (1981). *See also* *Matheson v. Stork*, 239 Neb. 547, 552, 477 N.W.2d 156, 160 (1991) (“As Matheson has failed to plead facts from which it can be inferred that he was harmed, there can be no damages.”).

General damages, those that necessarily follow from the alleged acts, need not be specifically pleaded. Factual allegations concerning the complained of act support recovery for any damage that necessarily follows therefrom. *See, e.g.,* *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 792, 452 N.W.2d 746, 749 (1990); *Washington v. American Cmty. Stores Corp.*, 196 Neb. 624, 629, 244 N.W.2d 286, 289 (1976) (impairment of future earning capacity as distinguished from loss of past earnings); *Grass v. Valley Feed and Grain*, 181 Neb. 505, 508, 149 N.W.2d 355, 357 (1967) (“elements of past and prospective disability”); *Husak v. Omaha Nat’l Bank*, 165 Neb. 537, 544–45, 86 N.W.2d 604, 609 (1957) (future pain and permanent effect of injuries); *Barnhart v. Henderson*, 147 Neb. 689, 702, 24 N.W.2d 854, 861 (1946) (damages necessarily following breach of contract); *Nye v. Adamson*, 130 Neb. 887, 892–93, 266 N.W. 767, 770 (1936) (loss of earning capacity); *Fink v. Busch*, 83 Neb. 599, 604, 120 N.W. 167, 169 (1909) (mental anguish and future pain and suffering); *Carlile v. Bentley*, 81 Neb. 715, 719–21, 116 N.W. 772, 774 (1908) (loss of time and earning capacity if injury suffered necessarily imports such loss); *Harshman v. Rose*, 50 Neb. 113, 114, 69 N.W. 755, 755–56 (1897) (the necessary and usual consequence of assault and battery).

Special damages, those that do not naturally and necessarily follow from the complained of act, must be specifically pleaded. Neb. Ct. R. Pldg. § 6-1108 ("If the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated[.]"). See NJI2d Civ. 4.59 and the Comment thereto.

b. The Proof: In General

As a general rule, it is prejudicial error to instruct on an element of damages pleaded but not supported by the evidence. The party alleging damages has the burden of proving them "with as much certainty as the case permits." *Meisinger Earth Moving, Inc. v. State*, 212 Neb. 554, 560-61, 324 N.W.2d 387, 390 (1982); *LeRoy Weyant & Sons, Inc. v. Harvey*, 212 Neb. 65, 68, 321 N.W.2d 429, 431 (1982). Items subject to more precise measurement, medical expenses, lost wages, and the like, require more certain proof. Items not subject to precise measurement, pain and suffering, future earning capacity, and the like, require less certain proof. Richard E. Shugrue, *Nebraska Law on the Measure of Damages*, Ch. 1, General Rules, at 5-6 (NCLE, Inc. 1983).

The burden regarding damages is to establish by the greater weight of the evidence basic facts that would permit the trier of fact reasonably to estimate actual damages. They need not be proved with a mathematical certainty, but when the existence or the extent thereof is uncertain or based upon speculation and conjecture, damages may not be allowed. See generally, e.g., *TNT Cattle Co. v. Fife*, 304 Neb. 890, 922, 937 N.W.2d 811, 836 (2020); *Pan v. IOC Realty Specialist*, 301 Neb. 256, 276, 918 N.W.2d 273, 291 (2018) (value of converted property); *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 872, 896 N.W.2d 156, 193 (2017); *O'Connor v. Kearny Junction, L.L.C.*, 295 Neb. 981, 988, 893 N.W.2d 684, 690-91 (2017); *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 112, 808 N.W.2d 67, 76 (2012) (trial court must refrain from submitting damages to the jury where the evidence requires the jury to engage in speculation or conjecture); *Schinnerer v. Nebraska Diamond Sales Co.*, 278 Neb. 194, 201, 769 N.W.2d 350, 356 (2009) (Wage Payment Act); *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 655, 748 N.W.2d 626, 639 (2008) (lost profit); *Bristol v. Rasmussen*, 249 Neb. 854, 863, 547 N.W.2d 120, 127 (1996) (value of crops); *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 330, 411 N.W.2d 331, 334 (1987); *Borland v. Gillespie*, 206 Neb. 191, 197, 292 N.W.2d 26, 30 (1980); *Batterman v. Richardson*, 189 Neb. 303, 310, 202 N.W.2d 613, 617 (1972) (burden remains when the verdict is directed on liability); *Cooper v. Hastert*, 175 Neb. 836, 839-40, 124 N.W.2d 387, 389 (1963) (burden remains when negligence is admitted). See also *Washington v. American Cmty. Stores Corp.*, 196 Neb. 624, 630-31, 244 N.W.2d 286, 290 (1976) ("A party who objects to the evidence [of damages] and causes it to be excluded, cannot obtain a reversal of the judgment as unsupported for want of the evidence so excluded."); *Enterprise Co. v. Sanitary Dist. No. One*, 176 Neb. 271, 274, 125 N.W.2d 712, 714 (1964) (while a requested instruction that uncertain, conjec-

tural, or speculative damages cannot be recovered does correctly state the law, “there is no duty upon a trial court to instruct the jury concerning damages that cannot be recovered”); *Ricenbaw v. Kraus*, 157 Neb. 723, 733, 61 N.W.2d 350, 357 (1953) (improper to judicially notice cost of making damaged crop fit for market, an element of damages; since this fact varies greatly, it must be proved).

Regarding speculative damages and the loss-of-chance doctrine, see part 2(d) of this Introduction, above.

Even when damage evidence is uncontradicted, the factfinder need not necessarily accept it.

It is well established that in awarding damages, the factfinder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. Neither is it necessary that an appellate court be able to discern the exact computations by which a verdict is reached.

ConAgra, Inc. v. Bartlett P'ship, 248 Neb. 933, 941, 540 N.W.2d 333, 338 (1995). *Accord* *Springer v. Bohling*, 263 Neb. 802, 812, 643 N.W.2d 386, 395 (2002); *Bristol v. Rasmussen*, 249 Neb. 854, 863, 547 N.W.2d 120, 127 (1996); *American Tel. & Tel. Corp. v. Thompson*, 193 Neb. 327, 330, 227 N.W.2d 7, 9 (1975). See also *O'Neil v. Behrendt*, 212 Neb. 372, 377, 322 N.W.2d 790, 793 (1982) (fact that evidence was undisputed may be considered in deciding whether verdict was inadequate [or, presumably, excessive]).

Where there is no accurate measure of damages, the award is discretionary with the trier of fact and will not be reversed unless clearly wrong and unreasonable. See Part 2, *supra*.

c. The Proof: “Reasonable Certainty”

There are a number of Nebraska Supreme Court cases that say damages must be proved with reasonable certainty. See, e.g., *Weitz Company, LLC v. Hands, Inc.*, 294 Neb. 215, 235, 882 N.W.2d 659, 673 (2016); *Twin Towers Condo. Ass'n, Inc. v. Bel Fury Invest. Group, L.L.C.*, 290 Neb. 329, 343, 860 N.W.2d 147, 199 (2015); *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 113, 808 N.W.2d 67, 76 (2012); *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 389, 778 N.W.2d 433, 451 (2010); *Eicher v. Mid Am. Fin. Inv. Corp.*, 275 Neb. 462, 477, 748 N.W.2d 1, 14 (2008); *McWhirt v. Heavey*, 250 Neb. 536, 550, 550 N.W.2d 327, 336 (1996) and other cases cited *infra*. These cases raise two questions. First, is this language somehow a limitation applied only to special damages? Second, is this proof with “reasonable certainty” a jury question; that is, does it require submission to the jury of a burden of proof different than the greater weight of the evidence?

The answer to the first question seems to be that the language applies to both general and special damages. Professor Dobbs' Handbook on the Law of Remedies discusses proof of damages with reasonable certainty as though it only applied to special or consequential damages. D. Dobbs, Handbook on the Law of Remedies § 12.3, at 798 (1973). This is contrary to Nebraska's rule and to the approach of the Restatement of Contracts. Restatement (Second) of Contracts § 352 (1981) provides: "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." The Restatement makes no distinction between general and special damages. *Birkel v. Hassebrook Farm Serv., Inc.*, 219 Neb. 286, 289, 363 N.W.2d 148, 151 (1985), and *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 438, 197 N.W.2d 646, 648 (1972), are two Nebraska breach of contract cases that use the words "reasonably certain" to describe the damages, general and special, recoverable in a contract case. *Accord* *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 331, 411 N.W.2d 331, 334–35 (1987) ("reasonable certainty"). *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 186, 137 N.W.2d 701, 711–12 (1965) uses "reasonable certainty" similarly in a tort action.

The Nebraska Supreme Court always defines "reasonable certainty" with some variation of the following: It is not whether "damages are capable of mathematically exact measurement, but whether there is sufficient evidence and data to enable the trier of fact, the jury, with a reasonable degree of certainty and exactness to estimate the actual damages." *Midlands Transp. Co.*, 188 Neb. at 438, 197 N.W.2d at 648. *Accord* *TNT Cattle Co. v. Fife*, 304 Neb. 890, 922, 937 N.W.2d 811, 836 (2020); *ACI Worldwide Corp.*, 296 Neb. at 872, 872 N.W.2d at 193; *Lesiak*, 283 Neb. at 113, 808 N.W.2d at 77; *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 579, 805 N.W.2d 68, 88 (2011) ("[D]amages cannot be sustained by evidence which is speculative and conjectural."); *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 188, 568 N.W.2d 908, 911 (1997); *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 353, 377 N.W.2d 98, 100 (1985).

Invariably, this definition is followed with a statement such as this: "It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture." *Midlands Transp.*, 188 Neb. at 440, 197 N.W.2d at 649. *Accord, e.g., TNT Cattle Co.*, 304 Neb. at 922, 937 N.W.2d at 836; *Shipler v. General Motors Corp.*, 271 Neb. 194, 231, 710 N.W.2d 807, 838 (2006); *Gagne v. Severa*, 259 Neb. 884, 893, 612 N.W.2d 500, 506 (2000); *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 280, 557 N.W.2d 1, 13 (1996); *Evergreen Farms v. First Nat'l Bank & Trust*, 250 Neb. 860, 868, 553 N.W.2d 728, 734 (1996) ("reasonable certitude and exactness," but not "mathematical certainty"; cannot be "established by evidence which is speculative and conjectural"); *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 593, 419 N.W.2d 143, 148 (1988). *See also* *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 28–29, 237 N.W.2d 92, 97 (1975) (consequential

damages under U.C.C. §§ 2-714(3) and 2-715(2), citing *Midlands Transp.*).

The “reasonable certainty” standard is applied by the trier of law, not the trier of fact. When the judge decides whether the party claiming damages has raised a submissible issue, the standard for the judge to apply is whether that party has proved facts that provide a reasonably certain basis for the calculation of damages. If not, then the matter should be taken out of the hands of the jury. “We have consistently framed the question whether the evidence of damages is ‘reasonably certain’ as a question of law, and not as a matter of fact to be decided by the trier of fact.” *Pribil v. Koinzan*, 266 Neb. 222, 227, 665 N.W.2d 567, 572 (2003) (citing a page of cases) (reversing *Pribil v. Koinzan*, 11 Neb.App. 199, 212–14, 647 N.W.2d 110, 120–21 (2002)). *Accord Twin Towers Condo. Ass’n*, 290 Neb. at 335, 860 N.W.2d at 154; *Lesiak*, 283 Neb. at 112, 808 N.W.2d at 76 (trial court must refrain from submitting damages to the jury where the evidence requires the jury to engage in speculation or conjecture; what is required is “enough evidence to provide a reasonable basis for the jury to estimate the extent of the damage.”); *Shipler v. General Motors Corp.*, 271 Neb. 194, 231, 710 N.W.2d 807, 838 (2006).

[T]he initial question of law for the trial court is whether the evidence of damages provides a basis for determining damages with reasonable certainty, i.e., the evidence of damages is not speculative or conjectural. If the evidence does provide such a basis, the issue of damages can be submitted to the jury. The jury, however, is not charged with the duty of determining whether the evidence of damages is reasonably certain; rather, the jury is instructed that the plaintiff must prove the nature and extent of damages by the greater weight of the evidence.

Pribil v. Koinzan, 266 Neb. at 228, 665 N.W.2d at 573. *Accord Lesiak, supra*; *Shipler, supra*. The “reasonable certainty” standard prevents the judge from submitting to the jury damages that are speculative and conjectural. *See also* NJI2d Civ. 4.40, Comment.

World Radio Labs., Inc. v. Coopers & Lybrand, 251 Neb. 261, 557 N.W.2d 1 (1996), states that damages cannot be sustained by “speculative and conjectural [evidence]. *In addition*, a plaintiff must prove damages with reasonable certainty.” *Id.* at 280, 557 N.W.2d at 13 (emphasis added). The use of “[i]n addition” indicates an affirmative reasonable-certainty requirement that somehow goes beyond the rule that the evidence not be speculative—some sort of increased burden. The Committee stands by its opinion (in the above paragraph) that, whatever this means, it has no effect on the jury instructions.

And, in fact, *Pribil v. Koinzan, supra*, was reversed on the basis of a jury instruction that stated that “[t]he evidence must establish the amount of any item of damage with reasonable certainty or that item of damage cannot be recovered.” *Id.* at 225, 665 N.W.2d at 571.

Here is how the Committee makes sense of this: A damage award may not be based on speculation. When that rule is discussed in the context of the jury's role, the language of speculation and conjecture is used. When that rule is discussed in the context of the judge's role, the language of reasonable certainty is used. See *Pribil v. Koinzan*, 266 Neb. at 229, 665 N.W.2d at 574 ("When the plaintiff seeks prospective damages, the contingent nature of the damages claimed inherently requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of the trial." When that is the case, and when the evidence warrants, "the jury should be instructed . . . that the plaintiff may recover damages for injuries 'reasonably certain' to be incurred in the future.").

The above discussion relates to cases stating as a general proposition that past, present, and future damages must be proved with reasonable certainty. This is distinguished from cases stating that the jury may award damages for expenses, lost earnings, and the like "reasonably certain" to be experienced in the future. Regarding the latter, see NJI2d Civ. 4.01, Authorities.

4. Specific Performance

"An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court." Same quotation: *Walters v. Sporer*, 298 Neb. 536, 546, 905 N.W.2d 70, 79 (2018); *O'Connor v. Kearny Junction, L.L.C.*, 295 Neb. 981, 986, 893 N.W.2d 684, 689 (2017). Accord, e.g., *Tierney v. Four H Land Company Limited Partnership*, 288 Neb. 586, 587-88, 852 N.W.2d 292, 295 (2014) (quoting *Mogensen v. Mogensen*, 273 Neb. 208, 212, 729 N.W.2d 44, 50 (2007)); *Langemeier v. Urwiler Oil & Fertilizer, Inc.*, 265 Neb. 827, 834, 660 N.W.2d 487, 492 (2003).

Specific performance is an appropriate remedy only under certain circumstances. Specific performance may be granted only where there is a valid, legally enforceable contract, and the party seeking specific performance has substantially complied with the terms of that contract. There must be no adequate remedy at law for breach of the relevant contract. Where a contract relates to real property, the inadequacy of a remedy at law is assumed.

Tierney, 288 Neb. at 594, 852 N.W.2d at 298-99 (citations omitted). Accord *Johnson v. Nelson*, 290 Neb. 703, 710, 861 N.W.2d 705, 711-12 (2015).

"In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they

would have been if the contract had been performed at the time agreed upon.” *O’Connor v. Kearny Junction, L.L.C.*, 295 Neb. 981, 988, 893 N.W.2d 684, 690 (2017).

“[S]pecific performance is not generally demandable as a matter of absolute legal right; it is addressed to the legal discretion of the court and will not be granted where enforcement of the contract would be unjust.” *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 238, 720 N.W.2d 886, 902-03 (2006) (contract “for acquisition of shares of a closely held family corporation”; *id.*).

“Specific performance should be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.” *Tierney*, 288 Neb. at 597, 852 N.W.2d at 301 (citing cases) (internal quotation marks omitted). *Accord, e.g., Johnson*, 290 Neb. at 710, 861 N.W.2d at 301; *Mohrlang v. Draper*, 219 Neb. 630, 633, 365 N.W.2d 443, 446 (1985) (contract for sale or real estate).

“A court’s discretion to order specific performance is . . . ‘not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge.’” *Tierney*, 288 Neb. at 597-98, 852 N.W.2d at 301 (break for lengthy indented quotation omitted). Whether the court should grant specific performance “‘is controlled by established principles of equity and depend[s] upon the facts and circumstances of the particular case.’” *Tierney*, 288 at 597, 852 N.W.2d at 301 (“[C]oncepts of fairness and equity can be considered.” *Tierney*, 288 at 598, 852 N.W.2d at 301).

[T]o the extent hardship enters into the equation, . . . [h]ardship arising from a “circumstance unforeseeable at entry into the contract” may excuse specific performance of a contract, provided that the hardship is not “self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance.” It is inconsequential to this analysis how the hardship compares to the benefits that would be obtained by the party seeking performance.

We adopted the foregoing approach to hardship, because under a contrary rule, “one would derive a benefit from his or her own inexcusable neglect.”

Tierney, 288 Neb. at 598, 852 N.W.2d at 301.

Hardship is not a question of “comparing the cost of performance to the benefits that would accrue to the party seeking specific performance.” Otherwise “a party could be excused from specific performance due to

the exact burdens it willingly and legally assumed under the contract . . . and could derive positive benefits from creating impediments to its own performance.” *Tierney*, 288 Neb. at 598-99, 852 N.W.2d at 301. *See also, Tierney*, 288 Neb. at 600, 852 N.W.2d at 302.

“The burden of proving a contract is on the party who seeks to compel specific performance.” *Johnson*, 290 Neb. at 710, 861 N.W.2d at 711-12. “A party seeking specific performance must show his right to the relief sought, including proof that he is ready, able, and willing to perform his obligations under the contract.” *James J. Parks Co. v. Lakin*, 206 Neb. 184, 188, 292 N.W.2d 21, 24 (1980). *Accord Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 238-39, 720 N.W.2d 886, 903 (2006) (contract “for acquisition of shares of a closely held family corporation”); *Lange-meier v. Urwiler Oil & Fertilizer, Inc.*, 265 Neb. 827, 834, 660 N.W.2d 487, 493 (2003); *Langemeier v. Urwiler Oil & Fertilizer, Inc.*, 259 Neb. 876, 882, 613 N.W.2d 435, 439 (2000).

In an action for specific performance of a real estate purchase agreement, . . . all persons with an interest in the real estate that is the subject of the purchase agreement, whose rights to the real estate may be affected by the specific performance action, [must] be made parties to the lawsuit. In the absence of an indispensable party, the district court is without jurisdiction to determine the controversy.

Langemeier I, 259 Neb. at 883-84, 613 N.W.2d at 440.

The statute of frauds applicable to the sale of an interest in land is found at Neb. Rev. Stat. § 36-103 (Reissue 2016). *Ficke v. Wolken*, 291 Neb. 482, 488-94, 868 N.W.2d 305, 311-14 (2015), discusses the statute and an exception authorizing “specific performance of an oral contract for the sale of real estate upon the basis of past performance.” *Id.* at 488-94, 868 N.W.2d at 311-14. In this regard, *see* N.J.I2d Civ. 15.01, Comment.

Regarding specific performance of a contract for the sale of land, *see also Sayer v. Bowley*, 243 Neb. 801, 805-07, 503 N.W.2d 166, 169-71 (1993); *Pluhacek v. Nebraska Lutheran Outdoor Ministries, Inc.*, 227 Neb. 778, 780-81, 420 N.W.2d 286, 288-89 (1988) and the cases and authorities cited in those cases.

“A right of first refusal may be enforced by specific performance where it can be proved that the condition triggering the right has occurred and the option holder was ready, able, and willing to buy during that period.” *Walters v. Sporer*, 298 Neb. 536, 548, 905 N.W.2d 70, 80 (2018).

“In decreeing specific performance, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the agreed-upon time.” *Pennfield*

Oil Co. v. Winstrom, 272 Neb. 219, 238, 720 N.W.2d 886, 902 (2006) (contract “for acquisition of shares of a closely held family corporation”; *id.*).

Specific performance of a breach of a covenant not to compete “may be refused if the performance is of such a character as to make effective enforcement unreasonably difficult or to unnecessarily require long-continued supervision by the court. Where specific enforcement of a contract is denied, the court may award damages in the same proceeding.” *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 111, 262 N.W.2d 442, 448 (1978) (citations omitted). In this regard, *see* NJI2d Civ. 4.51.

“ ‘[W]here the existence of a particular person is necessary for the performance of a contractual duty, the death of that person, or his or her loss of capacity to perform the duty, discharges the obligor’s duty to perform.’ ” *Wilson v. Fieldgrove*, 280 Neb. 548, 552, 787 N.W.2d 707, 711-12 (2010) (citation to the Kansas Supreme Court and the Restatement (Second) of Contracts omitted). *See also* L. Simpson, *Handbook of the Law of Contracts* §§ 176, 177 (2d ed. 1965). *See also* the discussion of the affirmative defense of impossibility of performance, at NJI2d Civ. 15.20.

“If the specific performance promised by a contractor becomes impossible, either by the destruction of the specific subject matter, the death of a necessary person, or the non-existence of the specifically contemplated means of performance, his duty is discharged—unless the parties expressed a contrary intention.” A. Corbin, *Corbin on Contracts* § 1321 (1952 & Supp. 2001) (revised edition found at 14 James P. Nehf, *Corbin on Contracts* § 74.1 (rev. ed. 2001)). *See also* the discussion of the affirmative defense of impossibility of performance, at NJI2d Civ. 15.20.

For more cases involving specific performance of a contract, *see* NJI2d Civ. 15.01, *Authorities*.

On a related matter in criminal cases, “when the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea.” *State v. Smith*, 295 Neb. 957, 972, 892 N.W.2d 52, 63 (2017).

5. Noncompensatory Damages

a. In General

In Nebraska, the general rule in civil cases is that substantial damages may only be compensatory in nature. *See, e.g., “L” Invs., Ltd. v. Lynch*, 212 Neb. 319, 327, 322 N.W.2d 651, 656 (1982); *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975); *University of Neb.*

at Omaha v. Paustian, 190 Neb. 840, 843, 212 N.W.2d 704, 706 (1973); Sober v. Smith, 179 Neb. 74, 78, 136 N.W.2d 372, 375 (1965); Abel v. Conover, 170 Neb. 926, 934, 104 N.W.2d 684, 688 (1960); Johnsen v. Taylor, 169 Neb. 280, 291, 99 N.W.2d 254, 261 (1959); Fremont, E. & M.V.R.R. v. French, 48 Neb. 638, 644, 67 N.W. 472, 474 (1896).

More specifically, the rule regarding nominal damages is this: "A negligence action is brought not to vindicate a right but to recover compensation for all damages sustained." Proof of damages is an essential element of the case. In a negligence action, therefore, actual damages are essential to recovery and nominal damages are not allowed. Beavers v. Christensen, 176 Neb. 162, 166, 125 N.W.2d 551, 554 (1963). *See also* Bittner v. Miller, 226 Neb. 206, 212, 410 N.W.2d 478, 482 (1987) ("[N]egligence is actionable only when it results in damages." here there was no evidence that leaving the sponge in plaintiff's body after surgery caused any damage).

However, where proof of damage is not an essential element of the case, nominal damages may be awarded. Beavers v. Christensen, 176 Neb. 162, 166, 125 N.W.2d 551, 554 (1963); Larson v. Marsh, 144 Neb. 644, 650, 14 N.W.2d 189, 193 (1944) (violation of statutory duty to place name on ballot). *See also* Suhr v. City of Scribner, 202 Neb. 364, 369, 275 N.W.2d 596, 600 (1979), *appeal after remand*, 207 Neb. 24, 295 N.W.2d 302 (1980) (wrongful eviction); D.W. Trowbridge Ford, Inc. v. Galyen, 200 Neb. 103, 109, 262 N.W.2d 442, 446 (1978) (breach of contract not to compete); George Rose Sodding & Grading Co. v. City of Omaha, 187 Neb. 683, 685–86, 193 N.W.2d 556, 558 (1972), *appeal after remand*, 190 Neb. 12, 205 N.W.2d 655 (1973) (trespass); Mathis v. State, Dept. of Rds., 178 Neb. 701, 707, 135 N.W.2d 17, 20 (1965) (taking an easement); Hutchens v. Kuker, 168 Neb. 451, 454, 96 N.W.2d 228, 231 (1959) (libel per se); Ord v. Benson, 163 Neb. 367, 372, 79 N.W.2d 713, 716 (1956) (breach of contract for purchase of tractor); Stewart v. Spade Twp., 157 Neb. 93, 97–98, 58 N.W.2d 841, 843 (1953) (in an action to recover reasonable value of labor, counterclaim for damage caused by laborer); K. Johnson & R. Seckman, *Nebraska Law on The Measure of Damages*, Ch. 7, General Rules for Breach of Contract Damages, at 18 (NCLE, Inc. 1983); Restatement (Second) of Contracts § 346 (1981).

b. Punitive Damages

The common wisdom is that punitive damages generally are not available in civil cases in Nebraska. *E.g.* O'Brien v. Cessna Aircraft Co., 298 Neb. 109, 139, 903 N.W.2d 432, 458 (2017) ("Under Nebraska law, 'punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.'"); Golnick v. Callender, 290 Neb. 395, 405, 860 N.W.2d 180, 190 (2015) ("In a negligence case . . . the plaintiff is not vindicating the public's interest in punishing the defendant's wrongful conduct . . . A plaintiff's interest in a negligence case is limited to compensation for the harm cause by the defendant's tortious conduct."); *Miller v. Kingsley*, 194 Neb. at 124, 230 N.W.2d at 472; *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 789,

217 N.W.2d 914, 915 (1974); *Univ. of Neb. at Omaha v. Paustian*, 190 Neb. 840, 843, 212 N.W.2d 704, 706 (1973); *Abel v. Conover*, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960) ("It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained. This rule is so well settled that we dispose of it merely by the citation of cases so holding."); *Fremont, E. & M.V.R.R. v. French*, 48 Neb. 638, 644, 67 N.W. 472, 474 (1896); *Boldt v. Budwig*, 19 Neb. 739, 745, 28 N.W. 280, 284 (1886). This rule is based upon an interpretation of Article VII, section 5 of the Nebraska Constitution; for this reason it applies even when the legislature attempts to impose "liability for actual damages and additional liability for the same act." *Abel v. Conover*, *supra*. See also *Univ. of Neb. at Omaha v. Paustian*, *supra*.

There is, however, a contrary view. The case relied upon by most others in the line of cases cited in the preceding paragraph is *Abel v. Conover*. *Abel* states that since the Nebraska Constitution provides that "all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is [unconstitutional]." *Abel*, *supra* at 932, 104 N.W.2d at 689. *Abel* does not state that punitive damages are not available in Nebraska. Rather, it states that under the Nebraska Constitution punitive damages, as a penalty, may not be paid to the private litigant. If they are available, they must be paid into the school fund. Vincent M. Powers, *Punitive Damages in Nebraska*, *The Nebraska Lawyer* 18 (June 2003) (citing *Abel*, *supra*; Neb. Const. art. VII, § 5).

This view of punitive damages raises a great many problems, among them, these: If a lawyer seeks punitive damages in Nebraska, does the school fund then have an interest in the litigation that is protectable? If so, how is that interest protected? If a plaintiff's lawyer seeks punitive damages, does that lawyer take on an obligation to the school fund or does that lawyer have an obligation to his or her private client to negotiate a settlement that increases the compensatory damages and decreases the punitives?

Other states have statutes requiring that some or all of any punitive damages be paid into a state fund of one sort or another. As this is written in the spring of 2011, the following state statutes have provisions for the payment of punitive damages to the state: Ga. Code Ann. § 51-12-5.1 (2010); Ind. Code Ann. § 34-51-3-6 (West 2009); Iowa Code Ann. § 668A.1 (West 2010); Mo. Ann. Stat. § 537.675 (West 2010); Or. Rev. Stat. § 31.735 (2010); Utah Code Ann. § 78-18-1 (2003). Neither the state nor any agency of the state is a party in interest under any of these statutes. By and large, the statutes have to do with things like the percentage of the punitive damages that go to the state, to whom the money is to be paid, and the rights of the state as a judgment creditor.

The interpretation of the Nebraska Constitution that it allows pu-

nitive damages so long as they are paid into the school fund is consistent with Nebraska's Wage Payment and Collection Act, which allows double or sometimes triple recovery for nonpayment of wages and states that the excess "shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska." Neb. Rev. Stat. § 48-1232 (Reissue 2010). Vincent M. Powers, *Punitive Damages in Nebraska*, The Nebraska Lawyer 18, 19 (June 2003). Regarding the Wage Payment and Collection Act, see NJI2d Civ. 4.52.

The Uniform Commercial Code specifically prohibits punitive damages, except as otherwise provided. Neb. U.C.C. § 1-106(1) (Reissue 2001).

Regarding punitive damages and a choice-of-law or conflict-of-law question, including discussion of the Restatement (Second) of Conflict of Laws, see *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 139-42, 903 N.W.2d 432, 458-460 (2017). See also *Miller v. Kingsley*, 194 Neb. at 125, 230 N.W.2d at 474-75 (citing the Full Faith and Credit Clause of the United States Constitution and holding that the fact that a judgment rendered in another state contains an award for punitive damages and that a judgment awarding punitive damages violates the public policy of Nebraska does not render the judgment unenforceable in Nebraska).

Punitive damages are allowed whenever necessary to "fully preserve and protect any Federal Constitutional right." *Gilliam v. City of Omaha*, 331 F.Supp. 4, 8 (D.Neb.1971), *rev'd on other grounds*, 459 F.2d 63 (8th Cir.1972).

The common wisdom regarding punitive damages in Nebraska comes with this caveat. In *University of Neb. at Omaha v. Paustian*, the Supreme Court upheld a provision of Nebraska's Worker's Compensation Act which increases compensation by 50% for delay in payment. The court concluded that this does not violate the rule in *Abel* and, in the process, said the following:

[O]ur holding in *Abel v. Conover*, . . . has no application in this case. Where the court there refers to "liability for actual damages" it seems evident that it is talking about actual damages as determined under the rules of the common law as applied by this court. The opinion in that case was founded upon a premise which the court stated in the following language: "It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained."

The Workmen's Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit. Compensation under the act

need bear no relationship to actual damages resulting from the injury.

University of Neb. at Omaha v. Paustian, 190 Neb. at 843–44, 212 N.W.2d at 706 (citations omitted). One interpretation of this passage is that the rule from *Abel* applies only to the redress of injuries to rights that existed at common law, and that it does not apply to the redress of statutory rights that did not so exist. Another interpretation is that this is not designed to punish the defendant, but to compensate the plaintiff for the loss of the use of the money. This provision of the Worker's Compensation Act stands outside of the *Vince Powers* interpretation, *supra*. This money is paid to the worker and not to the school fund.

6. The Collateral Source Rule

The general rule in negligence actions is that evidence of any source of collateral compensation available to the party seeking damages is inadmissible to the issue of the measure of damages. “[B]enefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. [This] prevent[s] a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.” *Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc.*, 232 Neb. 763, 767, 443 N.W.2d 872, 875 (1989) (to diagnose problem with grain bin, third party emptied it of grain; loss suffered includes cost of emptying bin; evidence third party emptied bin without submitting bill, inadmissible to issue of damages). *Accord, e.g., Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 63, 917 N.W.2d 435, 456 (2018) (concerning contractual indemnification); “[T]he fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. [This] ‘prevent[s] a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.’”; *Countryside Coop v. Harry A. Koch Co.*, 280 Neb. 795, 802-03, 790 N.W.2d 873, 881-82 (2010) (proceeds from two different insurance policies); *Fickle v. State*, 273 Neb. 990, 1009, 735 N.W.2d 754, 772 (2007), *clarified at* 274 Neb. 267, 268–69, 759 N.W.2d 113, 116 (2007) (same quotation both places: “Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule.”); *Shipler v. General Motors Corp.*, 271 Neb. 194, 231–33, 710 N.W.2d 807, 838–40 (2006); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 847–49, 560 N.W.2d 451, 455–56 (1997) (rule generally includes pension and disability benefits; rule discussed in context of two separate injuries); *Tetherow v. Wolfe*, 223 Neb. 631, 638–39, 392 N.W.2d 374, 380 (1986) (negligent drafting of contract for sale of land allowed purchaser to back out of deal and recover down payment; by contract, purchaser and seller split interest earned on escrow of down payment; reducing the damages recovered against the person who drafted the contract by the amount of interest retained by the seller violated the collateral source rule); *Huenink*

v. Collins, 181 Neb. 195, 196, 147 N.W.2d 508, 509 (1966) (that claimant was “indemnified for loss by insurance cannot be set up by the wrongdoer in mitigation of damages, where the wrongdoer did not contribute to the procurement of the insurance”); Harper v. Young, 139 Neb. 624, 629–30, 298 N.W. 342, 345 (1941) (evidence of plaintiff’s pension and the possibility of his receiving compensation from his employer); Taulborg v. Andresen, 119 Neb. 273, 276–77, 228 N.W. 528, 529–30 (1930) (“evidence of the financial standing of the parties is clearly inadmissible.”); Rosewater v. Hoffman, 24 Neb. 222, 230, 38 N.W. 857, 861 (1888) (evidence of defendant’s wealth).

See also SFI Ltd. P’ship 8 v. Carroll, 288 Neb. 698, 851 N.W.2d 82 (2014), stating the following:

Under the antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer. The antisubrogation rule has been extended to “implied coinsured”. To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchases. In addition, the insurer should not be in a situation where there exists a potential conflict of interest which could affect the insurer’s incentive to provide its insured with a vigorous defense.

Id., at 705, 851 N.W.2d at 88 (footnotes omitted).

“Not every casual or inadvertent reference to an insurance company in the course of trial will necessitate a mistrial. . . . ‘[W]hether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration.’” Bank v. Mickels, 302 Neb. 1009, 1023, 926 N.W.2d 97, 107 (2019) (noting that the appellant did not object at trial, but did file a motion for a mistrial at the close of the evidence; “the exchange was not emphasized”; “[t]he reference did not telegraph to the jury information on whether [the plaintiff] received the benefits of health insurance”; and “[t]he effect of the question and answer was mitigated by jury instructions that explained the collateral source rule”; *id.* at 1023–24, 926 N.W.2d at 107).

Evidence of compensation from a collateral source is not necessarily inadmissible to issues other than the measure of damages. For example, while such evidence is not admissible as evidence of the “value” of the injury, it may be admissible as evidence of the “extent” of the injury. Ferlise v. Raznick, 202 Neb. 745, 748–49, 277 N.W.2d 94, 95 (1979) (receipt of unemployment benefits on condition of being ready and willing to work relevant to whether plaintiff suffered a complete loss of earning capacity). In this regard, the collateral source rule is like the rules excluding evidence of liability insurance, subsequent remedial measures, offers to compromise and the like, Neb. Rev. Stat. §§ 27-407 *et seq.* (Reissue 2016): These rules do not exclude the evidence in all of its possible uses, but only in one or more specific forbidden uses.

The collateral source rule does not apply to benefits paid to the claimant by the tortfeasor or someone identified with the tortfeasor; such benefits stem from the tortfeasor and, therefore, are not collateral. R. Henderson, *Nebraska Law on the Measure of Damages*, Ch. 1, General Rules (NCLE, Inc. 1981) and R. Shugrue, *Nebraska Law on the Measure of Damages*, Ch. 1, General Rules, at 6 (NCLE, Inc. 1983) (updating and revising the 1981 work); *Beeder v. Fleer*, 211 Neb. 294, 298–300, 318 N.W.2d 708, 711 (1982) (“[T]he language and the intent of [Neb. Rev. Stat.] § 25-1222.01, which provides that an insurance company is entitled to credit on any judgment rendered against an insured for any payments or partial payment of claimed damages made on behalf of such party to an injured person or on his behalf to others, includes an assignee or subrogee of such injured person” *Id.* at 300, 318 N.W.2d at 711).

“[U]nemployment compensation benefits are not considered a collateral source for purposes of damages in employment cases.” *Pierce v. Landmark Management Group, Inc.*, 293 Neb. 890, 908, 880 N.W.2d 885, 901 (2016) (citing and discussing cases, *id.* at 908-909, 880 N.W.2d at 901, and “leav[ing] for another day consideration of whether deductions [or unemployment compensation benefits] for backpay awards . . . are mandatory or discretionary[.]” *id.* at 909, 880 N.W.2d at 901, and noting that the trial “court’s decision not to permit the jury to hear evidence of . . . unemployment benefits [does] not determine whether the employers were entitled to an offset of those benefits[.]” *id.*).

Regarding possible instruction on the collateral source rule, see NJI2d Civ. 4.01, Comment.

And regarding the rule against “double recovery” in a breach of contract action, see NJI2d Civ. 4.40, Comment.

7. Judgment Interest

There are two kinds of judgment interest: prejudgment interest and postjudgment interest. Each is governed in part by statute and in part by case law. “Postjudgment interest is governed by Neb. Rev. Stat. § 45-103.01 (Reissue 2010) and provides that such interest begins to accrue ‘from the date of entry of judgment.’ Construing § 45-103.01 and § 45-104 together, we hold that prejudgment interest under § 45-104 ends, and postjudgment interest begins, on the date of entry of judgment.” *Weyh v. Gottsch*, 303 Neb. 280, 316, 929 N.W.2d 40, 64 (2019).

a. Statutes Applying to Both Pre- and Postjudgment Interest

i. The Rate of Judgment Interest

Neb. Rev. Stat. § 45-103 (Reissue 2010) sets the generally applicable rate of judgment interest and delimits the cases to which it applies. This statutory rate does not apply to an action in which a statute sets

another rate or to a contract action where the parties have agreed to a different rate of interest. Neb. Rev. Stat. § 45-103 (Reissue 2010).

ii. Pleading Judgment Interest

“If a party does not pray for interest, none can be recovered.” *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 668-69, 392 N.W.2d 771, 775 (1986) (“The trial court was incorrect in awarding prejudgment interest in this case, since [plaintiff] had not requested it in its petition.”).

iii. Subtracting Payments Made Prior to Trial

“All payments made prior to trial by or on behalf of the defendant shall be subtracted from the judgment before interest as provided in subsection (1) of section 45-103.02 is added.” Neb. Rev. Stat. § 45-103.03 (Reissue 2010).

iv. Interest on Foreign Judgments

Interest on a foreign judgment is to be included as calculated under Nebraska law. *Nebraska Uniform Enforcement of Foreign Judgments Act*, Neb. Rev. Stat. § 25-1587.01 (Reissue 2016).

b. Prejudgment Interest

“Prejudgment interest is interest due, pursuant to statute, as interest that accrues prior to the rendition of a judgment.” *First Nat’l Bank v. Bolzer*, 221 Neb. 415, 421, 377 N.W.2d 533, 537 (1985). *Accord*, e.g., *Prudential Ins. Co. of Am. v. Greco*, 211 Neb. 342, 347-48, 318 N.W.2d 724, 727 (1982); *Lovelace v. Stern*, 207 Neb. 174, 180-81, 297 N.W.2d 160, 164-65 (1980).

When “the amount due as interest prior to judgment [is] not by reason of a statute but, rather, by reason of an agreement of the parties” the prejudgment interest rules do not apply. In fact, it is improper to refer to such an amount “as ‘prejudgment interest’ when in fact it is simply the interest contracted for by the parties . . .” *First Nat’l Bank*, 221 Neb. at 421-22, 377 N.W.2d at 537-38 (overruling earlier case with contrary language). *Accord*, e.g., *Prudential Ins.*, 211 Neb. at 347-48, 318 N.W.2d at 727; *Lovelace*, 207 Neb. at 180-81, 297 N.W.2d at 164-65. *See also* *AVG Partners I v. Genesis Health Clubs*, 307 Neb. 47, 64, 948 N.W.2d 212, 230 (2020) (“[I]nterest under [Neb. Rev. Stat. § 45-104] can be recovered on a lease, although the statute’s provisions may be superseded by the terms set forth in the lease.”).

For an extensive discussion of prejudgment interest, *see* *AVG Partners I v. Genesis Health Clubs*, 307 Neb. 47, 948 N.W.2d 212 (2020); *Weyh v. Gottsch*, 303 Neb. 280, 301-17, 929 N.W.2d 40, 55-66 (2019).

“In Nebraska, there are two statutes that authorize recovery of prejudgment interest. The first, § 45-104, was enacted in 1879, and the

second, § 45-103.02, was enacted in 1986 and amended in 1994.’’ *AVG Partners I*, 307 Neb. at 61, 948 N.W.2d at 228 (quoting *Weyh*, 303 Neb. at 301, 929 N.W.2d at 55). *See generally* *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 242–44, 959 N.W.2d 251, 280 (2021).

We now hold that §§ 45-103.02 and 45-104 are alternative and independent statutes authorizing the recovery of prejudgment interest. In other words, the Legislature has created three separate ways to recover prejudgment interest, and none is preferred. Section 45-103.02(1) authorizes the recovery of prejudgment interest on unliquidated claims when the statutory preconditions are met, § 45-103.02(2) authorizes the recovery of prejudgment interest on liquidated claims, and § 45-104 authorizes the recovery of prejudgment interest on four categories of contract-based claims without regard to whether the claim is liquidated or unliquidated.

All three of these statutory provisions establish different criteria for the recovery of prejudgment interest, and none makes the recovery of prejudgment interest contingent on proof of another. We thus disapprove of our prior cases that allowed prejudgment interest only if § 45-104 was satisfied and the claim was also liquidated[.]

Weyh, 303 Neb. at 313-14, 303 N.W.2d at 313. *See also* *AVG Partners I*, 307 Neb. at 65, 948 N.W.2d at 230 (“[W]hether a claim is liquidated or unliquidated is immaterial with respect to a litigant’s ability to recover prejudgment interest under § 45-104.”)

Section 45-103.02 provides for prejudgment interest in two situations: (1) on an *unliquidated* claim, under some conditions and with some exceptions stated immediately below, “interest . . . shall accrue on the unpaid balance . . . from the date of the plaintiff’s first offer of settlement which is exceeded by the judgment until the entry of judgment,” § 45-103.02(1); and, (2) on a *liquidated* claim, with the same exceptions stated immediately below, “interest . . . shall accrue on the unpaid balance . . . from the date the cause of action arose until the entry of judgment,” § 45-103.02(2).

The exceptions to the rule in the preceding paragraph are these: Interest shall not accrue prior to the date of entry of judgment for “[a]ny action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee’s office or employment” or for “[a]ny action arising under Chapter 42” of the Nebraska Revised Statutes, which chapter deals generally with husbands and wives, including divorce, alimony, and child support. Neb. Rev. Stat. § 45-103.04 (Reissue 2010). *Accord* *Eikmeier v. City of Omaha*, 280 Neb. 173, 179, 783 N.W.2d 795, 800 (2010). These exceptions apply to liquidated and unliquidated claims.

Section 45-104 applies to four types of claims—all contract based—under which prejudgment interest is allowed: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment.

AVG Partners I, 307 Neb. at 61–62, 948 N.W.2d at — (stating that it does not appear that § 45-104 would apply to “an action for damages to property resulting from grading of a street . . . [or] to recover an overpayment of insurance proceeds under alternative theories of fraudulent misrepresentation and mutual mistake.”).

“Whether prejudgment interest should be awarded is reviewed de novo on appeal.” Same quotation: *Fitzgerald v. Cmty. Redev. Corp.*, 283 Neb. 428, 442, 811 N.W.2d 178, 191 (2012); *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 447, 810 N.W.2d 666, 676 (2011); *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 778, 725 N.W.2d 168, 173 (2006). *Accord* *Wayne L. Ryan Revocable Trust v. Ryan*, 308 Neb. 851, 873, 957 N.W.2d 481, 498 (2021); *McGill Restoration*, 309 Neb. at 242, 959 N.W.2d at 280 (2021); *AVG Partners I*, 307 Neb. at 54, 948 N.W.2d at 224; *Weyh*, 303 Neb. at 295, 929 N.W.2d at 52; *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 168, 871 N.W.2d 776, 802 (2015); *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 377, 778 N.W.2d 433, 444 (2010); *Blue Valley Coop. v. National Farmers Org.*, 257 Neb. 751, 757, 600 N.W.2d 786, 792 (1999).

Finally, note that Nebraska Court Rule of Pleading § 6-1108(a) states, in part that if recovery of money is “demanded, . . . and if interest thereon be claimed, the time from which interest is to be computed shall . . . be stated.” However, as stated in *AVG Partners I* “compliance with § 6-1108(a) is not determinative where entitlement to interest is based on statute and the adverse party had notice and an opportunity to be heard prior to judgment.” *AVG Partners I*, 307 Neb. at 64, 948 N.W.2d at 230 (explaining why this is so *id* at 61–64, 948 N.W.2d at 227–30).

i. Liquidated Claims

With some exceptions discussed below, § 45-103.02(2) allows prejudgment interest on a liquidated claim. *See, e.g.*, *Countryside Coop v. Harry A. Koch Co.*, 280 Neb. 795, 814–15, 790 N.W.2d 873, 889 (2010); *Davis v. Davis*, 265 Neb. 790, 797, 660 N.W.2d 162, 167 (2003); *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 482–83, 507 N.W.2d 465, 477 (1993); *Otto Farms, Inc. v. First Nat'l Bank of York*, 228 Neb. 287, 293, 422 N.W.2d 331, 336 (1988) (prejudgment interest in conversion action).

Section 45-104 provides that,

[u]nless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

Neb. Rev. Stat. § 45-104 (Reissue 2010). In 2019, the Court held that “§ 45-104 authorizes recovery of prejudgment interest on four categories of contract-based claims without regard to whether the claim is liquidated or unliquidated,” and disapproved of prior cases allowing prejudgment interest only if § 45-104 was satisfied. *Weyh v. Gottsch*, 303 Neb. 280, 301-17, 929 N.W.2d 40, 55-66 (2019).

“Interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment.” Neb. Rev. Stat. § 45-103.02(2) (Reissue 2010).

A claim is liquidated “when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery. A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.” Same quotation: *Fitzgerald v. Cmty. Redev. Corp.*, 283 Neb. 428, 461, 811 N.W.2d 178, 203 (2012) (citation omitted); *Countryside Coop v. Harry A. Koch Co.*, 280 Neb. 795, 814-15, 790 N.W.2d 873, 889 (2010) (footnotes omitted). *Accord, e.g.*, *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 184, 871 N.W.2d 776, 802 (2015); *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 172, 825 N.W.2d 779, 792 (2013); *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 778, 725 N.W.2d 168, 173 (2006); *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., Co.*, 269 Neb. 692, 701, 695 N.W.2d 665, 673 (2005); *Cheloha v. Cheloha*, 255 Neb. 32, 41-45, 582 N.W.2d 291, 301 (1998).

The amount upon which prejudgment interest would accrue is not in dispute if it is either fixed or readily ascertainable by computation with exactness and without reliance on opinion or discretion. *Wells Fargo Alarm Servs. v. Nox-Crete Chems., Inc.*, 229 Neb. 43, 47, 424 N.W.2d 885, 889 (1988); *Hill v. City of Lincoln*, 221 Neb. 719, 723, 380 N.W.2d 296, 299 (1986); *Land Paving Co. v. D.A. Constr. Co.*, 215 Neb. 406, 407-08, 338 N.W.2d 779, 780 (1977); *Friehe v. State Bd. of Educ. Lands & Funds*, 199 Neb. 504, 506, 259 N.W.2d 925, 927 (1977). Thus, where the evidence presented furnishes data that, if believed, makes it possible to compute damages with exactness, the amount of recovery is considered liquidated. *Treptow Co. v. Duncan Aviation, Inc.*, 210 Neb.

72, 79, 313 N.W.2d 224, 228 (1981). On the other hand, if damages cannot be computed without reliance upon opinion or discretion, the amount is not readily ascertainable and, therefore, is not liquidated. *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 270, 354 N.W.2d 625, 634 (1984); *Erin Rancho Motels, Inc. v. United States Fidelity and Guar. Co.*, 218 Neb. 9, 14-15, 352 N.W.2d 561, 565 (1984) (true even though party required to pay had offered settlement in a specific amount); *Smith v. Fettin Roofing Co., Inc.*, 213 Neb. 184, 188, 328 N.W.2d 470, 473 (1982); *Friehe*, 199 Neb. at 506, 259 N.W.2d at 927 (reliance upon opinion testimony of an expert precluded liquidation); *Ritzau v. Wiebe Constr. Co.*, 191 Neb. 92, 97, 214 N.W.2d 244, 247-48 (1974); *In re Ruwe's Estate v. Ruwe*, 190 Neb. 663, 666-67, 211 N.W.2d 610, 613 (1973) (right to recover "reasonable rental value" of goods or services precludes liquidation since ascertainment of "reasonable value" necessarily depends on exercise of opinion or discretion); *Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc.*, 189 Neb. 30, 35, 199 N.W.2d 729, 733 (1972) (because computation of damages required use of an accounting method the jury was not required to accept as the proper measure of damages, computation was not possible without reliance upon opinion or discretion).

As noted above, this is so except in an "action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment" or for "[a]ny action arising under Chapter 42 of the Nebraska Revised Statutes, which chapter deals generally with husbands and wives, including divorce, alimony, and child support. Neb. Rev. Stat. § 45-103.04 (Reissue 2010). *Accord Eikmeier v. City of Omaha*, 280 Neb. 173, 179, 783 N.W.2d 795, 800 (2010). These exceptions apply to liquidated and unliquidated claims.

Regarding liquidated claims, *see also* part 8 of this Introduction, below.

ii. Unliquidated Claims

"Ordinarily, prejudgment interest is *unavailable* on unliquidated damages." *Martensen v. Rejda Bros.*, 283 Neb. 279, 292, 808 N.W.2d 855, 866 (2012) (emphasis added).

However, when a defendant declines a plaintiff's offer to settle and the subsequent judgment against the defendant exceeds the offer, then, by statute, that exposes the defendant to prejudgment interest on an unliquidated claim which otherwise might have been immune from prejudgment interest.

Section 45-103.02(1) [of the Nebraska Revised Statutes (Reissue 2010)] controls the award of prejudgment interest on an unliquidated claim where an offer has been refused and the judgment exceeds the offer. . . .

[U]nder § 45-103.02(1), where the claim is unliquidated and the plaintiff's offer of settlement is exceeded by the judgment, prejudgment interest accrues on the full amount of the judgment starting on the date of the plaintiff's first offer of settlement which offer is exceeded by the judgment. To the extent that [the previous edition] . . . of the introduction to chapter 4 of N.JI2d Civ. is to the contrary, it is disapproved.

Martensen, 283 Neb. at 292-93, 808 N.W.2d at 866 (citation omitted) ("Offers to settle and offers of judgment are generally encouraged. . . . '[I]t is the policy of the law to encourage rather than discourage the settlement of controversies by the parties out of court.' *Tadros v. City of Omaha*, 273 Neb. 935, 942, 735 N.W.2d 377, 382 (2007).").

The statute imposes four conditions on this settlement-offer prejudgment interest. (1) The offer must be made in writing and served "upon the defendant by certified mail, return receipt requested, [and] . . . allow judgment to be taken in accordance with the terms and conditions stated in the offer[.]" (2) It must be "made not less than ten days prior to the commencement of the trial[.]" (3) "A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney [must be] . . . filed with the clerk of the court in which the action is pending[.]" (4) And the offer must have not been "accepted prior to the trial or within thirty days of the date of the offer, whichever occurs first." Neb. Rev. Stat. § 45-103.02(1)(a)-(d) (Reissue 2010). See *Martensen*, 283 Neb. at 292, 808 N.W.2d at 866.

These four conditions do not apply to awards of prejudgment interest under § 45-103.04. Neb. Rev. Stat. § 45-103.02(1) (Reissue 2012). *Accord*, e.g., *Cheloha v. Cheloha*, 255 Neb. 32, 41-42, 582 N.W.2d 291, 299 (1998). Older cases state a contrary rule. In 1994 that contrary rule was changed by amendment to § 45-103.02. *E.g.*, *Cheloha*, *supra*.

"There is no specific statutory requirement that a settlement offer pursuant to § 45-103.02 must be made during the pendency of litigation in order to serve as the basis for recovery of prejudgment interest." *Wortman*, 254 Neb. at 550, 578 N.W.2d at 417.

In this regard, note that an offer of judgment is different from a settlement offer. *Young v. Midwest Fam. Mut. Ins. Co.*, 272 Neb. 385, 389, 722 N.W.2d 13, 17 (2006). Note also, however, that the settlement offer need not explicitly state an offer "to allow judgment to be taken." It is enough that the offer included references to § 45-103.02 and clearly indicated that "it was intended as a settlement offer made pursuant thereto. By its specific reference to the statute, the letter clearly placed [the offeror] on notice that acceptance of the proposal would require her to allow a judgment to be taken in the amount of the demand and that failure to do so could result in liability for prejudgment interest." *Wortman by & Through Wortman v. Unger*, 254 Neb. 544, 549-50, 578 N.W.2d 413, 416 (1998).

Again, as noted above, this is so except in an “action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee’s office or employment” or for “[a]ny action arising under Chapter 42 of the Nebraska Revised Statutes, which chapter deals generally with husbands and wives, including divorce, alimony, and child support. Neb. Rev. Stat. § 45-103.04 (Reissue 2010). *Accord* Eikmeier v. City of Omaha, 280 Neb. 173, 179, 783 N.W.2d 795, 800 (2010). These exceptions apply to liquidated and unliquidated claims.

c. Postjudgment Interest

“Interest as provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of rendition of judgments until satisfaction of judgment.” Neb. Rev. Stat. § 45-103.01 (Reissue 2010).

Regarding interest from the date of a county court judgment later affirmed by a district court, see Neb. Rev. Stat. § 25-2733 (Reissue 2016).

Regarding including postjudgment interest in an appellate bond on appeal from county court to district court, see Neb. Rev. Stat. § 25-2730(1) (Reissue 2016). Regarding including postjudgment interest in an appellate bond on appeal to the Court of Appeals or the Supreme Court, see Neb. Rev. Stat. § 25-1916(1) (Reissue 2016).

Regarding postjudgment interest against the state, see the following: Neb. Rev. Stat. § 25-21,211 (Reissue 2016) (when state cannot pay adverse judgment from current appropriations and judgment stayed until end of next legislative session); Neb. Rev. Stat. § 25-21,213 (Reissue 2016) (when state files notice of appeal but does not appeal or does appeal and judgment is affirmed).

“[W]hen a decree falls within the purview of the applicable post-judgment interest statute, interest is chargeable without an express direction to that effect appearing in the decree.” *Sherard v. State*, 244 Neb. 743, 746, 509 N.W.2d 194, 197 (1993) (post-judgment interest statute here used mandatory language: interest “shall” be assessed). *Accord* *Stuart v. Burcham*, 62 Neb. 84, 86, 86 N.W. 898, 900 (1901).

8. Breach of Contract: Liquidated-Damages Provisions versus Penalty Provisions

In the law of remedies for nonperformance or breach of contract there is a distinction between liquidated-damage provisions and penalty provisions. The former is allowed, the latter is not, so the question becomes, which is which? First, however, it is important to recognize “ “[t]he whole subject of penalty versus liquidated damages only arises

when the parties to a contract have attempted to provide for a remedial right upon breach of a contract.” ’ ’ Schuyler Co-op. Ass’n v. Sahs, 276 Neb. 578, 583, 755 N.W.2d 802, 806 (2008) (quoting *Berens & Tate v. Iron Mt. Info. Mgt.*, 275 Neb. 425, 431–32, 747 N.W.2d 383, 388 (2008)) (citation to case from which *Berens & Tate* quoted omitted). The question “only arises when the contractual provision seeks to determine, in advance, the measure of damages resulting from a parties’ breach or nonperformance of the contract.” *Berens & Tate*, 275 Neb. at 431, 747 N.W.2d at 388. This means, for example, that “a provision for payment of a specified sum as compensation for services already contemplated by the contract, as opposed to compensation for injury resulting from a breach of the contract, is neither a liquidated damages clause nor a penalty provision.” *Id.* In fact, “a contractual provision that requires payment based on something other than a breach of the contract is neither a liquidated damages clause nor a penalty provision.” *Id.*

“In the context of a liquidated damages provision, [the Supreme Court] has held that ‘parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.’” *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 24, 645 N.W.2d 519, 527 (2002). *Accord Berens & Tate*, 275 Neb. at 430, 747 N.W.2d at 387. The court consistently upholds “the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided that stipulated sum is reasonable in light of the circumstances.” *Reichert, supra*.

Whether a court will enforce a liquidated damage clause in a contract depends upon whether the court considers it to be a true liquidated damages clause or a penalty clause. *E.g., Reichert*, 264 Neb. at 25, 645 N.W.2d at 527; *Abel Constr. Co. v. School Dist.*, 188 Neb. 166, 170, 195 N.W.2d 744, 747 (1972); *Sofio v. Glissmann*, 156 Neb. 610, 624, 57 N.W.2d 176, 184 (1953); *Edgar v. Anthes*, 109 Neb. 546, 548, 191 N.W. 682, 683 (1922).

Whether the sum stipulated in the contract is to be considered as liquidated damages or as a penalty is a question of law to be determined by the court, not the jury. *Berens & Tate*, 275 Neb. at 429, 747 N.W.2d at 387; *Abel Constr., supra*, 188 Neb. at 170, 195 N.W.2d at 747; *Parsons Constr. Co. v. Metropolitan Utils. Dist.*, 170 Neb. 709, 713, 104 N.W.2d 272, 275 (1960); *Sofio*, 156 Neb. at 624, 57 N.W.2d at 184; *Stanford Motor Co. v. Westman*, 151 Neb. 850, 858, 39 N.W.2d 841, 846 (1949).

An express declaration in the parties’ contract, using the term “penalty,” “forfeiture,” “liquidated damages,” or “stipulated damages” is not conclusive and not binding on the court’s interpretation as to whether the contract provided for liquidated damages or a penalty. *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 496 (8th Cir.1916), *cert. denied*, 242 U.S. 643, 37 S.Ct. 212, 61 L.Ed. 542 (1916); *Abel Constr.*, 188 Neb. at 170, 195 N.W.2d at 747; *Parsons Constr.*, 170

Neb. at 713, 104 N.W.2d at 275; *Stanford Motor Co.*, 151 Neb. at 858–59, 39 N.W.2d at 846.

A stipulated amount will be considered liquidated damages rather than a penalty if, at the time the parties contracted, reasonably anticipated damages were difficult to ascertain, and the amount stipulated either is a reasonable estimate of probable damages or is reasonably proportional to the actual damages caused by the breach; otherwise it is a penalty clause. *Berens & Tate*, 275 Neb. at 430–31, 747 N.W.2d at 387; *Bando v. Cole*, 197 Neb. 722, 726, 250 N.W.2d 651, 653 (1977); *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 401, 238 N.W.2d 240, 243 (1976). Reasonableness is generally a question of whether the amount is so great as to constitute a penalty. *Reichert*, 264 Neb. at 24, 645 N.W.2d at 527. If construction is doubtful, the court will usually consider the provision a penalty. *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 319, 320, 179 N.W. 546, 546 (1920). *But see Kealy v. Harter*, 682 F.2d 198, 200 (8th Cir.1982) (court followed this general rule but recognized a “general trend away from disfavoring provision for liquidated damages.”).

Communications Workers of Am. v. Abrahamson, 228 Neb. 335, 422 N.W.2d 547 (1988) is a liquidated damages case with unusual facts. Pursuant to *Communications’* contract with its members, the labor union imposed fines on union members who had worked during a strike. The court concluded that “these reasonable fines may be considered liquidated damages enforceable by the courts.” *Id.* at 346, 422 N.W.2d at 554. (“[A]ctual damages to the union are impossible to ascertain. It is just such a situation that liquidated damages are intended to cover The amount of the fines assessed was based on a reasonable calculation [roughly equivalent to a day’s wages for every day the employee crossed the picket line] and should be upheld.” *Id.*)

“When . . . the parties [to a contract] are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement, courts rarely find that liability limitations are unconscionable.” *Reichert*, 264 Neb. at 25, 645 N.W.2d at 527. *See also Berens & Tate*, 275 Neb. at 432–33, 747 N.W.2d at 389 (“[W]e have been reluctant to modify contracts between parties with business experience, as opposed to contracts between consumers and skilled corporate parties. [B]usiness operators are free to establish the prices they want for their services. . . .”).

If the court finds that the stipulated amount was intended as liquidated damages rather than a penalty, it is proper for the court to direct a verdict for the amount stipulated. *Camp v. Pollock*, 45 Neb. 771, 776, 64 N.W. 231, 232 (1895). *See also Abel Constr.*, 188 Neb. at 167, 195 N.W.2d at 746; *Stanford Motor Co.*, 151 Neb. at 851, 39 N.W.2d at 842 (wherein the courts affirmed directed verdicts based upon liquidated damages clauses).

“Ordinarily a sum paid in part performance of a contract, with a

provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages." *Porter v. Smith*, 240 Neb. 928, 933, 486 N.W.2d 846, 851 (1992) (citations and multiple quotation marks omitted).

A claim is not liquidated when a reasonable controversy exists as to either the right to recover or the amount of such recovery. *E.g.*, *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 1044, 776 N.W.2d 188, 201 (2009); *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 404, 529 N.W.2d 16, 21 (1995); *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 482–83, 507 N.W.2d 465, 477 (1993) (exact amount must be determinable without opinion or discretion inherent in fact finding process); *Lutheran Med. Ctr. v. City of Omaha*, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988); *Circle 76 Fertilizer Inc. v. Nelsen*, 219 Neb. 661, 669, 365 N.W.2d 460, 467 (1985); *Ellis & Guy Adver., Inc. v. Cohen*, 219 Neb. 340, 346, 363 N.W.2d 180, 185 (1985) ("Here, while there is no reasonable controversy as to Ellis & Guy's right to recover from someone nor as to the amount of recovery, there is a controversy as to from whom Ellis & Guy may recover Such a dispute is a controversy which requires that prejudgment interest not be awarded."); *O'Keefe Elevator Co., Inc. v. Second Ave. Props., Ltd.*, 216 Neb. 170, 175–76, 343 N.W.2d 54, 57 (1984); *Langel Chevrolet-Cadillac, Inc. v. Midwest Bridge & Constr. Co.*, 213 Neb. 283, 289, 329 N.W.2d 97, 101 (1983); *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 143–44, 231 N.W.2d 110, 114 (1975).

If neither the right to recover, nor the amount claimed, is placed in dispute, and the only dispute is whom to pay, then the claim is liquidated. *D.K. Meyer Corp. v. Bevco, Inc.*, 206 Neb. 318, 325–26, 292 N.W.2d 773, 777 (1980). "Liquidated claims are those where there is no reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery." *Blue Valley Coop. v. National Farmers Org.*, 257 Neb. 751, 764, 600 N.W.2d 786, 796 (1999).

The fact that a party asserts a counterclaim against the plaintiff does not by itself mean that the plaintiff's right to recover is reasonably in dispute and, therefore, that the claim must be unliquidated. If the defending party loses on its counterclaim, and the amount claimed was otherwise liquidated, the trier of fact may determine whether the counterclaim presented a reasonable controversy as to the right to recover. *Land Paving Co.*, 215 Neb. at 407–08, 338 N.W.2d at 780 (trial court dismissed counterclaim in a contract action; appellate court held "[t]he effect of the trial court's findings was to determine that no reasonable controversy existed as to the plaintiff's right to recover"); *King v. Sky Harbor Air Serv., Inc.*, 204 Neb. 4, 5, 281 N.W.2d 209, 210 (1979). Conversely, if the defending party succeeds on its counterclaim, a reasonable controversy necessarily existed. *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 308–09, 338 N.W.2d 601, 607 (1983).

Similarly, "in an action for a liquidated sum . . . , the amount

claimed does not become an unliquidated claim merely because of the assertion of an offset, and . . . if the trier of fact finds against the defendant on the offset, prejudgment interest should be awarded on the plaintiff's claim." *Wiebe Constr. Co. v. School Dist.*, 198 Neb. 730, 737–38, 255 N.W.2d 413, 417 (1977). On the other hand, if the setoff succeeds, then the claim subject to the offset is unliquidated. *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 754, 429 N.W.2d 328, 334 (1988) (citing *Langel Chevrolet-Cadillac*, 213 Neb. at 289–90, 329 N.W.2d at 102). *But see Wiebe Constr. Co.*, *supra*, noting that other courts consider claims liquidated even when an offset is allowed. In *Langel*, the court stated that: "Whether we wish to go that far can be decided when a pertinent case reaches us." 198 Neb. at 738, 255 N.W.2d at 417. Neither *Gottsch* nor *Langel* discusses this point, though *Gottsch* does clearly state the rule.

"[L]iquidated damages and mitigation of damages are antithetic doctrines." *Browning Ferris Indus. of Neb. v. The Eating Establishment*, 6 Neb. App. 608, 614, 575 N.W.2d 885, 889 (1998). When a contract contains a valid liquidated damage clause, there is no duty to mitigate. However, a contracting party cannot "negate the general duty to mitigate damages by merely inserting a liquidated damages provision in a contract." *Id.* The liquidated-damages provision must be valid and enforceable. Regarding mitigation of damages, see particularly N.J.2d Civ. 4.70. *See also*, the discussion of the collateral source rule in part A(6) of the Introduction to this chapter.

See also part 7(b)(i)-(ii) of this Introduction, above.

9. Court Awarded Attorney Fees in Civil Actions

a. In General

The general statutory authority for such an award of fees is Neb. Rev. Stat. § 25-824 (Reissue 2016). (In addition, as discussed below, there are a few other situations in which attorney fees can be awarded, including situations where courts have inherent power to award such fees and where state courts are enforcing certain federal statutory rights.) Neb. Rev. Stat. § 25-824.01 (Reissue 2016) lists 10 nonexclusive factors Nebraska courts consider in determining the amount of the fees to be assessed. *See McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 240–41, 959 N.W.2d 251, 279 (2021) ("[T]he court considers a number of factors, including, but not limited to, the 10 factors listed in § 25-824.01.)

The statutory authority for such an award in workers' compensation cases is Neb. Rev. Stat. § 48-125(4)(b) (Cum. Supp. 2018). For a discussion of attorney fees in workers' Compensation cases, *see, e.g.*, *Sellers v. Reefer Systems, Inc.*, 305 Neb. 868, 943 N.W.2d 275 (2020).

"A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme

Court has recognized and accepted a uniform course of procedure for allowing attorney fees.” *White v. White*, 296 Neb. 772, 777, 896 N.W.2d 600, 604 (2017). *Accord* *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 325 (2019); *Millard Gutter Co. v. American Fam. Ins. Co.*, 300 Neb. 466, 478–79, 915 N.W.2d 58, 67 (2018) (“[W]hile our cases have not always been consistent in their treatment of taxable costs, we recently recommitted to the basic principle that ‘it is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs.’ To that end, we have expressly disapproved of our prior cases which permitted the recovery of litigation expenses without an explicit basis in statute or uniform procedure.” (footnotes omitted)); *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 881, 896 N.W.2d 156, 198 (2017) (discussing the Junkin Act, Nebraska’s unlawful restraint of trade statutes, which are found at Neb. Rev. Stat. §§ 59-801-59-831 (Reissue 2010), and which allows the plaintiff to recover costs and reasonable attorney fees); *Vlach v. Vlach*, 286 Neb. 141, 148, 835 N.W.2d 72, 78 (2013); *Eicher v. Mid America Financial Inv. Corp.*, 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005) (citing cases); *In re Application of SID No. 384*, 259 Neb. 351, 365, 609 N.W.2d 679, 689 (2000); *Woollen v. State*, 256 Neb. 865, 887, 593 N.W.2d 729, 744 (1999) (citing cases).

Examples of specific statutes and courses of procedure can be found below in this part of this Introduction.

b. Frivolous Conduct During the Course of Litigation

“Courts additionally have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.” *White*, 296 Neb. at 777, 896 N.W.2d at 604. “[A]ttorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct.” *Seldin v. Estate of Silverman*, 305 Neb. 185, 210, 939 N.W.2d 768, 789 (2020) (referencing Neb. Rev. Stat. § 25-824(2) (Reissue 2016)). *Accord*, e.g., *Nathan v. McDermott*, 306 Neb. 216, 247–48, 945 N.W.2d 92, 115–16 (2020); *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 325 (2019); *Pinnacle Enters. v. City of Papillion*, 302 Neb. 297, 306, 923 N.W.2d 372, 379 (2019); *Peterson v. Don Peterson & Assocs. Ins. Agency, Inc.*, 234 Neb. 651, 658–59, 452 N.W.2d 517, 522 (1990).

“A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant’s position. The term ‘frivolous’ connotes an improper motive or legal position so wholly without merit as to be ridiculous.” *Nathan*, 306 Neb. at 247–48, 945 N.W.2d at 115; *Seldin*, 305 Neb. at 210, 939 N.W.2d at 944. *Accord*, e.g., *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309

Neb. 202, 24–42, 959 N.W.2d 251 (2021); *George Clift Enters., Inc. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 816 947 N.W.2d 510, — (2020) (“The determination of whether a particular claim or defense is frivolous must depend upon the facts of the particular case.”); *Korth v. Luther*, 304 Neb. 450, 485, 935 N.W.2d 220, — (2020); *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 28, 810 N.W.2d 677, 685-86 (2012) (including a claim “made in bad faith”).

“Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.” Same quotation: *Nathan*, 306 Neb. at 248, 947 N.W.2d at 115; *Seldin*, 305 Neb. at 210, 939 N.W.2d at 789. *Accord Korth*, 304 Neb. at 474, 935 N.W.2d at —.

The doctrine that “a party is protected from tort liability for the act of filing a lawsuit . . . does not protect a party from liability for the act of filing a ‘sham’ lawsuit. A lawsuit is a ‘sham’ if it both (1) objectively baseless in the sense that no reasonable litigant could expect success on the merits and (2) subjectively motivated by bad faith.” *ACI Worldwide Corp.*, 296 Neb. 818, 861, 861 N.W.2d at 187 (paragraph break and footnotes omitted).

Neb. Rev. Stat. 25-842(2) (Reissue 2016) provides that,

“[E]xcept as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney’s fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Subsection 5 applies when a party makes a good faith attempt to establish a new theory of law or files a timely voluntary dismissal. Subsection (6) applies to parties who are not licensed attorneys and who are appearing without an attorney and excepts them from subsection (3) unless they “clearly knew or reasonable should have known” that all or part of their “action or defense was frivolous or made in bad faith.”

c. Marital Dissolution Cases

“[I]n dissolution cases, as a matter of custom, attorney fees and costs are awarded to prevailing parties. [A] uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.” *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 325–26 (2019) (stating things that should be considered in awarding attorney fees in a dissolution action) (footnote omitted).

Furthermore, the Legislature has authorized the court to award attorney fees to an attorney the county has appointed in a dissolution ac-

tion “if the court finds that the party responsible is indigent” Neb. Rev. Stat. § 42-358(1) (Reissue 1010). See *White*, 296 Neb. at 777-780, 896 N.W.2d at 604-06 (“[T]he Legislature has determined that [such] . . . is for a public purpose only when a responsible party to the dissolution is indigent. If such responsible party is not indigent, the appointed attorney has other means of pursuing payment of his or her fees and expenses. Alternatively, dissolution courts have the power to order that the underlying parties be jointly and severally liable for the payment of the court-appointed attorney’s fees.” *White*, 296 Neb. at 779, 896 N.W.2d at 606.). See also *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 326 (2019) (stating the award is discretionary with the trial court and is reviewed de novo on the record for abuse of discretion); *Vlach*, 286 Neb. at 149, 835 N.W.2d at 74 (same as *Moore*).

d. Court Appointed Guardian or Conservator

The Legislature has also authorized the court to award attorney fees to a court appointed guardian or conservator for incapacitated persons. In re Guardianship & Conservatorship of Alice H., 303 Neb. 235, 243, 927 N.W.2d 787, 792 (2019) (quoting relevant parts of Neb. Rev. Stat. § 30-2620.1 (guardianship) and § 30-2643 (conservator ship)).

e. An Action on an Insurance Policy

“[I]n an ‘action upon any type of insurance policy . . . against any company, . . . the court, upon rendering judgment against such company, . . . shall allow the plaintiff a reasonable sum as an attorney’s fee.’” *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 380, 778 N.W.2d 433, 446 (2010) (quoting Neb. Rev. Stat. § 44-359 (Reissue 2010)). However, a plaintiff who rejects an insurer’s “offer of judgment and later fails to recover more than the amount offered” may not recover an attorney fee. *Dutton-Lainson*, 279 Neb. at 380, 778 N.W.2d at 446 (emphasis added) (quoting *Young v. Midwest Family Mut. Ins. Co.*, 272 Neb. 385, 387, 722 N.W.2d 13, 16 (2006) and citing Neb. Rev. Stat. §§ 44-359 and 25-901 (Reissue 2010)).

An offer of judgment is not the same as a settlement offer. *Young*, 272 Neb. at 389, 722 N.W.2d at 17. However, a settlement offer need not explicitly state an offer “to allow judgment to be taken.” In a case involving prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2004)[, now published as § 45-103.02 (Reissue 2016),] the court held that it was enough that the offer included references to § 45-103.02 and clearly indicated that “it was intended as a settlement offer made pursuant thereto. By its specific reference to the statute, the letter clearly placed [the offeror] on notice that acceptance of the proposal would require her to allow a judgment to be taken in the amount of the demand and that failure to do so could result in liability for prejudgment interest.” *Wortman By and Through Wortman v. Unger*, 254 Neb. 544, 549-50, 578 N.W.2d 413, 416 (1998). It seems that the same interpretation would apply here.

Furthermore, and again referencing prejudgment interest under

Neb. Rev. Stat. § 45-103.02 (Reissue 2010), the Court has held that “[t]here is no specific statutory requirement that a settlement offer pursuant to § 45-103.02 must be made during the pendency of litigation in order to serve as the basis for recovery of prejudgment interest.” *Wortman*, 254 Neb. at 550, 578 N.W.2d at 417. It would seem that the same interpretation would apply here.

See below for a discussion of prejudgment interest generally.

f. Attorney Fees as an Element of Damage

Attorney fees may be recoverable as a separate element of damages. Sometimes one of the items of damages in the instant case will be fees paid to attorneys for their work in prior proceedings, when those expenditures were a proximate result of the accident under litigation. *Woollen v. State*, 256 Neb. 865, 887–88, 593 N.W.2d 729, 744 (1999) (citing cases) (legal expenses paid in prior proceedings brought as a result of medical fees incurred for the treatment of injuries sustained as a result of the accident that is the subject of the case at bar; if damages are reduced under the comparative negligence statute, then these fees are reduced along with other damages).

“One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.”

Zimmerman v. FirstTier Bank, N.A., 255 Neb. 410, 422, 585 N.W.2d 445, 454 (1998) (quoting Restatement (Second) of Torts § 914(2) (1979)). *Accord Tetherow v. Wolfe*, 223 Neb. 631, 638, 392 N.W.2d 374, 379 (1986).

g. Fees in a State Court Action to Enforce a Federal Statutory Right

When suit is filed in state court to enforce a federal statutory right, state courts are bound by the federal statute and the United States Supreme Court’s interpretations of the statute. *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 887, 902 N.W.2d 115, 123 (2017) (discussing the civil rights statute at 42 U.S.C. § 1983 and its companion attorney’s fees statute, 42 U.S.C. § 1988; noting “that a prevailing party’s [§ 1988] right to attorney fees . . . cannot be limited by local rules”).

h. Evidence of the Attorney Fees Incurred

“We have generally said that if an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.” Same quotation: *Brumbaugh*, 306 Neb. at 257, 945 N.W.2d at —; *ACI Worldwide Corp.*, 296 Neb. at 881, 896 N.W.2d at 198.

The determination of the amount of attorney fees is necessarily a question of fact that requires a factual determination on sev-

eral factors, including the value of legal services rendered by an attorney by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Bower v. Eaton Corporation, 301 Neb. 311, 341, 918 N.W.2d 249, 272–73 (2018). *Accord* *Douglas County School District No. 10 v. Tribedo, LLC*, 307 Neb. 716, 731, — N.W.2d —, — (2020); *Brumbaugh*, 306 Neb. at 258, 945 N.W.2d at —; *Sellers v. Reefer Systems, Inc.*, 305 Neb. 868, 872, 943 N.W.2d 275, — (2020); *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 325 (2019); *Pan*, 301 Neb. at 278, 918 N.W.2d at 292; *ACI Worldwide Corp.*, 296 Neb. at 881–82, 896 N.W.2d at 198; *Vlach*, 286 Neb. at 149, 835 N.W.2d at 74; *Zimmerman v. FirstTier Bank, N.A.*, 255 Neb. 410, 426–27, 585 N.W.2d 445, 456 (1998).

i. Appellate Review of an Award of Attorney Fees

“When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.” Same quotation: *Seldin v. Estate of Silverman*, 305 Neb. 185, 197, 939 N.W.2d 768, 781 (2020); *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 381, 702 N.W.2d 792, 806 (2005) (citing cases). *Accord, e.g.*, Neb. Rev. Stat. § 25-824.01 (Reissue 2016) (stating that when determining the amount of an attorney fee award “the court shall exercise its sound discretion.”); *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 223, 959 N.W.2d 251, 269 (2021); *Douglas County School District No. 10 v. Tribedo, LLC*, 307 Neb. 716, 731, 950 N.W.2d 599, 610 (2020); *George Clift Enters. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 800, 947 N.W.2d 510, — (2020); *Nathan*, 306 Neb. at 247, 945 N.W.2d at 115–16 (defining “abuse of discretion”); *Brumbaugh v. Bendorf*, 306 Neb. 254, 945 N.W.2d 116 (2020) (“A trial court’s decision awarding or denying attorney fees will be upheld absent an abuse of discretion.” *Id.* at 256, 945 N.W.2d at —. “There is no dispute that attorney fees are discretionary under both federal and state statutes.” *Id.*; *see also id.* at 257, 945 N.W.2d at —.); *Sellers v. Reefer Sys., Inc.*, 305 Neb. 868, 872, 943 N.W.2d 275, — (2020) (same as first quotation from *Brumbaugh*, above; holding that “an appellate court will uphold a lower court’s decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.”; defining “abuse of discretion.” *Id.*; defining “frivolous.”) *State ex rel. Petersen v. Creative Comm. Promotions*, 302 Neb. 606, 610, 924 N.W.2d 664, 667 (2019) (same as first quotation from *Brumbaugh*, above); *Moore v. Moore*, 302 Neb. 588, 604, 924 N.W.2d 314, 326 (2019) (holding that in a marital dissolution action “the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion”; stating things that should be considered in awarding attorney fees in a dissolution action).

“Ordinarily, an improper calculation of attorney fees would require a remand in order to reconfigure the award. However, when the record is sufficiently developed that a reviewing court can apply the law to the facts and calculate a fair and reasonable fee without resorting to remand, that route is available to the appellate court.” *Seldin*, 305 Neb. at 218-19, 943 N.W.2d at 794.

“Allocation of amounts due between offending parties and attorneys is part and parcel of the determination of the amount of the award and is reviewed for abuse of discretion.” *George Clift Enters.*, 306 Neb. at 819, 947 N.W.2d at ____.

Regarding the “abuse of discretion” standard, *see generally* NJI2d Civ. 1.42, Comment & Authorities.

j. Public Policy in Litigation Over a Contract

On a related matter, a contract provision allowing attorney fees to the party prevailing in litigation over the contract is “contrary to public policy and void.” *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 765, 472 N.W.2d 391, 402 (1991). *Accord, e.g.* *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb, Inc.*, 298 Neb. 705, 718-21, 905 N.W.2d 644, 657-59 (2018) (declining to depart from this “long-held jurisprudence”).

State ex rel. Peterson v. Creative Community Promotions, LLC discusses the meaning of “prevailing party.” *State ex rel. Peterson v. Creative Cmty. Promotions, LLC*, 302 Neb. 588, 614-16, 924 N.W.2d 664, 670-71 (2019) (citing and discussing, among other cases, *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001)).

k. After Appeal Perfected, Trial Court Lacks Jurisdiction to Enter an Order for Costs

“[A]fter an appeal has been perfected, a trial court lacks jurisdiction to enter an order for costs,” *McLaughlin v. Hellbusch*, 251 Neb. 389, 396, 557 N.W.2d 657, 662 (1997), to issue an order for an attorney fee, *WBE Co. v. Papio—Missouri River Natural Res. Dist.*, 247 Neb. 522, 525-26, 529 N.W.2d 21, 23-24 (1995), or to grant a counterclaim for an attorney fee or costs, *Currie v. Chief Sch. Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996) (discussed further at NJI2d Civ. 2.03). This is so even though the motion for taxation of costs or an attorney fee was filed before the opposing party perfected the appeal in question.

10. The Costs and Expenses of Litigation

On a matter somewhat related to the award of attorneys’ fees, the costs and expenses of litigation cannot “be recovered unless provided for by statute or a uniform course of procedure.” *City of Falls City v. Neb.*

Mun. Power Pool, 281 Neb. 230, 234, 795 N.W.2d 256, 259 (2011). The awarding of litigation costs is a public-policy question and “[i]t is the Legislature’s function through the enactment of statutes to declare what is the law and public policy.” *Id.* at 235, 795 N.W.2d at 260. This is not a new rule. *See* Geere v. Sweet, 2 Neb. 76, 76-77 (1872) (Unknown at common law, costs are “given only by statute The right to costs is a statutory right, and cannot be enlarged by judicial authority.”).

11. Miscellaneous

“‘When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.’” Omaha Mining Co. v. First Nat’l Bank, 226 Neb. 743, 746, 415 N.W.2d 111, 113 (1987) (quoting Hegarty v. Campbell Soup Co., 214 Neb. 716, 726, 335 N.W.2d 758, 765 (1983)).

This part of the first printing of NJI2d Civ. mentioned damages for alienation of affections. The cause of action for alienation of affections or criminal conversation has been done away with by statute. Neb. Rev. Stat. § 25-21,188 (Reissue 2016); *Speer v. Dealy*, 242 Neb. 542, 495 N.W.2d 911 (1993) (cause of action for alienation of affection barred; also, torts of intentional interference with a contract and intentional infliction of emotional distress unavailable as regards interference with marital relationship; *see also* NJI2d Civ. 9.04).

B. PERSONAL INJURY

NJI2d Civ. 4.00

GENERAL INSTRUCTION ON DAMAGES IN A TORT ACTION WHERE JOINT AND SEVERAL LIABILITY IS AN ISSUE—ECONOMIC AND NONECONOMIC DAMAGES

In Instruction No. —, I spoke of economic and noneconomic damages.

ECONOMIC DAMAGES

I am about to give you a list of things you may consider in making your decision regarding economic damages. From this list, you must only consider those things you decide were proximately caused by defendants’ negligence.

1. The reasonable value of medical (, hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future);

2. The (wages, salary, profits, reasonable value of the working time, business) the plaintiff has lost because of (his, her) (inability, diminished ability) to work;

3. The reasonable value of the (earning capacity, business or employment opportunities) the plaintiff is reasonably certain to lose in the future;

4. Reasonable funeral costs;

5. The reasonable value of plaintiff's loss of the use of (his, her) property;

6. The reasonable value of the cost of repair or replacement (here describe the thing repaired or replaced);

7. The reasonable cost of obtaining substitute domestic services.

NONECONOMIC DAMAGES

I am about to give you a list of things you may consider in making your decision regarding noneconomic damages. From this list, you must only consider those things you decide were proximately caused by defendants' negligence.

1. The reasonable monetary value of the physical pain and mental suffering (and emotional distress) the plaintiff has experienced (and is reasonably certain to experience in the future);

2. The reasonable monetary value of the inconvenience the plaintiff has experienced (and is reasonably certain to experience in the future);

3. The reasonable monetary value of loss of society and companionship suffered by the plaintiff and reasonably certain to be suffered in the future;

4. The reasonable monetary value of any injury to plaintiff's reputation;

5. The reasonable monetary value of any humiliation the plaintiff has experienced (and is reasonably certain to experience in the future);

6. The plaintiff's (husband's, wife's) loss of consortium. Consortium means those things to which a person is entitled by reason of the marriage relationship. It includes affection, love, companionship, comfort, assistance, moral support, and the enjoyment of (sexual, conjugal) relations.

ECONOMIC AND NONECONOMIC DAMAGES

In your determination of economic and noneconomic damages, you must consider the nature and extent of the injury, including whether the injury is temporary or permanent, and whether any resulting disability is partial or total.

COMMENT**I. IN GENERAL**

Regarding damages in general, *see also* the Introduction to Chapter 4, above, and the Comment and Authorities to NJI2d Civ. 4.01, below. Regarding Nebraska's new comparative negligence statute—Neb. Rev. Stat. §§ 25-21,185, et seq. (Reissue 2016)—the source of the law on which this instruction is based, *see* NJI2d Civ. 5.04.

This instruction applies to causes of action that accrue on or after February 8, 1992. Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016). For causes of action that accrue before February 8, 1992, *see* NJI2d Civ. 4.01.

The cross-reference to "Instruction No. —" refers to NJI2d Civ. 5.02, 5.03, and 5.04. This instruction defines words used in each of those instructions.

This instruction blends together NJI2d Civ. 4.01 and the new statute's definitions of economic and noneconomic damages.

II. THE EXAMPLES ARE ONLY EXAMPLES

The examples of economic and noneconomic damages listed in this instruction are neither inflexible nor all-inclusive. They are taken from the statute, which is quoted in relevant part in the Authorities, below. The statute states that each kind of damages "includ[es], but [is] not limited to" the listed examples.

It is not appropriate to tell the jury that economic or noneconomic damages "include, but are not limited to." The judge decides what is included on the list of elements of damages that is given to the jury, as the proper measure of damages is a question of law. *E.g.*, *Griffith v. Drew's LLC*, 290 Neb. 508, 515, 860 N.W.2d 749, 758 (2015) ("While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.") (discussed further above, in part A(2)(b) of this Introduction). Use only those parts of the pattern that state elements of damage properly raised by the pleadings and the evidence; delete the irrelevant ones. If the pleadings and the evidence call for the addition of other elements, other than those specified in the instruction, the judge decides that also.

Likewise, the statute states that economic damages are "monetary losses," and noneconomic damages are "subjective nonmonetary losses."

These qualifiers help the court decide which elements of damages go on which list. They are not for the jury and, therefore, are not in the instruction.

III. PAIN AND SUFFERING

“The amount of damages for pain, suffering, and emotional distress inherently excludes valuation. As a general rule, the law gives the jury the right to determine the amount of recovery in cases such as this, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.” *Roth v. Wiese*, 271 Neb. 750, 769, 716 N.W.2d 419, 436 (2006) (citation omitted). *Accord Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 129, 900 N.W.2d 742, 744 (2017).

“There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence.” *Fickle v. State*, 273 Neb. 990, 1012, 735 N.W.2d 754, 773 (2007), clarified at 274 Neb. 267, 735 N.W.2d 754 (2007). *Accord, Cohan*, 297 Neb. at 129, 900 N.W.2d at 744.

In the statute’s definition of noneconomic damages, the list includes “pain, suffering, . . . mental suffering.” (See the statute quoted in the Authorities, below.) In the opinion of the Committee, this is redundant. Pain, suffering, and mental suffering are two concepts, not three. See, e.g., *NJI2d Civ. 4.01*. To avoid jurors struggling with trying to turn this into three things, this instruction only uses two of them.

“Emotional distress” is in the instruction because it is in the statute. See the Authorities, below. It is in parentheses because it will not routinely be included in the instruction. When the only injury alleged is emotional, the action is one for infliction of mental distress. In *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003), the Court wrote the following: “[W]hile it is true that the negligence alleged in this case involved the operation of a motor vehicle, the injury which is claimed to have resulted from such negligence is purely an emotional one. This, then, is an action for negligent infliction of emotional distress.” *Id.* at 761, 659 N.W.2d at 325. The cause of action for negligent infliction of emotional distress is discussed at length at *NJI2d Civ. 9.04*, Comment and in the cases cited and discussed therein. (Regarding the tort of intentional infliction of emotional distress, see *NJI2d Civ. 9.04*.)

“[D]amages for mental suffering are recoverable in a retaliatory discharge action brought by a former at-will employee alleging that the discharge violated a clear mandate of public policy.” *Wendlen v. Beatrice Manor*, 271 Neb. 373, 391, 712 N.W.2d 226, 241 (2006).

“[I]n many cases, a plaintiff’s anxiety is inseparable from his or her general mental suffering caused by a physical injury.” *Golnick v. Callen-*

der, 290 Neb. 395, 412, 860 N.W.2d 180, 195 (2015). Regarding “parasitic damages for the plaintiff’s ‘reasonable fear of a future harm attributable to a physical injury caused by the defendant’s negligence,” see *Golnick, supra*, and the cases cited therein. Parasitic damages could include a fear of AIDS developed after being struck with a needle. See *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 784–91, 580 N.W.2d 86, 91–96 (1998).

IV. “INCONVENIENCE” AND “HUMILIATION”

This instruction’s examples of damages are typical of damages involved in Nebraska civil actions, except for these two: (1) “inconvenience”; and (2) “humiliation.”

The Committee has found one personal injury case where the Supreme Court noted “[t]here was evidence introduced to support the plaintiff’s diminished capacity to enjoy life with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience,” *Swiler v. Baker’s Super Mkt., Inc.*, 203 Neb. 183, 187, 277 N.W.2d 697, 700 (1979), but the court does no more on this point than to note that there was such evidence.

“Inconvenience” is in the instruction because it is in the statute. It is in brackets because, other than that “serious inconvenience is a consideration in some nuisance cases,” *Golnick v. Callender*, 290 Neb. 395, 412, 860 N.W.2d 180, 195 (2015), it is difficult to know what to make of inconvenience as an element of damages in a Nebraska civil action.

The Committee has found a number of cases where the court mentioned that humiliation had been claimed as an element of damages; in some, the court approved of it as an element. These cases include civil actions for the following: *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988) (regarding intentional interference with a contract of employment), *overruled on other grounds by Landon v. Pettijohn*, 231 Neb. 837, 840, 438 N.W.2d 757, 759–60 (1989); *Pick v. Fordyce Co-op Credit Ass’n*, 225 Neb. 714, 408 N.W.2d 248 (1987) (regarding the tort of intentional infliction of emotional distress); *Hennis v. O’Connor*, 223 Neb. 112, 388 N.W.2d 470 (1986) (regarding slander); *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985) and *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978) (both regarding alienation of affection); *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983) (regarding sexual harassment and assault); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978) (regarding breach of promise to marry); *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975) (regarding “criminal conversation”); *Crouter v. Rogers*, 193 Neb. 497, 227 N.W.2d 845 (1975) (regarding assault); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974) (unlawful restraint); *Whitcomb v. Nebraska State Educ. Ass’n*, 184 Neb. 31, 165 N.W.2d 99 (1969) (regarding libel).

Regarding the tort of intentional infliction of emotional distress, see N.JI2d Civ. 9.04, below.

Again, as with “inconvenience,” “humiliation” is in the instruction because it is in the statute, and it is in brackets because it is difficult to know what to make of it as an element of damages in a Nebraska civil action.

Inconvenience and humiliation are not in NJI2d Civ. 4.01 because the only Nebraska authority for these two elements of damages is in the statute and the statute does not apply to the cases covered by NJI2d Civ. 4.01. It seems that the elements of damages should be the same under both 4.00 and 4.01 but it is not up to the Committee to add to the law.

V. CONSORTIUM

Regarding consortium, see generally NJI2d Civ. 4.01, Authorities.

The definition of consortium in this instruction (and in NJI2d Civ. 4.01) includes “services.” The statute designates consortium as a noneconomic damage. It designates “costs of obtaining substitute domestic services” as an economic damage. The Committee raises the following question: If substitute services could have been but were not hired, is the value of such services “consortium” and, therefore, a noneconomic damage, or is it still included within “costs of obtaining substitute domestic services” and, therefore, an economic damage?

Without commenting on what exactly it means, the Committee notes that the legislative history states the following regarding wrongful death actions:

There is lost income, which effectively is the economic damage, the lost income that the family derives from a father or mother who is killed as a result of the negligence of someone else, the loss of household services, basically the services that are provided by that individual to the family, loss of care, comfort and support, which can be . . . are various items of damage that are specifically set forth in Nebraska law and have been consistently applied for years. And this amendment makes certain, and I believe Senator Kristensen is in agreement with it, makes certain that that law will not be affected by this change in 88.

Floor Debate, L.B. 88, First Session, 92nd Legislature, at 879 (Senator Ashford, Feb. 13, 1991). (Because of problems with L.B. 88, First Session, 92nd Legislature (1991), it was quickly repealed and replaced by the statute being instructed on here, L.B. 262, Second Session, 92nd Legislature (1992), codified as Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016); the language regarding economic and noneconomic damages was not changed; the legislative history to L.B. 88 is the legislative history to this part of L.B. 262).

See also Rasmussen v. State Farm Mut. Auto. Ins. Co., 278 Neb.

289, 301-02, 770 N.W.2d 619, 629-30 (2009) (loss of consortium when a husband and wife are both injured in the same accident).

VI. WRONGFUL DEATH

Does this split of damages into economic and noneconomic apply in a wrongful death action? For a discussion of this question, see NJI2d Civ. 5.04, Comment, part IX. *See also* NJI2d Civ. 4.60, Comment.

AUTHORITIES

The following is quoted from Neb. Rev. Stat. § 25-21,185.08 (Reissue 2016), Legislative Bill 262, Second Session, 92nd Legislature (1992):

(2) Economic damages shall mean monetary losses, including, but not limited to, medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities; and

(3) Noneconomic damages shall mean subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation, but shall not include economic damages.

The following is quoted from *Tolliver v. Visiting Nurse Ass'n.*, 278 Neb. 532, 541, 771 N.W.2d 908, 916 (2009):

Economic losses can include more than out-of-pocket and benefit-of-the-bargain losses. They include monetary losses for medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of domestic services, loss of employment, and loss of business or employment opportunities.

NJI2d Civ. 4.01

GENERAL INSTRUCTION ON DAMAGES IN A TORT ACTION WHERE JOINT AND SEVERAL LIABILITY IS NOT AN ISSUE

If you return a verdict for the plaintiff, then you must decide how much money will fairly compensate the plaintiff for (his, her) injury.

I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were proximately caused by defendant's negligence:

1. The nature and extent of the injury, including whether the injury is temporary or permanent (and whether any resulting disability is partial or total);
2. The reasonable value of the medical (, hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future);
3. The (wages, salary, profits, reasonable value of the working time) the plaintiff has lost because of (his, her) (inability, diminished ability) to work;
4. The reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future;
5. The physical pain and mental suffering the plaintiff has experienced (and is reasonably certain to experience in the future); and
6. The plaintiff's (husband's, wife's) loss of consortium. Consortium means those things to which a person is entitled by reason of the marriage relationship. It includes affection, love, companionship, comfort, assistance, services, moral support, and the enjoyment of (sexual, conjugal) relations.

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.]

SPECIAL NOTE

For many causes of action that accrue on or after February 8, 1992, Neb. Rev. Stat. §§ 25-21,185, *et seq.* (Reissue 2016) changes Nebraska law regarding joint and several liability and divides damages into "economic" and "noneconomic." The above instruction does not apply to actions of a type to which contributory negligence is an allowable defense, that accrue on or after that date, and where joint and several liability is an issue. NJI2d Civ. 4.00 applies instead. Regarding §§ 25-21,185, *et seq.* (Reissue 2008), see NJI2d Civ. 5.04, Comment. Consult that Comment for an explanation of when the above instruction applies.

COMMENT

The elements of damage set forth in this instruction are neither inflexible nor all-inclusive. Use only the numbered paragraphs that state elements of damage properly raised by the pleadings and the evidence. Make appropriate changes when there are multiple parties and where a counterclaim, *et cetera*, is to be considered.

If it avoids confusion, the parties' names should be substituted for the words plaintiff, defendant, husband and wife. Otherwise, doing so is optional.

The jurors are told that they "may consider" these elements of damages. The word "may" is used because the trial court is not permitted to assume that any particular element has been shown to have proximately resulted from defendant's negligence. *See Remmenga v. Selk*, 152 Neb. 625, 629, 42 N.W.2d 186, 189 (1950).

Regarding the six elements of damages set out in the instruction, the general language used therein is preferred. It is "not necessary, and probably inadvisable, to be specific." *Coleman v. Diamond Eng'g Co.*, 193 Neb. 487, 494, 227 N.W.2d 841, 845 (1975).

The plaintiff's recovery is not limited to amounts that he or she has paid. To so limit recovery would more often than not violate the collateral source rule. If it is necessary to instruct the jury on the collateral source rule, the following can be added to the end of NJI2d Civ. 4.01:

"Whether or not any of the expenses I have just mentioned have been paid by someone other than the plaintiff is irrelevant. Such a payment by someone else does not affect the plaintiff's right to recover for such expenses and you must not consider it."

Regarding the collateral source rule, see part A(6) of the Introduction to this chapter, *i.e.*, Chapter 4.

"Personal injury" is discussed and distinguished in *Gallion v. O'Connor*, 242 Neb. 259, 261-62, 494 N.W.2d 532, 533-34 (1993):

■ "[It] denotes an injury to the physical body of a person, including pain and suffering from such injury; injury to a person's health; or injury to that person's reputation, as contradistinguished from injury to his or her property." *Id.* at 261, 494 N.W.2d at 533.

■ "[It] may cover every variety of injury to a person's body, feelings, or reputation." *Id.* at 262, 494 N.W.2d at 534.

■ "[It] is broader, more comprehensive, and more significant than . . . 'bodily injur[y]' and does not necessarily mean or involve the element of personal contact." *Id.* at 261, 494 N.W.2d at 534.

■ "[It] include[s] libel, slander, malicious prosecution, assault and battery, false imprisonment, and other actionable injuries to the person." *Id.* at 262, 494 N.W.2d at 534.

■ It includes these three elements of damages: "medical expenses

and loss of earnings, which are essentially economic loss, and mental and physical suffering, which is noneconomic loss.” *Id.* at 262, 494 N.W.2d at 534.

■ It encompasses “[a]ny condition which creates an actionable annoyance and inconvenience to one in his or her home or business[. Any such condition] is an offense against the person and is a personal injury, as respects a right of recovery therefor.” *Id.*

AUTHORITIES

See generally Part 2 of the Introduction to Chapter 4 and the authorities cited therein.

The instruction refers to expenses, earning capacity, and so forth, “reasonably certain” to be experienced in the future. “When the plaintiff seeks prospective damages, the contingent nature of the damages claimed inherently requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of the trial.” When that is the case, and when the evidence warrants, “the jury should be instructed . . . that the plaintiff may recover damages for injuries ‘reasonably certain’ to be incurred in the future.” *Pribil v. Koinzan*, 266 Neb. 222, 226, 665 N.W.2d 567, 572 (2003). Regarding proof with “reasonable certainty,” see generally Part 3(c) of the Introduction to this chapter.

1. Permanence of Injury and Degree of Disability

See, e.g., Mahoney v. Nebraska Methodist Hosp., 251 Neb. 841, 850, 560 N.W.2d 451, 457 (1997) (evidence supports instruction on cosmetic deformity as part of future disability); *Woitalewicz v. Wyatt*, 229 Neb. 626, 629, 428 N.W.2d 216, 218 (1988) (“While it is true that there is often an economic component to disability, disability standing alone is a compensable element of damages totally separate and apart from loss of earnings or loss of earning capacity.”); *Stapleton v. Norvell*, 193 Neb. 71, 76, 225 N.W.2d 409, 412–13 (1975) (future disability not limited to functional disability; includes cosmetic deformity); *Anson v. Fletcher*, 192 Neb. 317, 325–26, 220 N.W.2d 371, 377 (1974) (twenty percent disability suffered during ten months between time of deceased’s injuries and his death); *Grass v. Valley Feed and Grain Co.*, 181 Neb. 505, 508, 149 N.W.2d 355, 357 (1967) (“[The] elements of past and prospective disability . . . are recoverable under the general ad damnum clause.”); *Caster v. Moeller*, 176 Neb. 30, 44, 125 N.W.2d 89, 98 (1963) (“The issue of future disability should have been submitted to the jury regardless of whether that disability affected the future earnings of the plaintiff or whether or not future pain and suffering were involved.”); *Mangiameli v. Ariano*, 126 Neb. 629, 636–37, 253 N.W. 871, 875 (1934); *Nixon v. Omaha & C.B. S. Ry.*, 79 Neb. 550, 552, 113 N.W. 117, 118 (1907).

Regarding any loss of enjoyment of life that results from a disability, see part 5 of this Comment, below.

See also *Springer v. Smith*, 182 Neb. 107, 113–14, 153 N.W.2d 300, 304 (1967) (error to prevent inquiry into source of disability for which plaintiff claims damages).

2. Medical Care

Connelly v. City of Omaha, 284 Neb. 131, 140–146, 816 N.W.2d 742, 756 (2012) (“[M]edical care and expenses incurred for the treatment of the injuries’ ”); *Steinauer v. Sarpy Cty.*, 217 Neb. 830, 843, 353 N.W.2d 715, 723 (1984); *Schaefer v. McCreary*, 216 Neb. 739, 743, 345 N.W.2d 821, 824 (1984) (need for future medical services and reasonable value thereof may be inferred from proof of past medical services and value thereof); *Stanek v. Swierczek*, 209 Neb. 357, 363, 307 N.W.2d 807, 811 (1981) (plaintiff not allowed to substitute cost of health insurance for this measure of damage); *Peacock v. J.L. Brandeis & Sons*, 157 Neb. 514, 519–20, 60 N.W.2d 643, 650 (1953); *Nebraska Law on the Measure of Damages*, Ch. 4 (NCLE, Inc. 1981). Compare *Murray v. Pearson Appliance Store*, 155 Neb. 860, 870, 54 N.W.2d 250, 257 (1952) (giving a medical care instruction where there was no evidence of actual expenses for such care or reasonable value thereof is reversible error); with *Oliverius v. Wicks*, 107 Neb. 821, 830–31, 187 N.W. 73, 76–77 (1922) (holding that there can be no recovery for medical and hospital expenses where there was no evidence of the reasonable value thereof; rather than reverse, the court orders remittitur).

“The private-party rate, not the Medicaid rate, is the proper rate to use in calculating . . . future medical expenses.” *Fickle v. State*, 273 Neb. 990, 1009, 735 N.W.2d 754, 771 (2007), clarified at 274 Neb. 267, 268, 759 N.W.2d 113, 115 (2007) (same quotation both places).

3. Loss of Past Earnings

“[L]oss of past earnings is an item of special damage and must be specifically pleaded and proved.” *Washington v. American Cmty. Stores Corp.*, 196 Neb. 624, 629, 244 N.W.2d 286, 289 (1976). This is the award for the value of the wages, the time, or the profits lost up to the date of the trial.

See generally *Siciunas v. Checker Cab Co., Inc.*, 191 Neb. 766, 770–71, 217 N.W.2d 824, 826–27 (1974); *Laun v. Roach*, 191 Neb. 11, 13, 213 N.W.2d 450, 451 (1973); *Caster v. Moeller*, 176 Neb. 30, 41, 125 N.W.2d 89, 97 (1963); *Carlile v. Bentley*, 81 Neb. 715, 721–22, 116 N.W. 772, 773–74 (1908) (“The value of one’s time lost cannot be proved by evidence of wages that one had received upon some special occasion.”).

Regarding profits, lost profits are recoverable in tort actions. *Diesel Serv., Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 803, 317 N.W.2d 719, 725 (1982); *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 143–44, 231 N.W.2d 110, 114 (1975); *Kaufman v. Tripple*, 180 Neb. 593, 601–02, 144 N.W.2d 201, 207–09 (1966). See also *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 180, 137 N.W.2d 701, 711–12 (1965) (loss of goodwill). However, “[t]he law generally is unfavorable to the

recovery of losses of profits [as distinguished from earnings] in tort actions . . . because they are ordinarily speculative, contingent, or uncertain.” *Kaufman v. Tripple*, 180 Neb. 593, 602, 144 N.W.2d 201, 207 (1966).

“A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. While damages for lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.” *Evergreen Farms v. First Nat’l Bank & Trust*, 250 Neb. 860, 868, 553 N.W.2d 728, 734 (1996) (bank’s refusal to loan money pursuant to previous loan agreements). *Accord* *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 870-77, 896 N.W.2d 156, 192-96 (2017); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 579, 805 N.W.2d 68, 88 (2011) (“[I]n many instances, lost profits from a new business are too speculative and conjectural to permit recovery of damages.”); *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 660, 748 N.W.2d 626, 642 (2008) (“There is no precise formula . . .”); *Home Pride Foods v. Johnson*, 262 Neb. 701, 710-11, 634 N.W.2d 774, 782-83 (2001) (we do not decide whether a plaintiff may recover damages for both lost profits and unjust enrichment; a majority of courts hold that plaintiff may only recover one or the other); *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 280-81, 557 N.W.2d 1, 13 (1996) (negligent audit). (Regarding the proof “with reasonable certitude and exactness” language, see part 3(c) of the Introduction to Chapter 4 of this work. Regarding lost profits, the references in the Index, under the heading “Damages,” subheading “Lost Profits.”)

4. Loss of Future Earnings Capacity

Subparagraph 4 of this instruction was used at the trial, and perhaps approved by implication in the Supreme Court, in *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997). In *McLaughlin*, appellant proffered a detailed jury instruction on her loss of future earning capacity. The trial court refused to give her instruction and, instead, instructed the jury that her damages could include “[t]he reasonable value of the earning capacity [she] is reasonably certain to lose in the future.” *McLaughlin*, 251 Neb. at 395, 557 N.W.2d at 662. The Supreme Court held it was not error to refuse to give the detailed instruction: “It is not error to refuse to give a requested instruction if the substance of the request is included in the instruction given.” *McLaughlin*, 251 Neb. at 395, 557 N.W.2d at 662.

“‘[I]t [is] unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity.’” *Wortman v. Northwestern Bell Tel. Co.*, 195 Neb. 637, 639, 240 N.W.2d 15, 16 (1976) (quoting *Baylor v. Tyrrell*, 177 Neb. 812, 823, 131 N.W.2d 393, 401 (1964)).

Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury

and damage. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry [I]t is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his past earnings.

Washington v. American Cmty. Stores Corp., 196 Neb. 624, 629–30, 244 N.W.2d 286, 289–90 (1976) (citations omitted). *Accord Snyder v. EMCASCO Ins. Co.* 259 Neb. 621, 630, 611 N.W.2d 409, 417 (2000); *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 330–31, 431 N.W.2d 617, 622–23 (1988). *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 787–88, 401 N.W.2d 489, 493 (1987); *Steinauer v. Sarpy Cty.*, 217 Neb. 830, 847, 353 N.W.2d 715, 725–26 (1984); *Schaefer v. McCreary*, 216 Neb. 739, 743, 345 N.W.2d 821, 825 (1984).

The key is not lost earnings, but lost earning capacity. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. at 330, 431 N.W.2d at 622.

Loss of earning capacity is not necessarily measured by plaintiff's calling or income, if any, at the time of the injury. *Schaefer v. McCreary*, *supra*; *Washington v. American Cmty. Stores Corp.*, *supra* (parole officer, candidate for Olympic wrestling team; damages for lost opportunity to coach wrestling or wrestle professionally); *Laun v. Roach*, 191 Neb. 11, 13, 213 N.W.2d 450, 451 (1973) (dental student at time of injury; practicing dentist at time of trial; damages based on loss of earning capacity as dentist); *Morford v. Lipsey Meat Co.*, 179 Neb. 420, 422–23, 138 N.W.2d 653, 655 (1965) (recovery permitted even though income after accident greater than before); *Jacobsen v. Poland*, 163 Neb. 590, 598–600, 80 N.W.2d 891, 898–901 (1957); *Dafoe v. Grantski*, 143 Neb. 344, 353, 9 N.W.2d 488, 493 (1943) (student with part time job; damages took into account likelihood he would have become an attorney); *Yost v. Nelson*, 124 Neb. 33, 39, 245 N.W. 9, 12 (1932); *Glick v. Poska*, 122 Neb. 102, 105, 239 N.W. 626, 628 (1931) (“prospects for future increase of earnings”); *Bliss v. Beck*, 80 Neb. 290, 295–96, 114 N.W. 162, 164 (1907) (housewife).

A damage award for impairment of earning capacity should be based on life expectancy immediately before the injury. *Borcherding v. Eklund*, 156 Neb. 196, 207, 55 N.W.2d 643, 651 (1952), *overruled on other grounds by Wolfe v. Mendel*, 165 Neb. 16, 84 N.W.2d 109 (1957); *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394, 403–04, 13 N.W.2d 627, 632 (1944); *Webb v. Omaha & S.I. Ry.*, 101 Neb. 596, 600, 164 N.W. 564, 565–66 (1917). Impaired earning capacity should be assessed as of the time of trial. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. at 331, 431 N.W.2d at 623.

It is error to instruct on both time lost from work and diminished

earning capacity during the same period. *Singles v. Union Pac. R.R. Co.*, 173 Neb. 91, 95, 112 N.W.2d 752, 754–55 (1962). Time lost should cover the pretrial period and lost earning capacity the post-trial period. It is also error if the instructions permit recovery for both labor to be hired because of the disability and loss of earning capacity. *McCarty v. Morrow*, 173 Neb. 643, 114 N.W.2d 512, 518 (1962). Such instruction permits double recovery for the same loss. *Id.*

A child may not recover for future earning capacity lost during the child's minority, and it is error to instruct otherwise. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 895, 91 N.W. 880, 885 (1902). A child may, however, recover for the loss of future earning capacity for the time after the child attains majority, *City of South Omaha v. Sutcliffe*, 72 Neb. 746, 750, 101 N.W. 997, 999 (1904).

In addition to the cases just discussed, *see, e.g.*, the cases cited in *Washington v. American Cmty. Stores Corp.*, *supra*; *Daniels v. Andersen*, 195 Neb. 95, 103–04, 237 N.W.2d 397, 403 (1975) (contention that lost future earnings were incorrectly calculated need not be decided because evidence shows that other elements of damages amount to more than the award); *Lake v. Southwick*, 188 Neb. 533, 537, 198 N.W.2d 319, 322 (1972) ("The time for allowance of damages for loss of future earning capacity is at the time of trial."); *Kaufman v. Tripple*, 180 Neb. 593, 601, 144 N.W.2d 201, 207 (1966) (previous earnings and profits held admissible to issue of impairment of earning capacity); *Caster v. Moeller*, 176 Neb. 30, 43, 125 N.W.2d 89, 97 (1963) (lack of proof of any lost earning capacity); *Husak v. Omaha Nat'l Bank*, 165 Neb. 537, 545, 86 N.W.2d 604, 609 (1957); *Nelson v. Wiepen*, 154 Neb. 458, 462, 48 N.W.2d 387, 389 (1951) (when pleadings and evidence raise issue of loss of future earning capacity, error not to instruct thereon). *See generally* C. White and H. Spencer, *Nebraska Law on the Measure of Damages*, Ch. 4, Loss of Earnings, Impairment of Earning Capacity (NCLE, Inc. 1983).

5. Physical Pain and Mental and Emotional Stress and Anxiety

"[T]he longstanding rule in Nebraska is that where a physical injury has been sustained, a plaintiff may recover damages for mental suffering and anxiety reasonably resulting from such physical injury." *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 783, 580 N.W.2d 86, 90 (1998) (here, "parasitic damages," *i.e.*, those occasioned by anxiety specifically due to reasonable fear of future harm attributable to physical injury caused by defendant's negligence, *id.*, at 783–84, 580 N.W.2d at 90–91; anxiety in this case was fear of AIDS resulting from physical injury that included medically sufficient channel of transmission of AIDS—needle prick—and may have exposed plaintiff to the disease). *Accord Malena v. Marriott Int'l*, 264 Neb. 759, 762–66, 651 N.W.2d 850, 853–56 (2002) (discussing at length Nebraska's rule regarding parasitic damages from a needle stick and a resulting fear of AIDS).

What is involved here is mental distress that accompanies a physi-

cal injury—mental distress not as a separate cause of action, but as a separate element of the damages occasioned by some other cause of action. There may be such a thing as a cause of action for negligent infliction of mental distress. In that regard, see the cases cited at NJI2d Civ. 9.04, Comment.

E.g., *Hitzemann v. Adam*, 246 Neb. 201, 207, 518 N.W.2d 102, 107 (1994) (parents damages for emotional distress caused by failed sterilization procedure in birth of healthy, normal child); *Bassinger v. Agnew*, 206 Neb. 1, 9, 290 N.W.2d 793, 798 (1980) (error to instruct on future pain and suffering; insufficient evidence); *Anson v. Fletcher*, 192 Neb. 317, 326, 220 N.W.2d 371, 377–78 (1974) (disability and pain and suffering incidental to back injury warrant “higher recovery”); *Zawada v. Anderson*, 181 Neb. 467, 473, 149 N.W.2d 329, 334 (1967); *Hermilla v. Peterson*, 171 Neb. 365, 378, 106 N.W.2d 507, 513–14 (1960); *Southwell v. De Boer*, 163 Neb. 646, 655, 80 N.W.2d 877, 883 (1957); *Nixon v. Omaha & C.B. St. Ry.*, 79 Neb. 550, 552, 113 N.W. 117, 118 (1907).

When the cause of action itself is for emotional distress (intentional or negligent), then, to support the cause of action, the distress be “‘outrageous’ and ‘extreme,’” “so severe that no reasonable person could be expected to endure it.” This is not the case when a plaintiff claims emotional distress as an element of damages under a different cause of action, when some other interest has been invaded. *Wendlen v. Beatrice Manor*, 271 Neb. 373, 392, 712 N.W.2d 226, 242 (2006). Regarding the torts of intentional and negligent infliction of emotional distress, see NJI2d Civ. 9.04.

On the subject of the loss of the enjoyment of life: Hedonic damages, or value-of-life damages, are not allowed as a separate category of damages in Nebraska. The value of the loss of the enjoyment of life may properly be a part of pain-and-suffering or disability damages, but it may not be treated as a separate category of damages. *Golnick v. Callender*, 290 Neb. 395, 412, 860 N.W.2d 180, 195 (2015); *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 25, 541 N.W.2d 30, 34 (1995); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 660–71, 538 N.W.2d 732, 739–45 (1995).

When a plaintiff claims emotional distress based on his or her own physical injury, the physical injury must either be obvious to a lay person or substantiated by expert medical testimony. *Turek v. Saint Elizabeth Cmty. Health Ctr.*, 241 Neb. 467, 475, 488 N.W.2d 567, 572 (1992). Regarding the need for expert medical testimony, see generally NJI2d Civ. 1.42, Comment.

See also *Springer v. Smith*, 182 Neb. 107, 113–14, 153 N.W.2d 300, 304 (1967) (trial court need not negate issue of future pain and suffering when instructing as to the allowance of pain already suffered); *Vanderlippe v. Midwest Studios*, 137 Neb. 289, 306, 289 N.W. 341, 349 (1939) (“Damages for pain and suffering are not allowable [for] the time

[during which] the injured person is unconscious.”); *R. Chaloupka, Nebraska Law on the Measure of Damages*, Ch. 2, Pain and Suffering (NCLE, Inc. 1983).

In addition to recovering for the pain and suffering a decedent experienced after a fatal injury was inflicted, the estate may recover for decedent’s “conscious prefatal-injury fear and apprehension of impending death.” *Nelson v. Dolan*, 230 Neb. 848, 855, 858, 434 N.W.2d 25, 31 (1989).

6. Loss of Consortium

“Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse’s affection, companionship, comfort, assistance, and particularly his or her conjugal society.” *Carlson v. Okerstrom*, 267 Neb. 397, 423, 675 N.W.2d 89, 111 (2004). *Accord* *Simms v. Vicorp Rests., Inc.*, 272 Neb. 700, 748, 724 N.W.2d 406, 409 (2006); *Hitzemann v. Adam*, 246 Neb. 201, 207, 518 N.W.2d 102, 107 (1994) (failed sterilization procedure resulting in birth of child); *Guenther v. Stollberg*, 242 Neb. 415, 416, 495 N.W.2d 286, 286 (1993) (injured parent; *see* discussion below); *Anson v. Fletcher*, 192 Neb. 317, 327, 220 N.W.2d 371, 378 (1974) (injured husband); *Riley v. Lidtke*, 49 Neb. 139, 141–42, 68 N.W. 356, 357 (1896) (injured wife); *Omaha & R.V. Ry. v. Chollette*, 41 Neb. 578, 592–93, 59 N.W. 921, 925 (1894) (injured wife); *Cooney v. Moomaw*, 109 F.Supp. 448, 449–51 (D.Neb.1953) (injured husband).

This is a type of damages “for which the law provides no precise measure.” *Carlson v. Okerstrom*, 267 Neb. 397, 423, 675 N.W.2d 89, 111 (2004) (internal quotation marks and citation omitted).

“Although a loss of consortium claim derives from the harm suffered by the injured spouse, it remains a personal legal claim which is separate and distinct from those claims belonging to the injured spouse.” *Simms v. Vicorp Rests., Inc.*, 272 Neb. 700, 748, 724 N.W.2d 406, 409 (2006) (citation omitted). Two causes of action accrue, one to the injured person and the other to his or her spouse. *Id.*

See also *Glandt v. Ricceri*, 123 Neb. 126, 128, 242 N.W. 363, 363–64 (1932) (where no evidence of value of loss of services, no recovery for same); *Wright v. City of Omaha*, 78 Neb. 124, 110 N.W. 754 (1907) (statute provided city not liable for certain damages unless given written notice of injury, and nature and extent thereof, within 20 days; wife’s written notice of her injury sufficient to enable husband to sue for value of wife’s services lost to him).

In *Guenther v. Stollberg*, 242 Neb. 415, 495 N.W.2d 286 (1993), the court was urged to hold that negligent, nonfatal injury to the parent of a minor child is the basis for a common-law cause of action by the child for loss of parental consortium. The court declined. There is no such

cause of action in Nebraska. *Accord* Schendt v. Dewey, 246 Neb. 573, 582, 520 N.W.2d 541, 548 (1994).

Note that the tort of alienation of affection has been abrogated in Nebraska. See part 9 of the Introduction to Chapter 4, above.

7. Speculation and Sympathy

Regarding speculation, guess, and conjecture, see Part 3 of the Introduction to Chapter 4, above.

Regarding damages by way of punishment or through sympathy, see NJI2d Civ. 1.01 and the Authorities thereto.

NJI2d Civ. 4.02

VERDICT DETERMINED BY CHANCE—QUOTIENT VERDICT

The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict. A verdict determined by chance is invalid.

COMMENT & AUTHORITIES

Quotient verdicts—that is, verdicts based upon the jurors' agreement in advance to award damages in an amount determined by averaging each juror's individual judgment—are invalid and will be set aside. *E.g.*, *Winston v. Davis*, 187 Neb. 522, 524–25, 192 N.W.2d 413, 415 (1971); *McGuire v. Thompson*, 152 Neb. 28, 33, 40 N.W.2d 237, 241–42 (1949) (after the fact agreement to use average does not invalidate verdict); *Glick v. Poska*, 122 Neb. 102, 107, 239 N.W. 626, 629 (1931); *Thomas v. Otis Elevator Co.*, 103 Neb. 401, 406, 172 N.W. 53, 55 (1919); and cases cited therein. However, the use of a quotient verdict may be next to impossible to prove: the effect of Nebraska Evidence Rule 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2016), is that the use of a quotient verdict may not be proved through the testimony, affidavit, or statement of any of the jurors. *Lambertus v. Buckley*, 206 Neb. 440, 441–42, 293 N.W.2d 110, 111 (1980); G. Michael Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules*, 9 *Creighton L.Rev.* 559, 577–79 (1976); G. Michael Fenner, *Nebraska Rules of Evidence*, Article 6: Competency and the Examination of Witnesses at 31–35 (NCLE, Inc. 1987). See also *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992) (presubmission discussion among jurors equated with “extraneous prejudicial information” or

"outside influence"); *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 453-57, 412 N.W.2d 56, 78 (1987).

NJI2d Civ. 4.09

ACTIVATION OR AGGRAVATION OF A PREEXISTING CONDITION—EXISTENCE OF CONDITION IN ISSUE

There is evidence that the plaintiff had (insert appropriate words such as "a back condition") prior to (here insert date of occurrence or descriptive such as "the date of the occurrence," "the date of the accident," "the date of the collision," "the date of the fall," et cetera). The defendant is liable only for any damages that you find to be proximately caused by the (occurrence, accident, collision, et cetera).

COMMENT

I. IN GENERAL

This instruction applies when the existence of the preexisting condition is in issue; if that is not the case, then delete the following four words from the beginning of the instruction: "There is evidence that."

This instruction combines NJI 4.09 (1969) and NJI 4.09A (1969). Professor Harvey Perlman, former President of the University of Nebraska and dean of and professor at the University of Nebraska School of Law, has criticized this approach as follows:

Juries are not easily instructed in preexisting condition cases and NJI 4.09 [(1969)] (*aggravation* of preexisting condition; defendant liable for aggravation) and NJI 4.09A [(1969)] (*activation* of preexisting condition; defendant liable for all damages) illustrate the problem. But NJI2d 4.09 abandons the distinction. It is suggested the judge now call attention to the claim of a preexisting condition and then state: "The defendant is liable only for any damages that you find to be proximately caused by the accident." In my view this is a dangerous instruction. With the original NJI 4.09A, a defendant had little reason to dredge up some preexisting condition unless he could show it caused the plaintiff difficulty prior to the accident. Now there may be a decided advantage to raise all manner of preexisting (sic) conditions because they are emphasized in the instruction and no further help is given the jury. For example, suppose I run over plaintiff, breaking his leg, and putting him out of work for 3 months. Can I show he has weak bones and might have broken his leg anyway? Can I show predispositions for mental disease, or anxiety, or skittishness to diminish recovery for pain and suffering? Is the new NJI2d 4.09 a subtle

erosion of the normal rule that one “takes the plaintiff as he find (sic) him”?

Harvey Perlman, Annual Institute on the Annual Survey of Nebraska Law, Nebraska Tort Law 1988–1989, Review and Comments 27 (1989).

II. DAMAGES THAT CANNOT BE SEPARATED

A. INTRODUCING THE PROBLEM

Part II of the Comment deals with this question: Who bears the risk of nonpersuasion on the issue of apportionment of damages, that is, who has the burden of proof on apportionment of damages, and how should the jury be instructed on the issue. At the time of the initial publication of NJI2d Civ. and at the time of the revision of Chapter 4, this seemed to some to be an open question, and was the subject of controversy within the Committee.

In the first printing of NJI2d Civ., in 1989, pattern instruction number 4.09 contained two paragraphs. In the first revision of Chapter 4 of the instructions, in 1994, the second paragraph was removed from the body of the pattern instruction and moved to part II(B) of the Comment. This second paragraph was moved into the Comment for two reasons: First, there *was* some dispute about the state of the law on this issue in Nebraska. The majority of the Committee believed that the paragraph in question was a correct statement of the law, but a minority disagreed.

Second, it was the belief of the majority of the Committee that while paragraph two correctly stated the law of Nebraska, including it in the body of the pattern instruction might lead to it being given routinely, and it should not be given routinely. *See Higginbotham v. Sukup*, 15 Neb. App. 821, 830, 737 N.W.2d 910, 917 (2007) (quoting this part of this Comment). The trial court should only give the second paragraph where apportionment of damages is a real problem. *See also Golnick v. Callender*, 290 Neb. 395, 407-10, 860 N.W.2d 180, 191-93 (2015) (discussing when to give the second paragraph). The Committee moved the second paragraph into the Comment as a way of inviting the trial court to stop and give extra thought to whether this second paragraph should be included in the case at bar.

The first question, Is this a correct statement of the law in Nebraska?, was answered on May 24, 1996. In *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996), the court approved both paragraphs of NJI2d Civ. 4.09 as they appeared in the 1989 publication of this work (but tailored by the trial court to the facts of that case). The second paragraph of the instruction given by the trial court, and approved by the Supreme Court read as follows: “If you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages.” *David v. DeLeon*, 250 Neb. at 113, 547 N.W.2d at 729 (quoting the trial court’s instruction).

Accord Golnick v. Callender, *supra*; Castillo v. Young, 272 Neb. 240, 246–47, 720 N.W.2d 40, 45 (2006).

The Supreme Court said this about that instruction:

We find that this instruction was the correct statement of the law and that it did not misstate the burden of proof: the instruction does not permit a jury to assess damages in any amount unless the plaintiff first proves proximate cause

The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. The plaintiff is not, however, required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all. . . . Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

. . . .

In the instant case, without the admonition that the defendant is liable for all damages if the jury cannot apportion, the instruction would have failed to address the event in which a jury finds that damages were proximately caused by a collision, but is unable to determine precisely what quantum of those damages was not preexisting. This instruction prevents the result of a jury finding that damages were proximately caused by the tortious act, but failing to award damages because it cannot demarcate preexisting illnesses from new losses. David's jury was properly instructed as to the law on the apportionment of damages, and as such, we will not disturb its verdict.

David v. DeLeon, 250 Neb. at 114–16, 547 N.W.2d at 729–730.

Along the way, the court cited and distinguished *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994). In *Macholan*, the Supreme Court upheld the trial court's refusal to give the burden-upon-failure-to-apportion paragraph of the aggravation instruction. In *Macholan*, "issues remained as to causation of the alleged injuries. The plaintiff in *Macholan* was not hurt badly enough in the collision to cause him any pain at that time, and no physician, including the plaintiff's own expert, could find any empirical evidence of injury to support the plaintiff's own complaints." *David v. DeLeon*, 250 Neb. at 115, 547 N.W.2d at 730. The rule of *Macholan*, and the distinction between *Macholan* and *David*, seems to be this: Apportionment requires

evidence that the tortious act under litigation caused some damage and that a preexisting condition caused some damage; the court never gets to the latter until there is sufficient evidence of the former.

Not only is the inability-to-apportion paragraph—the one patterned in part II(B) of this Comment—a correct statement of Nebraska law, but also, there are situations where it is prejudicial error to refuse to give it. Where that paragraph applies and is requested, it must be given; it is reversible error for the trial court to refuse the request. In *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996), there was “evidence that the collision aggravated the preexisting degenerative and weakened condition of Kirchner’s lumbar spine and that the degree to which said preexisting condition was aggravated could not be determined.” *Id.* at 60, 554 N.W.2d at 785. Kirchner asked the trial court to instruct the jury that if they could not separate the damages caused by the preexisting condition from those caused by the collision under litigation, then the defendant is liable for all of those damages. The trial court rejected his request. The Supreme Court held that because there was evidence that the damages could not be apportioned, because the requested instruction states the burden of proof when the damages cannot be apportioned, and because jury instruction that misstates the burden of proof is prejudicially erroneous, then failure to give this requested instruction constituted prejudicial error. *Id.*

Likewise, and more recently, in *Ketteler v. Daniel*, the court noted that the trial judge has a duty to correctly instruct jurors on law. In the context of the pleadings, evidence, and requested instructions in this case, it was error to refuse plaintiff’s requested instruction that if the jury cannot separate the damage caused by the preexisting condition from that caused by the collision under litigation, then the defendant is liable for all of the damage. *Ketteler v. Daniel*, 251 Neb. 287, 295–98, 556 N.W.2d 623, 628–30 (1996) (additionally, the court stated that the defendant may be liable for bodily harm to plaintiff even though injury greater than usual due to predisposing physical condition; defendant takes plaintiff as he finds her; for more on this point, see the Authorities, below).

As of this writing, then, there are five cases supporting (and sometimes requiring) the use of the paragraph under discussion: *Castillo v. Young*, 272 Neb. 240, 246–47, 720 N.W.2d 40, 45 (2006); *Gustafson v. Burlington N. R. Co.*, 252 Neb. 226, 229, 561 N.W.2d 212, 216 (1997) (apportionment instruction appropriate where there is evidence of preexisting condition but degree to which condition may have been aggravated could not be determined; apportionment instruction inappropriate in absence of proof of aggravation); *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996); *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

(Regarding prejudicial error in jury instructions, and the burden of proving error in the jury instructions in general, see Rule Adopted by

the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, Second Edition, *supra.*)

B. SUGGESTED INSTRUCTION

Again, as noted above, the following instruction should not be given routinely, but rarely. When instruction on the inability to separate damages is appropriate, the Committee suggests adding the following as a second paragraph to NJI2d Civ. 4.09:

“If you cannot separate damages caused by the preexisting (condition) from those caused by the (occurrence, accident, collision, et cetera), then the defendant is liable for all of those damages.”

The Supreme Court approved this paragraph in *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). The jury in this case, given this instruction almost verbatim, “was properly instructed on the law on the apportionment of damages.” *Id.* at 116, 547 N.W.2d at 730. *See also* *Golnick v. Callender*, 290 Neb. 395, 407-10, 860 N.W.2d 180, 191-92 (2015). *Higginbotham v. Sukup*, 15 Neb.App. 821, 737 N.W.2d 910 (2007) found that the trial court’s refusal to give this paragraph was reversible error. *Id.* at 835, 737 N.W.2d at 920. The proposed instruction (the paragraph quoted above) is a correct statement of the law, it was warranted by the evidence, and the plaintiff was prejudiced by the court’s failure to include the instruction. Without this instruction, the trial judge did not correctly state the burden of proof.

C. PRE-2000 EDITIONS OF THIS BOOK

Prior the Supreme Court’s 1966 decision in *David v. DeLeon*, *supra*, there was very little Nebraska law on this subject of the inability to separate damages. Pre-2000 editions of this book (all editions published before Thomson West switched the format from compression binding to paperback) included a lengthy discussion of what little Nebraska law there was. Those editions also included a discussion of the law from other jurisdictions. Finally, they included a lengthy discussion of how the Committee concluded, from what law there was, that the defendant carries the burden of apportionment, so that if the defendant cannot (or fails to) separate the preexisting injury from the injury caused by the defendant, the defendant is liable for the entire amount.

That material is omitted from this edition.

III. A PREEXISTING CONDITION THAT CAUSES DAMAGES TO BE GREATER THAN THEY WOULD OTHERWISE HAVE BEEN

The discussion in part II of this Comment has to do with how damages are to be apportioned between a preexisting condition and the occurrence being litigated and what to do when those damages cannot be separated. It is, of course, also true that if the plaintiff has a preexist-

ing condition and because of that condition the damages the plaintiff suffers from the defendant's negligence are greater than they otherwise would have been, "the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct." *Higginbotham v. Sukrup*, 15 Neb.App. 821, 830, 737 N.W.2d 910, 917 (2007).

IV. LOSS-OF-CHANCE DOCTRINE

Nebraska has not adopted the loss-of-chance doctrine. For a discussion of this issue, see the Introduction to this chapter, at part A(2)(d).

Here, you have an allegedly negligent defendant, on trial for damages resulting from the alleged negligence; you have a plaintiff who asks the court to include in any damages awarded an amount to compensate for the chance that he or she will suffer future damage from the loss of chance; this would require the trier of fact to speculate on what may or may not happen in the future. and a request from the plaintiff to include in the damages negligence. The loss-of-chance doctrine would require the trier of fact to speculate on whether the plaintiff would

AUTHORITIES

Snyder v. Contemporary Obstetrics & Gynecology, P.C., 258 Neb. 643, 657, 605 N.W.2d 782, 794–95 (2000) (the instruction given used the language of N.J.I.2d Civ. 4.09 and it was a correct statement of the law).

Golnick v. Callender, 290 Neb. 395, 407–10, 860 N.W.2d 180, 191–93 (2015) (discussing when to give the preexisting condition part of the instruction discussed in part II of the Comment, above).

"We have consistently held that the right of a person suffering from a preexisting condition who is injured by reason of the negligence of another to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting condition." *Wasiak v. Omaha Pub. Power Dist.*, 253 Neb. 46, 53, 568 N.W.2d 229, 234 (1997) (citing cases).

The Restatement (Second) of Torts states this:

The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

Restatement (Second) of Torts § 461 (1977). The negligent actor runs the risk that his liability will be increased by reason of the physical condition of the one towards whom his act is negligent. *See also* Prosser and Keeton *On the Law of Torts* § 43, at 291–92 (W. Keeton gen. ed. 5th ed. 1984).

If defendant's negligence activates a dormant preexisting condition or injury, which would not by itself have caused plaintiff any pain or disability, then the defendant is liable for the entire result. *Carnes v. Weesner*, 229 Neb. 641, 650, 428 N.W.2d 493, 499 (1988); *McCall v. Weeks*, 183 Neb. 743, 749-50, 164 N.W.2d 206, 209, 210 (1969); *Lemieux v. Sanderson*, 180 Neb. 311, 317, 142 N.W.2d 557, 561, 562 (1966); *Nownes v. Hillside Lounge*, 179 Neb. 157, 161, 137 N.W.2d 361, 363 (1965); *Morford v. Lipsey Meat Co.*, 179 Neb. 420, 422, 138 N.W.2d 653, 655 (1965).

The plaintiff has the burden of proving that the defendant's negligence either aggravated a preexisting injury or activated a dormant preexisting condition. *Johnsen v. Taylor*, 169 Neb. 280, 290-91, 99 N.W.2d 254, 261, 263, 265 (1959).

In addition, pay particular attention to the Comment, above.

NJI2d Civ. 4.12

MORTALITY TABLES—PERSONAL INJURY CASES

There is evidence before you from life expectancy tables. This evidence may assist you in determining probable life expectancy. This is only an estimate based on average experience. It is not conclusive. You should consider it along with any other evidence bearing on probable life expectancy, such as evidence of health, occupation, habits, and the like.

COMMENT & AUTHORITIES

Life expectancy tables can be found in the table section of the Revised Statutes of Nebraska.

The admission of life expectancy evidence is improper unless there is evidence of permanent injury. *Zager v. Johnson*, 174 Neb. 106, 115, 116 N.W.2d 1, 6-7 (1962); *Welstead v. Jim Ryan Constr. Co.*, 160 Neb. 87, 91-92, 69 N.W.2d 308, 312 (1955).

Future pecuniary loss is based upon one's life expectancy immediately before the injury, whereas future pain and suffering is based upon life expectancy in the injured condition. *Borcharding v. Eklund*, 156 Neb. 196, 207-08, 55 N.W.2d 643, 650 (1952); *Nelson v. Wiepen*, 154 Neb. 458, 462, 48 N.W.2d 387, 389 (1951); *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394, 402, 13 N.W.2d 627, 629 (1944); *Webb v. Omaha & S.I. Ry.*, 101 Neb. 596, 600, 164 N.W. 564, 565-66 (1917).

"[L]ife expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other

activities." *Oberhelman v. Blount*, 196 Neb. 42, 49, 241 N.W.2d 355, 360 (1976) (approving the introduction of life expectancy evidence from each of the three separate tables found in the appendix to Volume 2A of the Nebraska Statutes). Other cases supporting all or part of the above quotation from *Oberhelman*, include the following: *Baylor v. Tyrrell*, 177 Neb. 812, 823, 131 N.W.2d 393, 401 (1964) (lost earning capacity); *Patras v. Waldbaum*, 170 Neb. 20, 26, 101 N.W.2d 465, 469 (1960) (tables not binding); *Husak v. Omaha Nat'l Bank*, 165 Neb. 537, 546-47, 86 N.W.2d 604, 609 (1957) (life expectancy can be proved without introducing life expectancy tables; if introduced, tables are not conclusive); *Jacobsen v. Poland*, 163 Neb. 590, 604, 80 N.W.2d 891, 904-05 (1957) (tables not conclusive).

See also, NJI2d Civ. 4.01, Authorities. Regarding life expectancy in a wrongful death action, see NJI2d Civ. 4.60 and the Authorities thereto.

NJI2d Civ. 4.13

PRESENT CASH VALUE

If you decide that the plaintiff is entitled to recover damages for any future losses, then you must reduce those damages to their present cash value. You must decide how much money must be given to the plaintiff today to compensate (him, her) fairly for (his, her) future losses.

COMMENT & AUTHORITIES

This instruction should not list the factors the jurors are to consider in connection with this reduction to present cash value. That is to be left to the evidence, the argument of counsel, and the common sense and common knowledge of the jurors.

The details, the examples, and the table in NJI 4.13, at 103-05 (1969) are no longer to be used. The 1969 version of this instruction specifies some, but not all, of the factors that may be evidenced, argued, and considered in reducing an award of future damages to its present cash value. Particular care must be taken not to give such partial instruction. See generally G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305, 316-20 (1985).

Nebraska's general rule is that an award for future damages must be reduced to its present worth. *Fickle v. State*, 273 Neb. 990, 1010, 735 N.W.2d 754, 772, *clarified at* 274 Neb. 267, 270, 759 N.W.2d 113, 116-17 (2007); *Cassio v. Creighton Univ.*, 233 Neb. 160, 177, 446 N.W.2d 704, 715 (1989). This is true for damages for impairment of earning capacity, *Lake v. Southwick*, 188 Neb. 533, 538, 198 N.W.2d 319, 322 (1972); for damages for future pain and suffering, *Abbott v. Northwestern Bell Tel. Co.*, 197 Neb. 11, 16, 246 N.W.2d 647, 650 (1976); and, presumably, for

damages for future medical and similar expenses. While the general rule calls for reduction, if no such jury instruction is tendered, then no such instruction need be given, *Zawada v. Anderson*, 181 Neb. 467, 472, 149 N.W.2d 329, 333 (1967).

When an instruction is given, it may be very general. *Patras v. Waldbaum*, 170 Neb. 20, 22, 101 N.W.2d 465, 467-68 (1960). The common sense and common knowledge of the jurors, assisted by the evidence and the argument of counsel, may be relied upon to take it from there, *Jacobsen v. Poland*, 163 Neb. 590, 611, 80 N.W.2d 891, 904 (1957). See also *Segebart v. Gregory*, 160 Neb. 64, 68, 69 N.W.2d 315, 318 (1955).

Present value must be determined because the money awarded can be invested and earn interest. A present award should also consider the fact that inflation will increase the expenses incurred by the plaintiff. Although the plaintiff can earn interest, the value of the dollar will decline because of inflation. See, generally, G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305 (1985) (discussing various approaches for determining present value). These factors are left to the judgment of the trial court but should, nonetheless, be considered in the amount of the award.

Fickle, 273 Neb. at 1011, 735 N.W.2d at 773, clarified at 274 Neb. at 270-71, 735 N.W.2d at 774 (same quotation both places).

Nebraska's law on present cash value is in the process of being developed and, as a result, is somewhat uncertain in its detail. For a complete discussion of this State's law on the subject of present cash value, see G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305, 308-13 (1985) (on its face, this discussion is only complete as of 1985; nothing much has happened since then).

C. DAMAGES TO PROPERTY

NJI2d Civ. 4.20

DAMAGES TO PROPERTY—REPAIRS WILL RESTORE PROPERTY AT A COST LOWER THAN PROPERTY'S PRE-DAMAGE VALUE

If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to the plaintiff's (property), then you must decide how much money it will take to compensate the plaintiff for that damage. (He, She, It) is entitled to recover the reasonable cost of repairing the (property) to substantially the same condition it was in before it was damaged. [(He, She, It) is also

entitled to recover the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to complete the repair, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.]

COMMENT

I. IN GENERAL

The word "property" is used throughout this series of instructions. It is included in parentheses because if a more specific word will work, a word such as "car," then it should be substituted. Also used throughout is the word "repair." Depending on the facts, the word "restore" may be more appropriate.

The appropriate changes must be made when there are multiple parties, or where the instruction is to be used in connection with a counterclaim, *et cetera*, or, as noted above, where it is used in a non-negligence case.

NJI2d Civ. 4.20 through 4.25 are alternative instructions. Which is chosen will depend upon which issues are properly presented by the pleadings and the evidence. Each is drafted for use in a negligence case; they must be adapted for use in a non-negligence case. The bracketed portions of each should be given only when appropriate to the pleadings and the evidence.

When it is an issue of fact whether damaged property can be restored or has been destroyed, use NJI2d Civ. 4.23 or 4.24. When there is no such issue of fact, that is, when the repairable damage versus destruction question is agreed upon or decided as a matter of law, then either NJI2d Civ. 4.20, 4.21, or 4.22 should be used.

This instruction, NJI2d Civ. 4.20, is to be given where there is property damage that can be repaired to substantially the condition the property was in immediately before it was damaged and at a cost that is less than the property's market value immediately before it was damaged.

Regarding damage to property, see generally R. Gruit and D. Witt, *Nebraska Law on the Measure of Damages*, Ch. 5, Injury to and Destruction of Real and Personal Property (NCLE, Inc. 1983).

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that "the amount of special damages shall be stated" in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special

damages resulting from breaches of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

Regarding property damage that is the result of a breach of a contract warranting that the property was free of termite damage, *see* *Hansen v. Lien Termite and Pest Control Co.*, 229 Neb. 596, 428 N.W.2d 195 (1988). This case relies in part on “L” *Invs., Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982), which, as discussed in the Authorities, below, was partly overruled by *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986).

Note that mental suffering is not a legitimate measure of damages for negligent destruction of personal property, including the death of animals. *Fackler v. Genetzky*, 257 Neb. 130, 139–40, 595 N.W.2d 884, 891–92 (1999). *See* NJI2d Civ. 9.04, Comment.

II. ACTUAL CASH VALUE OR COST OF REPAIR?

Standard casualty protection for residential and commercial property insures the property only to the extent of its actual cash value. Actual cash value is the value of the property in its depreciated condition. The purpose of actual cash value coverage is indemnification. It is to make the insured whole, but never to benefit the insured because the loss occurred.

Most standard indemnity policies allow the insurer to choose to pay the lesser of actual cash value or the cost of repairing or replacing the damaged property. Thus, where the cost to repair or replace is greater than the actual cash value, the insured, not the insurer, is responsible for the cash difference necessary to replace the old property with new property.

D & S Realty v. Markel Ins. Co., 284 Neb 1, 14, 816 N.W. 2d 1, 11 (2012) (footnotes omitted) (replacement cost insurance may be purchased to cover more than the actual cash value, *id.* at 14-15, 816 N. W.2d at 11-12; discussing at length the difference between actual-cash-value and replacement-cost coverage).

[T]he measure of recovery for damage to personal property that cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred “is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.” In order to show this “lost market value,” a party must show (1) that the damage to the property is such that it cannot be repaired and thereby restored to substantially its condition immediately before the damage occurred or that the reasonable cost of repair exceeds the difference in market value of the property immediately before and

immediately after the injury, (2) the reasonable market value of the property immediately before the accident, and (3) the reasonable market value of the property immediately after the accident.

Woollen v. State, 256 Neb. 865, 889, 593 N.W.2d 729, 745 (1999) (citations omitted). See also *Chlopek v. Schmoll*, quoted in the Authorities, below. Regarding loss of use, see also the Authorities, below.

In *Henn*, a case involving damage to a home, the Court said this about actual cash value:

This Court has set forth three approaches to determining actual cash value: “(1) [W]here market value is easily determined, actual cash value is market value, (2) If there is no market value, replacement or reproduction cost may be used, (3) failing the other two tests, any evidence tending to formulate a correct estimate of value may be used.”

Henn v. American Family Mutual Insurance Co., 295 Neb. 859, 865–66, 894 N.W.2d 179, 184 (2017) (discussing each of the three tests at 295 Neb. at 866–877, 894 N.W.2d at 184–90).

Henn goes on to find that actual cash value includes “the depreciated value of the property just prior to the loss, which includes both materials and labor.” *Id.* at 875, 894 N.W.2d at 190.

III. DAMAGE TO CROPS OR CATTLE

Where the property in question consists of crops, see NJI2d Civ. 4.30. Where the property in question consists of cattle, see NJI2d Civ. 4.30, Comment.

IV. LOST PROFITS AS A MEASURE OF DAMAGES

Kunkel v. Cohagen, 151 Neb. 774, 778–79, 39 N.W.2d 609, 612 (1949) held that the plaintiff may rely on proof of lost profits to establish a reasonable value for loss of use when: (1) commercial property cannot be rented, in the market, to replace the damaged commercial property while it is being repaired, or (2) when such rental value cannot be established. Where this issue is present, then language such as the following should be added immediately after the bracketed material at the end of NJI2d Civ. 4.20:

“If you decide, however, that no replacement rental (property) (was, is) available, then, in addition to the reasonable cost of repair, the plaintiff is entitled to recover any lost profits proximately caused by the damage during the time reasonably needed to make the repairs.”

Where this is the case as a matter of law, then the following should be added in place of the bracketed material:

“(He, She, It) is also entitled to recover any lost profits (he, she, it) proximately caused by the damage during the time reasonably needed to make the repairs.”

Be aware, however, that Nebraska “law generally is unfavorable to the recovery of losses of profits in tort actions,” because they ordinarily are speculative, remote, contingent, consequential, and uncertain. *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 144–45, 231 N.W.2d 110, 114 (1975). Generally, loss of profits is not itself a measure of damages, but rather is evidence of loss of earning capacity. *Kaufman v. Tripple*, 180 Neb. 593, 603, 144 N.W.2d 201, 207 (1966).

Regarding lost profits, see also NJI2d Civ. 4.01, Comment, and NJI2d Civ. 4.59, Comment. See also *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 870–77, 896 N.W.2d 156, 192–96 (2017) regarding lost profits as a measure of damages under the Junkin Act, Nebraska’s unlawful restraint of trade statutes found at Neb. Rev. Stat. §§ 59-801-59-831 (Reissue 2010).

AUTHORITIES

“The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss.” “*L*” *Invs., Ltd. v. Lynch*, 212 Neb. 319, 327, 322 N.W.2d 651, 656 (1982) (partly overruled, as discussed below) (quoting *Davenport v. Intermountain Ry. Light & Power Co.*, 108 Neb. 387, 393, 187 N.W. 905, 907 (1922)).

Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.

Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.

The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is

less. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.

To the extent that any prior cases would limit the total compensation . . . to the fair market value . . . before the injury, [not allowing recovery for any loss of use that would take the amount recovered over the fair market value before the damage,] they are expressly overruled.

Chlopek v. Schmall, 224 Neb. 78, 88–89, 396 N.W.2d 103, 110 (1986) (citations omitted). See also *D & S Realty v. Markel Ins. Co. and Woolen v. State*, quoted in the Comment, above. Regarding damages when property cannot be repaired, see the Comment, above.

Cases that had expressed such the limitation stated in the final paragraph of the above quotation and, therefore, are at least partly overruled include *"L" Investments Ltd. v. Lynch*, 212 Neb. at 328, 322 N.W.2d at 656; *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 501, 283 N.W.2d 45, 47 (1979); *Hatch v. Heim*, 200 Neb. 735, 737, 739, 265 N.W.2d 444, 445, 446 (1978); *Sky Harbor Air Serv. Inc. v. Lang*, 194 Neb. 428, 432, 231 N.W.2d 704, 707 (1975); *Carl R. Anderson & Co. v. Suhr*, 181 Neb. 474, 478, 149 N.W.2d 101, 103 (1967); *Caves v. Barnes*, 178 Neb. 103, 108, 132 N.W.2d 310, 314 (1964); *Wylie v. Czapla*, 168 Neb. 646, 655, 97 N.W.2d 255, 262 (1959); *Lund v. Holbrook*, 153 Neb. 706, 713, 46 N.W.2d 130, 134 (1951); *Helin v. Egger*, 121 Neb. 727, 727, 238 N.W. 364, 365 (1931). Many of these cases are cited below, for other points.

Regarding damage to real property:

[I]n an action for compensatory damages for cutting, destroying, and damaging trees and other growth, and for related damage to the land, when the owner of land intends to use the property for residential or recreational purposes according to his personal tastes and wishes, the owner is not limited to the difference in value of the property before and after the damage or to the stumpage or other commercial value of the timber. Instead, he may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible. However, the award for such damage may not exceed the market value of the property immediately preceding the damage.

Keitges v. VanDermeulen, 240 Neb. 580, 589–90, 483 N.W.2d 137, 143 (1992) (if no factual question but that plaintiff's intended use of property is for residential or recreational purposes and plaintiff seeks only to recover cost of restoring property: evidence of land's diminution in value is not relevant; evidence of its value immediately before damage is relevant).

The burden of showing the cost of repair is on the party seeking recovery. The burden of showing that the repairs cost more than the property was worth before it was damaged is on the party so claiming; absent such evidence, it will be assumed that the cost of repair does not exceed the property's pre-damage market value. "*L*" *Invs. Ltd. v. Lynch*, 212 Neb. at 328-29, 322 N.W.2d at 657 (involving negligent tort). *Accord* *Five J's, Inc. v. B & S Props., Inc.*, 11 Neb.App. 370, 373-77, 650 N.W.2d 257, 261-64 (2002) (involving seller's misrepresentation).

The correct measure for determining the reasonable value of the "use of property" is the lesser of either the reasonable cost or the actual cost of renting property of a similar nature and performance. *Husebo v. Ambrosia, Ltd.*, *supra*; *American Tel. & Tel. Corp. v. Thompson*, 193 Neb. 327, 329-30, 227 N.W.2d 7, 9 (1975); *Caves v. Barnes*, *supra*; *Kunkel v. Cohagen*, 151 Neb. 774, 779, 39 N.W.2d 609, 612 (1949). *See also* *Thomas v. Burlington N. R. R., Inc.*, 203 Neb. 507, 513, 279 N.W.2d 369, 373 (1979). What constitutes a reasonable rental cost varies from locality to locality and is a question of fact to be determined from the evidence. *Husebo v. Ambrosia, Ltd.*, *supra*.

Normal costs of operation are not included as damages under this rule. *Husebo v. Ambrosia, Ltd.*, *supra*; *Caves v. Barnes*, *supra*; *Kunkel v. Cohagen*, *supra*. A mileage charge for a rental car is not a normal cost of operation to a lessee, and may be recovered as a part of the value for reasonable use of the injured property. *Husebo v. Ambrosia, Ltd.*, *supra*.

To defeat recovery of the reasonable cost of substitute rental property, the defendant must prove that the charges for the use of the rental property were not fair or reasonable, that the time for repair was longer than necessary, or that the rental property was held for an unreasonable length of time. *Husebo v. Ambrosia, Ltd.*, *supra*.

When the evidence shows that property used for commercial purposes cannot be rented in the market, or that the rental value cannot be established, then the owner of the property may rely on proof of lost profits to establish the reasonable value for loss of use. This is discussed in the Comment, above.

There will be times when, at the commencement of suit, the parties are unclear as to what is the appropriate measure of damages. Once it becomes clear, and the pleadings have been amended, if the reasonable value of the loss of use becomes an element of damages, then the trial court should allow the plaintiff to introduce evidence on that point. *Sky Harbor Air Serv. Inc. v. Lang*, 194 Neb. at 432-33, 231 N.W.2d at 708, *overruled on other grounds*, *Chlopek v. Schmaltz*, 224 Neb. at 89, 396 N.W.2d at 110.

Though there is a somewhat separate line of cases regarding an improvement upon realty that is damaged or destroyed without damage

to the realty itself, the measure of damages is the same. When the improvement can be repaired or restored at a cost capable of reasonable ascertainment, the measure of damages is the reasonable cost of repairing or restoring the property in like kind and quality. Consequential damages are also recoverable. Once again, this recovery is limited to this extent: the amount awarded as the reasonable cost of repair or restoration may not exceed the market value of the property immediately preceding the damage. "*L*" *Invs. Ltd. v. Lynch*, 212 Neb. at 327-28, 322 N.W.2d at 659 (citing cases and authorities).

When repairs will not restore the property to substantially the condition it was in before the damage, then the measure of damages is the difference between the property's reasonable market value immediately before, and immediately after, the accident. See, e.g., *Shotkowski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 29, 237 N.W.2d 92, 98 (1975) (damage to livestock); *Sky Harbor Air Serv. Inc.*, *supra*; *Sober v. Smith*, *supra*; *Sky Harbor Air Serv. Inc. v. Lang*, 194 Neb. at 432-33, 231 N.W.2d at 708, *overruled on other grounds*, *Chlopek v. Schmoll*, 224 Neb. at 89, 396 N.W.2d at 110; *Neill v. McGinn*, 175 Neb. 369, 374, 122 N.W.2d 65, 68 (1963); *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.*, 171 Neb. 681, 690, 107 N.W.2d 542, 548 (1961); *Wylie v. Czapla*, *supra*; *Dorn v. Sturges*, 157 Neb. 491, 507-08, 59 N.W.2d 751, 759 (1953); *Lund v. Holbrook*, *supra*; *Helin v. Egger*, *supra*.

Recovery of market value difference requires that the claimant establish three things: (1) that the property has been damaged and cannot by repair be placed in substantially the same condition it was in before the accident; (2) the reasonable market value of the property immediately before the accident; and the reasonable market value of the property immediately after the accident. *Wylie v. Czapla*, *supra*.

The owner of the property may give personal testimony to establish these facts, but this testimony by itself is insufficient to warrant recovery. *Wylie v. Czapla*, *supra*. See also *Hatch v. Heim*, *supra*; *Shotkowski v. Standard Chem. Mfg. Co.*, *supra*; *Carl R. Anderson & Co. v. Suhr*, *supra*. In addition, opinion evidence as to the value of the property is not binding on the trier of fact, even if the testimony is unopposed. *Burney v. Ehlers*, *supra*. See also *American Tel. & Tel. Corp. v. Thompson*, *supra*; NJI2d Civ. 1.42, Authorities (expert testimony not binding).

NJI2d Civ. 4.21

DAMAGES TO PROPERTY—REPAIRS WILL NOT RESTORE PROPERTY, OR REPAIRS WILL DO SO, BUT AT A COST IN EXCESS OF PROPERTY'S PRE-DAMAGE VALUE

If you decide that the defendant was negligent and that (his, her,

its) negligence proximately caused damage to the plaintiff's (property), then you must decide how much money it will take to compensate the plaintiff for that damage. (He, She, It) is entitled to recover the market value of the (property) before it was damaged, minus its market value after it was damaged. [(He, She, It) is also entitled to recover the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to obtain a suitable replacement, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.]

COMMENT

See NJI2d Civ. 4.20, Comment.

This instruction is to be given in one of the two following situations: (1) where there is property damage that cannot be repaired to substantially the condition the property was in immediately before it was damaged; or (2) when such damage can be so repaired, but at a cost in excess of the property's market value immediately before it was damaged.

As written, this instruction is to be used in cases where one of the two just-described situations exists as a matter of law, *i.e.*, where their existence is not a question of fact. If there is a question of fact as to whether the property can be repaired, either at all or at a cost less than its pre-damage value, that will have to be included in the instructions. See *Howells Elevator, Inc. v. Stanco Farm Supply Co.*, 235 Neb. 456, 462-63, 455 N.W.2d 777, 782 (1990).

The party claiming "cost of repairs" as damages has the burden of proving said cost. If the party against whom such recovery is sought believes that the cost of repairing the property exceeds its pre-damage market value, it has the burden of proving said fact. *Id.*

These rules are the same whether the damage is to real or personal property. *Id.*

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that "the amount of special damages shall be stated" in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special damages resulting from breaches of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

AUTHORITIES

Where the damage to personal property is such that it can-

not be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a replacement [P]rior cases [to the contrary] . . . are expressly overruled.

Chlopek v. Schmall, 224 Neb. 78, 89, 396 N.W.2d 103, 110 (1986). *Howells Elevator, Inc. v. Stanco Farm Supply Co.*, 235 Neb. 456, 463, 455 N.W.2d 777, 782 (1990).

See NJI2d Civ. 4.20, Authorities.

NJI2d Civ. 4.22

DAMAGES TO PROPERTY—REPAIRS WILL RESTORE PROPERTY—ISSUE OF FACT WHETHER COST OF REPAIR EXCEEDS PROPERTY'S PRE-DAMAGE VALUE

If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to the plaintiff's (property), then you must decide how much money it will take to compensate the plaintiff for that damage.

You must do this by deciding whether the reasonable cost of repairing the (property) (was, is) greater than the market value of the property before it was damaged. First, you must determine the reasonable cost of repairing the (property) to substantially the same condition it was in before it was damaged. Second, you must determine the market value of the (property) before it was damaged, minus its market value after it was damaged. The plaintiff is entitled to recover the lesser of those two amounts of money. [(He, She, It) is also entitled to recover the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to complete the repair or to obtain a suitable replacement, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.]

COMMENT & AUTHORITIES

I. IN GENERAL

See the Comment to NJI2d Civ. 4.20 and the, Authorities to NJI2d Civ. 4.20 and 4.21.

This instruction is to be given where there is property damage that can be repaired to substantially the condition the property was in immediately before it was damaged and where whether or not such repairs will cost more than the property was worth immediately before it was damaged is an issue of fact.

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that “the amount of special damages shall be stated” in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. *See* the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

II. LOST PROFITS

In certain circumstances, a plaintiff may rely on proof of lost profits to establish a reasonable value for loss of use. When this may be done is explained at NJI2d Civ. 4.20, Comment. Where this issue is present and NJI2d Civ. 4.22 is otherwise called for, NJI2d Civ. 4.22 should be modified by placing the following into the instruction, after the bracketed material:

“If you decide that no replacement rental (property) (was, is) available, then you should substitute therefor any lost profits proximately caused by the damage during the time reasonably needed to (make the repairs, obtain a suitable replacement).”

Where this is the case as a matter of law and NJI2d Civ. 4.22 is otherwise called for, NJI2d Civ. 4.22 should be modified by omitting the bracketed material at the end of the instruction and adding the following onto the end of what then becomes the instruction’s final sentence:

“plus any lost profits proximately caused by the damage during the time reasonably needed to (make the repairs, obtain a suitable replacement).”

Be aware, however, that Nebraska law generally does not favor the recovery of lost profits in tort actions. *See* NJI2d Civ. 4.20, Comment.

See the Comment to NJI2d Civ. 4.20, and the discussion and cross-references therein.

NJI2d Civ. 4.23

DAMAGES TO PROPERTY—NO ISSUE AS TO WHETHER COST OF REPAIRS EXCEEDS MARKET VALUE—ISSUE OF FACT WHETHER OR NOT REPAIRS WILL RESTORE PROPERTY

If you decide that the defendant was negligent and that (his, her,

its) negligence proximately caused damage to the plaintiff's (property), then you must decide how much money it will take to compensate the plaintiff for that damage.

You must do this by deciding, first, whether or not the plaintiff's (property) can be repaired to substantially the same condition it was in before it was damaged.

If you find that it can be, then the plaintiff is entitled to recover an amount of money equal to the reasonable cost of such repairs [plus the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to complete the repair, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation].

On the other hand, if you find that repairs will not restore the (property) to substantially the same condition, then the plaintiff is entitled to recover the (property's) market value before it was damaged minus its market value after it was damaged [plus the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to obtain a suitable replacement, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.]

COMMENT & AUTHORITIES

See NJI2d Civ. 4.20, Comment, and NJI2d Civ. 4.22, Comment. Specifically regarding the bracketed material, see NJI2d Civ. 4.20, Comment.

See the Authorities to NJI2d Civ. 4.20 and 4.21.

This instruction is to be given where there is property damage and where whether or not repairs will restore the property to substantially the condition it was in immediately before it was damaged is an issue of fact.

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that "the amount of special damages shall be stated" in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

NJI2d Civ. 4.24**DAMAGES TO PROPERTY—ISSUE OF FACT
WHETHER OR NOT REPAIRS WILL RESTORE
PROPERTY AND, IF SO, WHETHER COST OF
REPAIRS EXCEEDS PROPERTY'S PRE-DAMAGE
VALUE**

If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to the plaintiff's (property), then you must decide how much money it will take to compensate the plaintiff for that damage.

You must do this by deciding, first, whether or not the plaintiff's (property) can be repaired and thereby placed in substantially the same condition it was in before it was damaged.

A.

If you find that repairs will not restore the (property) to a condition substantially the same as its condition before it was damaged, then the plaintiff is entitled to recover the market value of the (property) before it was damaged minus its market value after it was damaged [plus the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to obtain a suitable replacement, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.]

B.

If you find that the (property) can be repaired, then you must decide whether the cost of doing so is more than the loss in market value.

You determine this in two steps. First, you must determine the reasonable cost of repairing the (property) to substantially the same condition it was in before it was damaged [plus the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to complete the repair, or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation]. Second, you must determine the market value of the (property) before it was damaged, minus its market value after it was damaged [plus the value of the loss of use of the (property), that is, either the reasonable cost of renting (replacement, similar) property for the amount of time reasonably required to obtain a suitable replacement,

or the amount actually paid for such a rental, whichever is less, but not including any normal costs of operation.] The plaintiff is entitled to recover the lesser of those two amounts.

COMMENT & AUTHORITIES

See NJI2d Civ. 4.20, Comment, and NJI2d Civ. 4.21, Comment. See also NJI2d Civ. 4.22, Comment. More specifically regarding the bracketed material, see NJI2d Civ. 4.20, Comment, and NJI2d Civ. 4.21, Comment.

See the Authorities to NJI2d Civ. 4.20 and 4.21.

This instruction is to be given where there is property damage and where both of the following are issues of fact: whether or not the property can be repaired to substantially the condition it was in immediately before the damage; and, if so, whether such repairs will cost more than the property was worth immediately before it was injured.

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that "the amount of special damages shall be stated" in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

NJI2d Civ. 4.25

DAMAGES TO LEASEHOLD INTEREST—LESSEE

The plaintiff is a lessee of the (property) involved in this action. If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to plaintiff, then the plaintiff is entitled to recover (here insert specific elements of damages).

COMMENT & AUTHORITIES

See NJI2d Civ. 4.20, Comment.

This instruction deals with the situation where a tenant loses some of the value of his or her leasehold interest. Outside of the condemnation cases, see NJI2d Civ. 13.26, there are no Nebraska cases on the subject. The instruction is based upon the instruction found at NJI 4.32 (1969). If the lessee's leasehold interest is destroyed, see NJI2d Civ. 4.26.

This instruction lacks specificity because there are no Nebraska

cases on the subject. It may be that a wholly different instruction will better express the measure of damages for a specific kind of loss sustained by a particular lessee. If so, then such an instruction should be drafted and used. When such instruction is drafted, care must be taken to insure that the jury understands that the lessee may only recover for the injury to his or her tenancy or other interests as a lessee, and not for the entire damage.

Though there are no Nebraska cases on the subject, the instruction does fill a gap. NJI2d Civ. 4.26, which applies when the leasehold is destroyed, will not work in this situation. Take, for example, a tenant who rents a house, and takes possession, and a neighbor negligently causes the flooding of the basement. "A third person causing an injury to the use or possession of leased premises is liable therefor to the tenant in possession," 51 C.J.S., *Landlord & Tenant* § 354, at 892 (1968), but the tenant is not entitled to recover market value minus rent when the injury is by way of damage, as opposed to destruction. That is, water in the basement may injure use and enjoyment, without totally destroying it, and the tenant is only entitled to the reduction in the usable value of the premises.

In the case of a condemnation, NJI2d Civ. 13.25 and 13.26 will apply. The measure of damages in a condemnation case appears to be the same as in the case of negligent damage to a leasehold. See the Comments and Authorities to NJI2d Civ. 13.25 and 13.26. Although the measure of damages as between a condemnation and negligent damage to a leasehold may well be the same, the usefulness of separate instructions arises from the basis of liability. As between private persons, the basis for liability for injury to a leasehold is generally trespass, nuisance, or strict liability. Dan B. Dobbs, *Handbook on the Law of Remedies*, § 5.1 at 311 (1973). The sovereignty's liability in a case of condemnation is predicated upon constitutional mandate. The Nebraska Constitution provides that: "The property of no person shall be taken or damaged for public use without just compensation therefor." Neb. Const. art. I, § 21 (emphasis added). (Emphasis added) This instruction and NJI2d Civ. 4.26 will be used in different kinds of lawsuits and will be plugged into a whole different set of accompanying instructions than will NJI2d Civ. 13.25 and 13.26.

The Authorities to NJI 4.32 (1969), citing Nineteenth and Twentieth Century cases from other jurisdictions, states:

In actions at law for either direct trespass or consequential injury, the question of damages usually turns on the distinction between injury to the estate of the tenant and injury to that of the landlord. The injury to the estate of the tenant (to his possessory interest) may involve two main items of damage: first, the actual injury inflicted in the past, such as the destruction of his crops, and second, any prospective reduction in the rental or usable value of the premises for the remainder of the term. In this respect the same injury may cause actionable damage

to both the possession of the tenant and the reversionary interest of the landlord. In the case of injury or destruction of a leased building, if the lessee is forced to remove from it, he may recover the value of the remainder of his term—the rental or usable value of the property for the unexpired time—with the cost of improvements made by him and the damage to his fixtures and personal property. If the lessee repairs the building and remains on the leased premises, and his defraying of the cost of repairs is a reasonable measure to preserve the value of his term, he may recover his reasonable cost in addition to damages for the disturbance to his possession. Thus, the cause of action for loss in the value of the property over and above the leasehold is in the lessor, but the lessee, usually without joining the lessor, may recover the value of his unexpired term.

Id. (citations omitted) (regarding determining whether an article is a fixture, see *Metropolitan Life Ins. Co. v. Reeves*, 223 Neb. 299, 301, 389 N.W.2d 295, 296 (1986).) Further regarding fixtures, see, e.g., *Griffith v. Drew's LLC*, 290 Neb. 508, 520–21, 860 N.W.2d 749, 759–60 (2015) and the cases cited there.

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that “the amount of special damages shall be stated” in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to *NJI2d Civ. 4.59* for a general discussion of special damages. *NJI2d Civ. 4.59* is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

On a related topic, *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 63, 382 N.W.2d 303, 309 (1986) states: “[I]n calculating the damages due a lessee for failure of the lessor to install items required by the lease, lessee’s damages are limited to the difference between the reasonable rental value of the property as it was as compared to what it was contracted to be.”

D & R Realty v. Bender, 230 Neb. 301, 431 N.W.2d 920 (1988), involved a flood that rendered unusable part of ground formerly planted to crops. The lessees paid a pro rata portion of the rent, based on the number of acres they had been able to plant. The lessor sued to recover the rest of the full value of the rent. The court stated: “[W]here a substantial portion of leased premises is destroyed or rendered incapable of being used by a lessee, the lessee is entitled to an apportionment of the rental to be paid, in the absence of an expressed assumption of the risk of such destruction.” *Id.* at 305–06, 431 N.W.2d at 922–23.

Related hereto, “A life tenant is entitled to and owns by absolute title everything in the nature of income, profit, and gain realized or ac-

crued from the property during his or her life tenancy.” In *Estate of Adelung*, 306 Neb. 646, 674, 947 N.W.2d 269, — (2020).

NJI2d Civ. 4.26

DESTRUCTION OF LEASEHOLD INTEREST—LESSEE

The plaintiff is the lessee of the (property) involved in this action and (his, her, its) leasehold interest has been destroyed. If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused the destruction of the plaintiff's leasehold interest, then, figuring from the date of the destruction of the (leasehold interest), the plaintiff is entitled to recover an amount of money equal to the fair market value of the remainder of the term of the lease had the (leasehold interest) not been destroyed, minus the rent the plaintiff would have had to pay.

COMMENT

See NJI2d Civ. 4.20, Comment. Regarding the destruction of a leasehold interest by eminent domain, see NJI2d Civ. 13.25.

This instruction applies when the plaintiff's leasehold interest has been destroyed. If it was only damaged, and not destroyed, see NJI2d Civ. 4.25. NJI2d Civ. 4.25 also works when there is a question of fact as to whether the leasehold interest was destroyed or merely damaged. In a case where damage or destruction is a question of fact, it might be that a combination of NJI2d Civ. 4.25 and 4.26 would be clearer than just 4.25 alone.

This instruction states the rent saved is an offset against the plaintiff's recovery. If there are other expenses that must be offset against the plaintiff's recovery and that are not included as items the witnesses have factored into the fair market value of the lease, care must be taken to include them in this instruction. (See NJI2d Civ. 13.25, Comment.)

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that “the amount of special damages shall be stated” in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the Comment and Authorities to NJI2d Civ. 4.59 for a general discussion of special damages. NJI2d Civ. 4.59 is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

Where this instruction puts the words “leasehold interest” in parentheses, either use these words, removing the parentheses, or, if

appropriate, substitute words describing the property involved, or substitute the date of destruction. Use whichever approach best aids clarity.

AUTHORITIES

Foreman & Clark of Neb., Inc. v. City of Omaha, 203 Neb. 746, 748, 280 N.W.2d 892, 893 (1979); Ballantyne Co. v. City of Omaha, 173 Neb. 229, 241-42, 113 N.W.2d 486, 495 (1962); In re Platte Valley Pub. Power & Irrig. Dist., 159 Neb. 609, 621-22, 68 N.W.2d 200, 207 (1955); State v. Platte Valley Pub. Power & Irrig. Dist., 147 Neb. 289, 300, 23 N.W.2d 300, 308 (1946). (All of the cases cited in these Authorities are condemnation cases.)

"The value of a leasehold must be determined by consideration of the *uses to which the property is adapted*. All circumstances naturally affecting this value are open to consideration." Dawson v. City of Lincoln, 176 Neb. 311, 314, 125 N.W.2d 908, 911 (1964). In Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 472-73, 106 N.W.2d 727, 738-39 (1960), the court mentions the following as circumstances that might appropriately be considered as relevant to the market value of the lease: uses made, or that may be made, of the premises; the nature, prosperity, and volume of the business carried on there; and the situation and condition of the premises.

A lessee compelled to move from condemned premises "is not entitled to be compensated for moving expenses." Ballantyne Co. v. City of Omaha, 173 Neb. at 241, 113 N.W.2d at 493.

"Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover." In re Platte Valley Pub. Power & Irrig. Dist., 159 Neb. at 618, 68 N.W.2d at 207.

NJI2d Civ. 4.27

DAMAGES—CONVERSION OF PROPERTY

If you decide that the defendant converted the plaintiff's property, then you must decide how much money it will take to compensate the plaintiff for that conversion. (He, She, It) is entitled to recover the fair market value of the converted property at the time and place of the conversion.

COMMENT

The cases say that where the property has no calculable market value, the measure of damages is its value to its owner, figured as of the time and place of the conversion. See Authorities, below. If it is the case that the property has no market value, then an appropriate

substitution will have to be made for the words “market value”. If the time and place of the conversion is not in dispute, then remove the words “at the time and place of the conversion” and insert a specific statement of the time and place. It might be preferable to insert, in place of the word “property” in the first sentence and the words “converted property” in the second sentence, a word or phrase describing the property in question. Do so if it aids clarity.

“We have defined tortious conversion as any distinct act of dominion wrongfully asserted over another’s property in denial of or inconsistent with that person’s rights. And our case law makes clear that in order to maintain an action for conversion, the plaintiff must establish a right to immediate possession of the property at the time of the alleged conversion.” *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 1019-20, 858 N.W.2d 196, 211 (2015) (footnotes omitted). *Accord Ochs v. Makousky*, 249 Neb. 960, 963, 547 N.W.2d 136, 139 (1996) (first sentence).

“Conversion is any unauthorized or wrongful act of dominion exerted over another’s personal property which deprives the owner of his property permanently or for an indefinite period of time.” Same quotation: *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 59, 840 N.W.2d 885, 894 (2013); *Farmland Serv. Coop., Inc. v. Southern Hills Ranch*, 266 Neb. 382, 392, 665 N.W.2d 641, 648 (2003); *Gen. Title Ins. Co. v. Wolf v. Walt*, 247 Neb. 858, 869, 530 N.W.2d 890, 898 (1995) (multiple quotation marks omitted). *Accord Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 164, 825 N.W.2d 779, 786-87 (2013) (“[C]onversion lies only for serious interference with possessory interests in personal property, not real property.”).

“In Nebraska, a bailee who handles bailed property in a manner that is in breach of the bailment agreement—that is, in a manner other than required by the contract—commits conversion.” *Peterson*, 287 Neb. at 59, 840 N.W.2d at 894 (citations omitted). For more on bailment, see *NJI2d Civ. 11.02, Comment & Authorities*.

To be recovered, special damages must be pleaded and evidenced. (Neb. Ct. R. Pldg. § 6-1108 states that “the amount of special damages shall be stated” in the pleading). If they are pleaded and evidenced, then additional or substitute instruction will be needed. See the *Comment and Authorities to NJI2d Civ. 4.59* for a general discussion of special damages. *NJI2d Civ. 4.59* is an instruction on the law of special damages resulting from breach of contract; it will serve as a model for an instruction on special damages resulting from damages to property.

“Actions for conversion and replevin are law actions. In an action at law tried to the bench, a district court’s factual findings and disposition have the same effect as a jury verdict and will not be set aside unless clearly wrong.” *Zelenka v. Pratte*, 300 Neb. 100, 104–05, 912 N.W.2d 723, 727 (2018) (footnote omitted).

“[T]he object of a replevin action is to recover specific personal property.” *Pinnacle Bank v. Darland Constr. Co.*, 270 Neb. 978, 980, 709 N.W.2d 635, 637 (2006) (money that is not specifically identifiable is not subject to replevin).

In a replevin case, the plaintiff has the burden to prove by a preponderance of the evidence that at the time of the commencement of the action (1) he was the owner of the property sought, (2) he was entitled to immediate possession of the property, and (3) the defendant wrongfully detained it.

Zelenka, 300 Neb. at 106, 912 N.W.2d at 728.

“[I]n a replevin case, when a defendant or intervenor is found to have ownership and right of possession of property, the replevin statutes necessarily place the issue of damages at issue.” *Foundation One Bank v. Svoboda*, 303 Neb. 624, 635, 931 N.W.2d 431, 638-39 (2019). This is so “‘whether the defendant pleads a general denial, or new matter as a defense, or a demand for damages.’” *Id.* (quoting *School Dist. v. Shoemaker*, 5 Neb. 36, 38, (1876)).

The general measure-of-damages rule in a replevin action is that the plaintiff “may recover the interest on the value of the property during the period it was wrongfully detained.” *Allemang v. Kearney Farm Ctr., Inc.*, 251 Neb. 68, 72, 554 N.W.2d 785, 788 (1996). Where, however, “use of the property is valuable and the value of the use exceeds the amount of interest on the value [of the property] . . . the plaintiff may recover the value of the loss of use of the property.” *Allemang v. Kearney Farm Ctr., Inc.*, 251 Neb. 68, 72, 554 N.W.2d 785, 788 (1996) (successful plaintiff in replevin action ought to recover all damages actually sustained by reason of unlawful detention; where special damages not shown, damages for wrongful detention limited to interest on value of property during time detained, *id.* at 74, 554 N.W.2d at 789; owner has duty to mitigate, same as any other litigant, including duty to file action for return of property unlawfully detained, *id.* at 75, 554 N.W.2d at 790). *See also* Neb. Rev. Stat. § 25-10,105 (Reissue 2016); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 197, 548 N.W.2d 764, 769 (1996); *Pick v. Fordyce Co-op Credit Ass’n*, 225 Neb. 714, 725, 408 N.W.2d 248, 256 (1987) (“The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.”). In this situation, an appropriate instruction will have to be drafted, keeping these legal principles in mind.

“[T]he statute of limitations for a conversion claim is 4 years.” *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 164, 825 N.W.2d 779, 786-87 (2013). Regarding statutes of limitations generally, see *NJI2d Civ. 2.02D* and *12.04, Comment & Authorities*, and cross-references therein.

Regarding damages for breach of contract to return specific property, see *NJI2d Civ. 4.48*.

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In Nebraska, the general rule on the measure of damages for conversion is well established. The measure of damages is the market value of the converted property at the time and place of conversion. *Pan v. IOC Realty Specialist*, 301 Neb. 256, 275, 918 N.W.2d 273, 290 (2018) (adding, “with interest accruing thereon” and stating that “‘fair market value’ is defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction”; *see also* NJ12d Civ. 13.02 re “fair market value”); *Imperial Empire Trading Co. v. City of Omaha*, 246 Neb. 919, 921, 524 N.W.2d 314, 316 (1994); *Otto Farms v. First Nat’l Bank of York*, 228 Neb. 287, 293, 422 N.W.2d 331, 336 (1988); *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 603, 379 N.W.2d 742, 750 (1986); *PWA Farms, Inc. v. North Platte State Bank*, 220 Neb. 516, 522–23, 371 N.W.2d 102, 105 (1985); *Richtmyer v. Mutual Live Stock Com’n Co.*, 122 Neb. 317, 319, 240 N.W. 315, 316 (1932); *Frank v. Stearns*, 111 Neb. 101, 107, 195 N.W. 949, 952 (1923), *modified* 111 Neb. 101, 198 N.W. 480 (1924); *Halbert v. Rosenbalm*, 49 Neb. 498, 508, 68 N.W. 622, 625 (1896).

Prejudgment interest is allowable from the date of the conversion, but only when damages are liquidated. *Otto Farms, Inc. v. First Nat’l Bank of York*, 228 Neb. 287, 293, 422 N.W.2d 331, 336 (1988) (citing and discussing cases). *See also* Dan B. Dobbs, *Handbook on the Law of Remedies* § 5.14, at 403 (1973) and *id.* § 3.5, at 165 n.7; *Fremont Nat’l Bank & Trust Co. v. Collateral Control Corp.*, 724 F.2d 1410, 1415 (8th Cir.1983). Interest will be figured by the court and need not be part of the instruction. Regarding liquidated damages, *see* Part 8 of the Introduction to Chapter 4.

Similarly, in a replevin action where the property is not returned the measure of damages is the value of the property plus interest from the date of the unlawful taking. *See* the Comment, above.

Where, because of the nature of the property converted, its market value cannot be established, the Nebraska Supreme Court has said that the measure of damages is the property’s value to its owner, figured as of the time and place of the conversion. *Linn v. Dodge Cty. Bank of Hooper*, 113 Neb. 446, 447, 203 N.W. 546, 547 (1925) (court’s syllabus); *Woodworth v. Hascall*, 59 Neb. 124, 126, 80 N.W. 483, 484 (1899). *See also* D. Dobbs, *Handbook on the Law of Remedies* § 5.12 (1973), which contains a good general discussion of various ways of measuring damages where “there is no market price that will fairly compensate the owner.” *See also id.* at §§ 5.13 and 5.14.

The time and place of conversion is when and where the defendant wrongfully converted the property. *Richtmyer v. Mutual Live Stock Com’n Co.*, 122 Neb. 317, 240 N.W. 315, 318 (1932) (cattle stolen from Cherry County ranch and delivered to and sold by livestock commission merchant in Omaha; time and place of conversion were in Omaha; evi-

dence of market value at both place of original taking and place where cattle received and disposed of held to be relevant). *See also* Packer v. Snyder, Malone, Coffman Co., 133 Neb. 756, 277 N.W. 60, 63 (1938).

There are no modern Nebraska cases on whether an increase in the value of the property after conversion may be recovered. The most recent definitive statement on this point said no. *Carpenter v. Lingenfelter*, 42 Neb. 728, 737, 60 N.W. 1022, 1025 (1894).

Although the increase in value may not be recoverable, gains prevented by the conversion may be—at least they are in an action for a breach of a contract to return bailed property. *See* Lincoln Welding Supply Co. v. Western Contracting Corp., 177 Neb. 160, 162–63, 128 N.W.2d 621, 623 (1964) and N.JI2d Civ. 4.48 and the Comment and Authorities thereto. In *Neill v. McGinn*, 175 Neb. 369, 373, 122 N.W.2d 65, 68 (1963), an action for conversion of an automobile, the court held that the plaintiff was not entitled to damages for loss of use.

D. DAMAGES TO CROPS

NJI2d Civ. 4.30

GENERAL INSTRUCTION ON DAMAGES TO CROPS

If you decide that the defendant was negligent and that (his, her, its) negligence proximately caused damage to the plaintiff's crops, then you must decide how much money it will take to compensate the plaintiff for that damage.

A. Crops Injured, But Not Destroyed

If you find that the crops have been injured, but not destroyed, then the plaintiff is entitled to recover the market value the crop would have had at maturity, if it had not been injured, minus any market value of the injured crop, and minus any savings to the plaintiff in the cost of production and transportation to market.

B. Annual Crops, Destroyed

If you find that the crops [were annual, as opposed to permanent or perennial, and that they] have been destroyed, then the plaintiff is entitled to recover the value the crop would have had if it had matured minus (its salvage value, if any, and minus) any savings to the plaintiff in the cost of production and transportation to market.

C. Perennial Crops, Destroyed

If you find that the crops [were permanent or perennial, as op-

posed to annual, and that they] have been destroyed, then the plaintiff is entitled to recover the difference between the value of the land before the crops were destroyed and its value after the crops were destroyed.

COMMENT

See generally NJI2d Civ. 4.20, Comment. Where the damage is the result of a condemnation, see NJI2d Civ. 13.28.

If any of the sub-issues set out in subdivisions A, B, or C, *supra*, are not in the case at hand, the instruction will, of course, have to be modified accordingly. If only one of those three sub-issues is involved, its subdivision in the instruction should be changed by deleting "If you find . . ." through ". . . then", and only that subdivision should be given. The bracketed material would be included only if there was an issue of fact as to whether the crop was annual or perennial.

If it is a mature, non-perennial crop that is destroyed, subdivision B should be changed to indicate that "the plaintiff is entitled to recover the market value of the mature crop minus (its salvage value, if any, and minus) any savings to the plaintiff in the cost of production and transportation to market."

Regarding loss of the use of ground formerly planted to crops, see *D & R Realty v. Bender*, 230 Neb. 301, 431 N.W.2d 920 (1988) (quoted at NJI2d Civ. 4.25, Comment); *Wischmann v. Raikes*, 168 Neb. 728, 748, 97 N.W.2d 551, 565 (1959).

Colvin v. John Powell & Co., 163 Neb. 112, 134, 77 N.W.2d 900, 915 (1956) approved the use of this sort of instruction in a case involving damages to feeder cattle where a portion of the herd was injured but survived without any reasonable market value.

"In an action for damages on account of injury to [crops], the owner of such [crops] is qualified by reason of that relationship to give his estimate of their value." *Bristol v. Rasmussen*, 249 Neb. 854, 865-66, 547 N.W.2d 120, 128-129 (1996) (multiple quotation marks omitted).

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The rule as to the fixation of damage to growing crops . . . is as follows: In determining the value of farm products of any year the jury should take into consideration the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances shown by the evidence tending to establish such value, which would properly include those arising before, at the time of, and after the injury, for the purpose of arriving at the

difference between the value of that crop before and after the injury.

Gable v. Pathfinder Irrig. Dist., 159 Neb. 778, 788, 68 N.W.2d 500, 507 (1955), *overruled on other grounds by Cover v. Platte Valley Pub. Power and Irr. Dist.*, 162 Neb. 146, 159-60, 75 N.W.2d 661, 671 (1956). *See also* *Romshek v. Osantowski*, 237 Neb. 426, 448-49, 466 N.W.2d 482, 498 (1991) (discussing relevant factors and, therefore, relevant evidence); *O'Neil v. Haarberg*, 179 Neb. 531, 538, 139 N.W.2d 217, 221-22 (1966), for an even longer list of things the jury should take into consideration.

The measure [of damages] where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.

Gable v. Pathfinder Irrig. Dist., 159 Neb. at 787, 68 N.W.2d at 506 (citing cases), also quoted in the appeal after retrial, *Gable v. Pathfinder Irrig. Dist.*, 163 Neb. at 354-55, 79 N.W.2d at 712, and quoted in *Kula v. Prososki*, 228 Neb. 692, 695, 424 N.W.2d 117, 120 (1988). *Accord* *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 112, 808 N.W.2d 67, 76 (2012); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 268, 354 N.W.2d 625, 633 (1984); *Steffen v. County of Cuming*, 195 Neb. 442, 445, 238 N.W.2d 890, 893 (1976). *See also* *Tyler v. Olson Bros. Mfg. Co., Inc.*, 201 Neb. 79, 83, 266 N.W.2d 216, 218 (1978) (award based on reduction in yield and reduction in price because of late harvest).

Bristol v. Rasmussen, 249 Neb. 854, 547 N.W.2d 120 (1996) provides the most complete single judicial statement of Nebraska's law of damages regarding damage to an annual crop (soybeans, in this case). The context is an obstruction built across a natural watercourse, causing water to collect and flood land of the upflow neighbor:

The measure of damages for the destruction of an unmaturing growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market. Damages based upon the value of an unmaturing crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The value of a matured crop may be proved by showing the market value, less the necessary costs of producing, harvesting, and transporting the crop to market. However, there are several factors that assist the trier of fact in determining the value of an unmaturing crop at the time of its injury or destruction, including: the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring

land; the development of the crop at the time of destruction; the yield of a similar crop not injured; the probable crop without injury; the time of the injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crop's not maturing; and all other circumstances illustrated by the evidence tending to establish such value.

Id. at 863–64, 547 N.W.2d at 127 (citations omitted) (owner of crops thereby qualified to estimate their value; *see* Comment, above).

“[T]he measure of damages for the destruction of an *unmatured* crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market.” *Pribil v. Koinzan*, 266 Neb. 222, 229, 665 N.W.2d 567, 574 (2003). “The measure of damages to growing [annual] crops destroyed by the wrongful act or omission of another is the value at the time of destruction.” Some cases state that the measure of damages for an unmatured crop is the value at the time of destruction. *State Dept. of Rds. v. Dillon*, 175 Neb. 350, 361, 121 N.W.2d 798, 804 (1963) (citing cases); *Patrick v. City of Bellevue*, 164 Neb. 196, 208, 82 N.W.2d 274, 282 (1957); *Gable v. Pathfinder Irrig. Dist.*, 159 Neb. 778, 787, 68 N.W.2d 500, 506 (1955) (citing cases). This “‘value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market.’” *Kula v. Prososki*, 228 Neb. 692, 695, 424 N.W.2d 117, 120 (1988) (quoting *Pulliam v. Miller*, 108 Neb. 442, 447, 187 N.W. 925, 927 (1922)). The pattern instructs on the value the crop had it matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market. It does not instruct on the crop's value at the time of destruction. Were the instruction to use the latter language, the jury might take it to mean that the measure of damages is the crops' salvage value. That is, of course, not the rule. (Additionally, *Anderson v. Chicago, B. & Q.R.*, 102 Neb. 497, 502, 167 N.W. 559, 561 (1918) stated this rule: “The measure of damages for the destruction of growing annual crops . . . is the value thereof immediately before their destruction.” Subdivision B of this instruction more clearly expresses the underlying notion than would an instruction that plaintiff is entitled to recover the value of the crops prior to or at the time of their destruction.)

Pribil, lists “several factors that may assist the trier of fact in determining the value of an unmatured crop at the time of its injury or destruction.” *See Pribil* 266 Neb. at 229–30, 665 N.W.2d at 574–75 for that list.

Regarding the question of speculative damages in a case involving the destruction of or damage to an unmatured crop, *see, e.g., Pribil*, above; *State v. Dillon*, 175 Neb. at 361, 121 N.W.2d at 804–05; *Patrick v. City of Bellevue*, 164 Neb. 196, 208, 82 N.W.2d 274, 282 (1957); *Faught v. Dawson Cty. Irrig. Co.*, 146 Neb. 274, 283, 19 N.W.2d 358, 363 (1945);

Thompson v. Chicago, B. & Q.R.R., 84 Neb. 482, 484, 121 N.W. 447, 448 (1909).

If an annual crop was mature when it was destroyed, then its "value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market." *Ricenbaw v. Kraus*, 157 Neb. 723, 733, 61 N.W.2d 350, 357 (1953) (citing cases), and quoted in *Ballmer v. Smith*, 158 Neb. 495, 503-04, 63 N.W.2d 862, 867 (1954). *Accord Pribil*, 266 Neb. at 230, 665 N.W.2d at 574-75.

"As to the loss of a perennial crop, such as a hay meadow or pasture, ". . . the measure of damages is the difference between the value of the land immediately before the injury with the crop growing thereon, and the value of the land immediately after the destruction of the crop." " *Wischmann v. Raikes*, 168 Neb. 728, 749-50, 97 N.W.2d 551, 565 (1959). *Accord Steffen v. County of Cuming, supra; Thompson v. Chicago, B. & Q.R.R., 84 Neb. at 483, 121 N.W. at 448* ("a fair criterion of the damage suffered by the destruction of a good stand of [permanent crop, such as alfalfa] would be the difference between the value of the land with such crop standing and growing upon it and the same land without such crop."). On a related, though different, point, *Hart v. Chicago & Nw. Ry.*, 83 Neb. 652, 654-56, 120 N.W. 176, 177-78 (1909), dealt with the destruction of a grove of trees; the court stated that where the trees have a value separate from the land the court may decline to instruct the jury that the measure of damages is the decrease in the value of the land.

See also Arnold v. Huenefeld, 176 Neb. 683, 693-94, 127 N.W.2d 196, 202 (1964) (denial of damages affirmed; lack of evidence of market value of crop and expenses with relation thereto and of evidence differentiating between totally damaged crops and partially damaged crops); *Turnell v. Mahlin*, 171 Neb. 513, 531, 106 N.W.2d 693, 703 (1960) (failure to prove damages to crops).

E. DAMAGES FOR BREACH OF CONTRACT

NJI2d Civ. 4.40

GENERAL INSTRUCTION ON DAMAGES FOR BREACH OF CONTRACT

If you find in favor of the plaintiff on (his, her, its) claim of breach of (here insert word or phrase specifying the claim, such as contract, warranty, covenant not to compete, et cetera), then you must determine the amount of plaintiff's damages.

(Here insert the proper measure of general damages.)

(Here insert the proper measure of special damages.)

If you find in favor of the plaintiff, but do not find any actual damage, then you may award the plaintiff no more than a nominal sum.

COMMENT

I. IN GENERAL

See generally the Introduction to Chapter 4.

The measure of damages to be inserted in place of the first set of parentheses in the above instruction must be the measure that is appropriate for the kind of breach involved, the pleadings, and the evidence in the case. NJI2d Civ. 4.41 through 4.59 set out the appropriate measures of damages, under Nebraska law, for a number of different, specific kinds of breaches of contract. Regarding the measure of damages to be inserted in the second set of parentheses, see NJI2d Civ. 4.59, which deals with actual, consequential, or special damages.

In addition, note that “parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.” *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 535, 483 N.W.2d 114, 120–21 (1992) (quoted more fully at NJI2d Civ. 4.52, Comment).

In particular cases these instructions may have to be rewritten, added to, or in some other way changed to fit the pleadings and the evidence. For example, the appropriate changes must be made if there are multiple parties or where the instruction is to be used in connection with a counterclaim, et cetera.

II. GENERAL RULES REGARDING DAMAGES FOR BREACH OF CONTRACT

It is the rule here, as it is elsewhere, that “a plaintiff in a breach of contract action must prove that the breach was the proximate cause of the damages claimed.” *George Clift Enters. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 810, 947 N.W.2d 510, — (2020).

A. RECOVERY OF ALL DAMAGES

“As a general rule, a party injured by a breach of contract is entitled to recover all damages which are reasonably certain and which are naturally expected to follow the breach.” Same quotation: *Phipps*, 259 Neb. at 503, 610 N.W.2d at 733; *Birkel v. Hassebrook Farm Serv., Inc.*, 219 Neb. 286, 289, 363 N.W.2d 148, 151 (1985). *Accord, e.g.*, *Gary’s Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 289, 799 N.W.2d 249, 257 (2011); *Gagne v. Severa*, 259 Neb. 884, 890, 612 N.W.2d 500, 504 (2000); *Bachman v. Easy Parking of America, Inc.*, 252 Neb. 325, 330, 562 N.W.2d 369, 373 (1997); *Lone Cedar Ranches, Inc. v. Jandebeur*, 246 Neb. 769, 777, 523 N.W.2d 364, 370 (1994); *Ed Miller &*

Sons, Inc. v. Earl, 243 Neb. 708, 716, 502 N.W.2d 444, 451 (1993); Harmon Cable Communications of Nebraska Ltd. Partnership v. Scope Cable Television, Inc., 237 Neb. 871, 889, 468 N.W.2d 350, 362 (1991); Chadd v. Midwest Franchise Corp., 226 Neb. 502, 509, 412 N.W.2d 453, 458 (1987). This modern statement of the rule is almost identical to its earliest statement. W.U. Tel. Co. v. Wilhelm, 48 Neb. 910, 915, 67 N.W. 870, 872 (1896).

"In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole." Same quotation: TNT Cattle Co. v. Fife, 304 Neb. 890, 922, 937 N.W.2d 811, 835-36 (2020); *Gary's Implement*, 281 at 289, 799 N.W.2d at 257. *Accord* Aon Consulting v. Midlands Fin. Benefits, 275, Neb. 642, 655, 748 N.W.2d 626, 639 (2008); *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 764, 626 N.W.2d 472, 506 (2001); *Ruble v. Reich*, 259 Neb. 658, 667, 611 N.W.2d 844, 851 (2000); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 236-37, 583 N.W.2d 320, 329 (1998); *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 515, 576 N.W.2d 817, 824-25 (1998); *Larsen v. First Bank*, 245 Neb. 950, 966, 515 N.W.2d 804, 815-16 (1994) (citing cases).

"In a contracts case the proper measure of damages is an amount which will compensate the injured person for loss which fulfillment of the contract would have prevented or breach of it has entailed." Same quotation: *Wells Fargo Alarm Servs. v. Nox-Crete Chems., Inc.*, 229 Neb. 43, 46, 424 N.W.2d 885, 888 (1988); *Stansbery v. Schroeder*, 226 Neb. 492, 496, 412 N.W.2d 447, 450 (1987). *Accord e.g.*, *Third Party Software, Inc. v. Tesar Meats, Inc.*, 226 Neb. 628, 631, 414 N.W.2d 244, 245 (1987); *May v. Marijo Corp.*, 207 Neb. 422, 424, 299 N.W.2d 433, 434 (1980) (citing cases); *Fink v. Denbeck*, 206 Neb. 462, 465, 293 N.W.2d 398, 401 (1980).

"As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach." *Chadd*, 226 Neb. at 509, 412 N.W.2d at 458. *Accord* *Aon Consulting*, 275, Neb. at 655, 748 N.W.2d at 639; *Nebraska Nutrients*, 261 Neb. at 764, 626 N.W.2d at 506. "When a breach of contract occurs, the plaintiff is entitled to the full profit he would have realized under the contract." *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 184, 439 N.W.2d 789, 792 (1989). *Accord* *Lone Cedar Ranches*, 246 Neb. at 777, 523 N.W.2d at 370. Specific applications of these general rules are found in NJI2d Civ. 4.41 through 4.59.

"[A] landlord may generally recover unpaid rent and expenses due under the lease from the time of the tenant's breach through the time the sale of the property is completed, plus any commercially reasonable expenses incurred in order to procure a new tenant or buyer." *Hand Cut*

Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb, Inc., 298 Neb. 705, 719, 905 N.W.2d 644, 658 (2018) (“If the landlord’s efforts to mitigate are reasonable under all the circumstances—including reasonable in time—damages will ordinarily run until the date of sale.” *Id.* at 721, 905 N.W.2d at 659.). *See also* NJI2d Civ. 4.70 regarding the landlord’s duty to mitigate damages.

Regarding a landlord’s damages, “[w]hen a lease provides for late charges, they may be recoverable as damages.” *AVG Partners I v. Genesis Health Clubs*, 307 Neb. 47, 75–76, 948 N.W.2d 212, 237 (2020). Regarding a lease as a contract, *See* NJI2d Civ. 15.01, Comment.

A cost-plus contract is one where the one performing under the contract is to be paid the cost of performance plus a specified percent of that cost. *Goes v. Vogler*, 304 Neb. 848, 854, 937 N.W.2d 190, 196 (2020). “[U]nder cost-plus contracts, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors.” *Goes*, 304 Neb. at 854–55, 937 N.W.2d 190, 196. In addition, “[I]n any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper. However, other than those already required by law and by the parties’ contracts, we decline to impose further fiduciary duties on contractors as a matter of law.” *Goes*, 304 Neb. at 856, 937 N.W.2d at 197 (brackets on original; citations and internal quotation marks omitted).

B. DOUBLE RECOVERY NOT ALLOWED

“A party may not have double recovery for a single injury, or be made more than whole by compensation which exceeds the actual damages sustained.” *deNourie & Yost Homes, LLC v. Frost*, 295 Neb. 912, 927, 893 N.W.2d 669, 927 (2017) (stating so in the context of election of remedies in a contract action). *Accord Vowers & Sons*, 254 Neb. at 515, 576 N.W.2d at 824.

Regarding rescission versus damages, *see* the heading *Rescission Versus Damages*, below in this Comment.

Regarding the collateral source rule in suits based in tort, *see* the Introduction to this chapter, at part A(6).

C. LOSS AVOIDED BY THE BREACH

“[A]ny cost or other loss that is avoided by the injured party’s not having to perform is deducted from the amount of damages.” *Ruble*, 259 Neb. at 667, 611 N.W.2d at 852.

In a breach of contract case, the claimant has the burden of proving any expenses saved by reason of the contract not being performed.

LeRoy Weyant & Sons, Inc. v. Harvey, 212 Neb. 65, 67, 321 N.W.2d 429, 431 (1982). This indicates that unlike mitigation of damages, NJI2d Civ. 4.70, expenses saved is not an affirmative defense.

D. DAMAGES FOR MENTAL ANGUISH

Nebraska's general rule is that damages for mental anguish are not recoverable in a breach of contract action. *Braesch v. Union Ins. Co.*, 237 Neb. 44, 59, 464 N.W.2d 769, 778 (1991), *disapproved on other grounds* by *Wortman v. Unger*, 254 Neb. 544, 551, 578 N.W.2d 413, 417 (1988).

E. CROSS REFERENCE

See also the Introduction to this chapter.

III. PROOF OF DAMAGES "WITH REASONABLE CERTAINTY"

There are Nebraska cases that say the plaintiff must prove damages "with reasonable certainty." The Committee understands that to be a standard to be applied by the trial judge. With this standard, the judge accommodates these two rules: while damages may be at best an estimate or approximation, the jury cannot be allowed to speculate or guess. The Committee does not understand these cases to impose upon the issue of damages a stronger burden of proof than the usual proof by a greater weight of the evidence. *See* NJI2d Civ. 2.12. This is discussed in greater detail in Part 3(c) of the Introduction to this chapter. *See also* NJI2d Civ. 1.01.

This "reasonable certainty" language is discussed at length in part 3 of the Introduction to this chapter.

IV. PRODUCTS LIABILITY AND ACTIONS IN CONTRACT VERSUS ACTIONS IN TORT

Regarding a purchaser choosing between suing a manufacturer under contract theories or under tort theories, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 788-90, 332 N.W.2d 39, 43-44 (1983) provides the general rule and the exception. The general rule is that "the purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability . . ." Recovery should be under a warranty or contract theory. The exception is that such recovery can be had when the damages recovered result from physical harm caused by the defective product, physical harm such as personal injury, death, or property damage, physical harm as opposed to the damage inherent in a reduction of the property's value by reason of its inherent defect. *Id.*

See also NJI2d Civ. Ch. 4, Intro., 11.20, 15.01, 15.20, 15.40.

V. RESCISSION VERSUS DAMAGES

"[T]he remedies of rescission and damages are inconsistent . . . 'A party who rescinds can generally recover nothing beyond restitution. He was not entitled to recover any profit of his bargain.'" *Boris v. Heyd*, 220 Neb. 569, 572, 371 N.W.2d 268, 270 (1985), *disapproved of on other grounds by* *Kraci v. Loseke*, 236 Neb. 290, 305, 461 N.W.2d 67, 77 (1990). Regarding the relief effected by rescission, see generally *Kraci v. Loseke*, *supra* ("[T]he purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract; hence, rescission may be unavailable unless the parties can be placed substantially in the status quo." *Id.* at 303, 461 N.W.2d at 76.

"[I]n equitable rescission of a real estate contract, a plaintiff purchaser is entitled to be returned to the status quo and recover payments on the contract rescinded, less the fair rental value of the premises for the time that the plaintiff held possession of the premises under the contract. *Id.* at 305, 461 N.W.2d at 77. "[W]hen there are contract terms controlling and there is no duress, an action for money had and received for money paid on a contract cannot be maintained without rescission of the contract." *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 917, 531 N.W.2d 523, 530 (1995). Regarding rescission, see *NJI2d Civ.* 15.24.

"The measure of restitution is normally a defendant's unjust gain." *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 873, 809 N.W.2d 725, 747 (2011).

Vasquez v. CHI Properties discusses the election of remedies between rescission and damages. *Vasquez v. CHI Properties*, 302 Neb. 742, 760–65, 925 N.W.2d 304, 319–22 (2019).

Regarding the rule against double recovery in contract actions, see the heading *Double Recovery Not Allowed*, above in this Comment.

Also regarding rescission, see the references in the Index, at *Contract, Rescission*.

VI. ACTION IN ASSUMPTIT

On a related matter, "Although founded on equitable principles, an action in assumpsit for money had and received is an action at law." *Kramer v. Kramer*, 252 Neb. 526, 540, 567 N.W.2d 100, 109 (1997). *Accord* *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 917, 531 N.W.2d 523, 530 (1995).

VII. LESSEE'S BREACH OF COVENANT TO REPAIR LEASED PREMISES

The instructions following this one are instructions on damages for breach of specific kinds of contracts. On a subject not covered by any of

the following instructions, Lessee's breach of covenant to repair leased premises is not covered by any of the following instructions. On that subject, in a case of first impression in Nebraska, the Supreme Court stated: "[W]hen a lessee during the term of a lease breaches a covenant to repair the leased premises, the lessor may bring an action as soon as the breach occurs." *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 715, 502 N.W.2d 444, 450 (1993).

Generally, in a lessor's suit brought before expiration of a lease's term, the measure of damages for a lessee's breach of a covenant to repair the leased premises is the reduction in value of the lessor's reversion, that is, the difference in the value of the premises with and without repairs However, in a lessor's suit before expiration of a lease's term, when repair costs provide a reasonably accurate measure of damages to a lessor as a result of a lessee's breach of a covenant to repair and do not result in a windfall to the lessor, repair costs may be used as the proper measure of damages.

Id. at 716-17, 502 N.W.2d at 451-52 (citations and rationale for the general rule omitted).

Regarding situations where an aggrieved party can bring either a contract action or a tort action, see *NJI2d Civ. 11.20*, Authorities, 15.01, Comment, and 15.40, Comment.

VIII. THE MEASURE OF DAMAGES AND THE U.C.C.

Regarding the measure of damages insofar as it is controlled by the Uniform Commercial Code, see *Neb. Rev. Stat. U.C.C. (Reissue 2001)*, and particularly Article 2, Sales, Part 7, Remedies; *see also* J. White and R. Summers, *Uniform Commercial Code* (3d ed. 1988).

AUTHORITIES

See generally the Introduction to Chapter 4, and *Neb. Rev. Stat., U.C.C., Article 2 (Sales), Part 7 (Remedies) (Reissue 2001)*. *See also* the Comment to this instruction, *supra*, and Chapters 7 through 12 of *Nebraska Law on the Measure of Damages* (NCLE, Inc. 1983).

Special damages must be pleaded. *Neb. Ct. R. Pldg. § 6-1108* ("If the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated[.]"). *See N.J.I.2d Civ. 4.59*.

In a breach of contract action, the claimant cannot recover substantial damages unless he or she furnishes evidence sufficient to provide a reasonable basis for their calculation. Failing that, the claimant "can recover only a nominal sum." *D.W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 109, 262 N.W.2d 442, 446 (1978); *Restatement*

(Second) of Contracts § 346 (1981) *See generally* Part 4 of the Introduction to Chapter 4. *See also* Ruble v. Reich, 259 Neb. 658, 667, 611 N.W.2d 844, 851 (2000).

NJI2d Civ. 4.41

BUYER'S DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND

The plaintiff is entitled to recover the market value of the land at the time of the breach, minus the contract price.

COMMENT

This instruction applies where the seller has breached a contract to convey land. It is to be inserted into NJI2d Civ. 4.40.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comments and Authorities thereto. Regarding special damages, see NJI2d Civ. 4.59.

AUTHORITIES

The general measure of damages for a breach of contract to convey land is the market value at the time of breach less the contract price. The exception to this rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

Kerrey Constr. Co. v. Hunt, 213 Neb. 776, 780–81, 331 N.W.2d 519, 521 (1983) (citations omitted). The special damages just described may include the profit lost through the loss of a resale contract, so long as “fairly and reasonably . . . supposed to have been in the contemplation of the parties at the time the contract was made.” *Id.* at 782, 331 N.W.2d at 552. Turner v. Alberts, 224 Neb. 632, 635–36, 399 N.W.2d 817, 819 (1987) supports all of, and quotes much of, the above.

To be recovered, special damages must be both pleaded and evidenced. Neb. Ct. R. Pldg. § 6-1108 (“If the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated[.]”). If special damages are pleaded and evidenced, see NJI2d Civ. 4.59, and particularly the Comment thereto.

“A right of first refusal may be enforced by specific performance where it can be proved that the condition triggering the right has occurred and the option holder was ready, able, and willing to buy during

that period.” *Walters v. Sporer*, 298 Neb. 536, 548, 905 N.W.2d 70, 80 (2018). Regarding specific performance, see also the Introduction of chapter 4, above.

NJI2d Civ. 4.42

SELLER’S DAMAGES FOR BREACH OF CONTRACT TO PURCHASE REAL ESTATE

The plaintiff is entitled to recover the contract price minus the fair market value of the property at the time of the breach.

COMMENT

This instruction applies where the buyer has breached a contract to purchase real estate. This instruction states the general rule. It is to be inserted into NJI2d Civ. 4.40. Regarding special damages, see *Kerrey Constr. Co. v. Hunt*, 213 Neb. 776, 779–80, 331 N.W.2d 519, 521 (1983), as quoted in the Authorities to NJI2d Civ. 4.41. If instruction regarding special damages is appropriate—if special damages are pleaded, Neb. Ct. R. Pldg. § 6-1108, and evidenced—see NJI2d Civ. 4.59.

When a real estate agent’s negligence allows a buyer to get out of a contract to purchase land and to escape liability for breach of contract, the seller may have a cause of action against the agent or the agent’s broker. In *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986), the Supreme Court held that the following is the proper measure of damages against the broker: “the difference between the contract price and the fair market value on the date performance was required, plus expenses of litigation in defending the earlier lawsuit [by the purchaser, wherein the court ordered the return of purchaser’s down payment].” *Id.* at 636, 392 N.W.2d at 378. *Accord Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 515, 576 N.W.2d 817, 825 (1998) (this is seller’s measure of damages against buyer, and it is seller’s measure against real estate agent who negligently failed to prepare enforceable purchase agreement). (Regarding recovery of attorney fees, see Part 9 of the Introduction to Chapter 4.)

AUTHORITIES

Vowers & Sons, Inc. v. Strasheim, 254 Neb. 506, 515, 576 N.W.2d 817, 824 (1998); *Hahn v. International Mgt. Servs., Inc.*, 207 Neb. 229, 233, 298 N.W.2d 140, 142 (1980).

NJI2d Civ. 4.43**DAMAGES FOR BREACH OF CONTRACT TO
RESTORE PROPERTY TO ITS ORIGINAL
CONDITION**

The plaintiff is entitled to recover the reasonable cost of restoring (his, her, its) property to its original condition.

COMMENT

This measure of damages applies to the property owner's damage for breach of a contract to restore his or her property to its original condition, promised in exchange for allowing the other party to use the property. This instruction should be inserted into NJI2d Civ. 4.40.

A more specific word of identification may be substituted for the word property.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comment and Authorities thereto. Regarding special damages, for example, damages for loss of use during restoration, see NJI2d Civ. 4.59.

AUTHORITIES

Stungis v. Union Packing Co. of Omaha, Inc., 196 Neb. 126, 133, 241 N.W.2d 660, 664 (1976) (in exchange for plaintiff's permission to use part of his property for excavation and storage of dirt during construction work on defendant's land, defendant agreed to restore plaintiff's property to original condition).

NJI2d Civ. 4.44**DAMAGES FOR BREACH OF CONTRACT—
SUBSTANTIAL PERFORMANCE—CONTRACTOR'S
DAMAGES****A.**

The plaintiff is entitled to recover the contract price minus the reasonable cost of making the work conform to the requirements of the contract, minus any payments already received on the contract.

B.

The plaintiff is entitled to recover the contract price minus the difference between the property's value as constructed and the value

the property would have had if it had been (built, et cetera) according to the contract, minus any payments already received on the contract.

C.

The damages you award to the plaintiff should be figured in the following manner. If you find that the defects can be remedied without materially injuring or reconstructing a substantial portion of the property, then the plaintiff is entitled to recover the contract price minus the reasonable cost of making the work conform to the requirements of the contract, minus any payments already received on the contract.

On the other hand, if you find that remedying the defect will require material injury to or reconstruction of a substantial portion of the property, then the plaintiff is entitled to recover the contract price minus the difference between the property's value (when, as) constructed and the value the property would have had if it had been (built, et cetera) according to the contract, minus any payments already received on the contract.

COMMENT

This instruction deals with the contractor's damages. Regarding the owner's damages, see NJI2d Civ. 4.45.

Parts A, B, and C of this instruction are alternatives. Only one should be given—which one depends on the pleadings and the evidence. The one given should be inserted into NJI2d Civ. 4.40. Regarding when to use which paragraph, see NJI2d Civ. 4.45, Comment.

Regarding a contractor's damages where there was a contract to repair a house but no set contract price, the Supreme Court has stated the following: "In the absence of a contract to pay a definite sum, the contractor is entitled to recover only the reasonable market value for material and labor. It has also been held that when a cost estimate is furnished, the contractor is entitled to the reasonable value of the services provided." *Union Ins. Co. v. Bailey*, 234 Neb. 257, 262–63, 450 N.W.2d 661, 665 (1990) (citation omitted).

See generally NJI2d Civ. 4.45, Comment.

AUTHORITIES

The court ruled in *Rickertsen v. Carskadon*, [172 Neb. 46, 49–50, 108 N.W.2d 392, 394 (1961)], that substantial performance was shown where the jury could believe the plaintiff in good faith substantially performed the terms of [the] contract, but that if there were some slight omissions or defects which were not so essential as to defeat the object of the parties, but

could be readily remedied, then the plaintiff could recover the contract price less the damages occasioned by the omission or defect. Such damages were what it would have cost the defendant to remove the defect or omission, and thus give to the defendant what his contract called for.

Lange Bldg. and Farm Supply, Inc. v. Open Circle R, Inc., 216 Neb. 1, 7, 342 N.W.2d 360, 364 (1983). Presumably, if the “defects [are] not so essential as to defeat the object of the parties, but [cannot] be readily remedied,” then the plaintiff’s damages are those expressed in Part B of the instruction. *Id.* If that is the case, then when it is a question of fact as to whether or not the defect can be readily remedied, the plaintiff’s damages are those expressed in Part C of the instruction. Compare the Authorities to NJI2d Civ. 4.45.

NJI2d Civ. 4.45

DAMAGES FOR BREACH OF CONSTRUCTION CONTRACT—OWNER’S DAMAGES; SUBSTANTIALLY PERFORMED CONTRACT; AND DEFECTIVE WORK OR UNSUITABLE MATERIALS

A.

The plaintiff is entitled to recover the reasonable cost of remedying the defects.

B.

The plaintiff is entitled to recover the reasonable cost of making the work conform to the requirements of the contract.

C.

The plaintiff is entitled to recover the difference between the property’s value (when, as) constructed and the value the property would have had if it had been built according to the contract.

D.

The damages you award to the plaintiff should be figured in the following manner. If you find that the defects can be remedied without materially injuring or reconstructing a substantial portion of the property, then the plaintiff is entitled to recover the reasonable cost of remedying the defects.

On the other hand, if you find that remedying the defect will require material injury to or reconstruction of a substantial portion of the property, then the plaintiff is entitled to recover the difference be-

tween the property's value (when, as) constructed and the value the property would have had if it had been built according to the contract.

COMMENT

This instruction states the owner's damages. Regarding the contractor's damages, see NJI2d Civ. 4.44.

Parts A, B, C, and D of this instruction are alternatives. Only one should be given—which one, depends on the pleadings and the evidence. The one given should be inserted into NJI2d Civ. 4.40. Parts A and B are alternatives to each other. They apply to a builder's contract where the work has been substantially performed, where the breach turns on defective work or unsuitable materials, and where, as a matter of law, the defect can be remedied without materially injuring or reconstructing a substantial portion of the subject of the contract. The measure of damages in Part C applies to the same sort of breach except that, as a matter of law, the defect cannot be remedied without materially injuring or reconstructing a substantial portion of the subject of the contract. Part D applies to the same sort of breach but where it is a question of fact whether the defect can be remedied without materially injuring or reconstructing a substantial portion of the subject of the contract.

If it aids clarity, a more specific word of identification may be substituted for the word "property," for the word "built," and for the word "defect."

General rule: "[A]n express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance." *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 508, 519 N.W.2d 530, 540 (1994) ("[I]f Lindsay was going to object to the construction . . . , it had to do so before accepting the work."). Exception: This rule does not apply "where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner." *Id.* ("Lindsay's acceptance of the work operated as a waiver of defective performance. Lindsay has neither pled nor attempted to prove that its acceptance was induced by fraud or was made under protest." And an agent of Lindsay had knowledge of the later claimed defect.). For more on the general topic of fraudulent inducement to sign a contract see NJI2d Civ. 15.21 and 15.22.

The 4-year limitation in Neb. Rev. Stat. § 25-223 (Reissue 2016) "applies to defective construction claims brought against contractors and builders, whether such claims are based on negligence or breach of warranty." *McCaulley v. C L Enterprises, Inc.*, 309 Neb. 141, 147, 959 N.W.2d 225, 230 (2021). As a general rule, when the basis of a claim against a builder or contractor "is improper workmanship resulting in defective construction, [this] statute . . . runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect." *Id.* at 147-48, 959 N.W.2d 230-31.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comments and Authorities thereto.

AUTHORITIES

[W]here defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects, but where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. The latter rule contemplates instances where the contract has been substantially complied with, the structure as completed will serve substantially as well as would the structure if completed according to contract, and completion in accord with the contract terms would either endanger the balance of the structure or be possible only at inordinate cost. 5 A. Corbin, Contracts § 1089 (1964). In the instant case the structure as completed could not qualify for an occupancy permit and was therefore totally without value for the purpose for which it was intended, replacement of the roof presented no danger to the balance of the structure, and there is no evidence that the cost was unreasonable or inordinate. "Without question, the contract breaker should pay the cost of construction and completion in accordance with his contract unless he proves affirmatively and convincingly that such construction and completion would involve an unreasonable economic waste." 5 A. Corbin, *supra* at 488, 519 N.W.2d 530.

Moss v. Speck, 209 Neb. 46, 48-49, 306 N.W.2d 156, 157-58 (1981).

See also, e.g., Remington v. Bryan, 205 Neb. 372, 380, 288 N.W.2d 253, 257 (1980); ARL Corp. v. Hroch, 201 Neb. 422, 427, 268 N.W.2d 101, 104 (1978); Henggeler v. Jindra, 191 Neb. 317, 320, 214 N.W.2d 925, 927 (1974); Nathan Constr. Co. v. Fenestra, Inc., 409 F.2d 134, 140 (8th Cir.1969).

NJI2d Civ. 4.46

**DAMAGES FOR BREACH OF CONTRACT FOR
CONSTRUCTION OR REPAIR—BUILDER'S
DAMAGES WHERE OWNER'S BREACH DOES NOT
ALLOW BUILDER TO COMPLETE PERFORMANCE**

The plaintiff is entitled to recover the following:

1. The reasonable cost of the work performed;
2. Plus the profit (he, she, it) would have received had (he, she, it) been allowed to complete the job as provided in the contract;

3. Minus any payments already received for (his, her, its) work.

COMMENT

This measure of damages applies to cases of partial performance where the owner breaches a construction contract by not allowing the builder to complete performance. In cases where the contract is completed but where a breach by the owner caused the contractor to incur extra costs, see *NJI2d Civ. 4.47*. This instruction should be inserted into *NJI2d Civ. 4.40*. In the opinion of the Committee, "reasonable cost" as used in subparagraph 1 of this instruction is synonymous with "value" as used in *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, quoted in the Authorities, below.

"[W]hen an owner has wrongfully interrupted a contractor and prevented the contractor from completing his or her work on a project, the contractor is entitled to a lien for the reasonable value of the labor he or she has performed and the material he or she has furnished, but the contractor cannot have a lien for the damages sustained from the breach of the contract." *Tilt-Up Concrete v. Star City/Fed.*, 255 Neb. 138, 152, 582 N.W.2d 604, 613 (1998) (stating long-time rule and interpreting Nebraska Construction Lien Act as not changing rule).

See also the Introduction to Chapter 4 and *NJI2d Civ. 4.40* and the Comment and Authorities thereto. Regarding special damages, see *NJI2d Civ. 4.59*.

AUTHORITIES

"Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the job as provided in the contract." *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 502-03, 288 N.W.2d 467, 477 (1980). *Accord* *Kroeger v. Franchise Equities Inc.*, 190 Neb. 731, 732, 212 N.W.2d 348, 349 (1973) and the cases cited therein. See also *Tilt-Up Concrete v. Star City/Fed.*, 255 Neb. 138, 152, 582 N.W.2d 604, 613 (1998) (lost profit).

In the opinion of the Committee, "reasonable cost" as used in the instruction is synonymous with "value" as used in the above quotation from the *Omaha Pub. Power Dist.* case. *Kroeger v. Franchise Equities, Inc.*, *supra*, seems to support this. There the court held that there was no satisfactory evidence of reasonable value of the work performed in that there was no evidence concerning labor costs, overhead, plans, and specifications. In any event, this seems only logical: As explained below, the general rule regarding this measure of damages is the contract price less costs saved by not having to perform; Nebraska's rule is simply the reverse, that is, the profits expected on the contract plus the costs incurred.

The cases cited above do not address the question of whether this measure of damages applies when, through no fault of the owner, the value of the work performed is substantially greater than the contract price. Regarding this situation, and regarding the general question of a contractor's remedies for an owner's breach of a construction or repair contract, see Dan B. Dobbs, *Handbook on the Law of Remedies*, § 12.24 (1973).

Nebraska's "reasonable value" rule is not the general rule everywhere.

The basic damages goal where the landowner breaches a construction contract, is to give the building contractor his expectancy. Where he has fully performed his contract by delivering the structure contracted for, he is entitled to recover the full contract price, just as in any other case where full performance creates a liquidated debt. At the other end of the spectrum, the landowner may repudiate the contract before the contractor has done any work or bought any materials at all. In such a case the policy of giving the contractor his expectancy is carried out by giving him the profit he would have made on the contract, and this is normally done by giving him the contract price less the cost of complying with the contract.

The more common and more difficult situation occurs where the contractor has done a portion of the work required under the contract before the owner breaches or repudiates. In that situation the basic rule is that the contractor is entitled to recover the contract price, less the savings he effects because he is not required to complete the job. This will normally be the contract price less the cost the contractor would have had in completing the work but will not now have because the work will not be done. As is the case with all basic damages rules, adjustments may be made. For example, the owner may be entitled to a credit for amounts already paid on the contract or for building materials on hand that the contractor can either resell or use in other construction. The basic rule—contract price less saved costs—operates to give the contractor his expectancy.

Dobbs, supra at 912–13 (footnotes omitted). Perhaps some variation of this contract price method would be used where the value of the work performed exceeds the contract price through no fault of the owner. On the other hand, the reasonable value approach may also be appropriate. Dobbs says that in this situation "[t]he choice between . . . [these two rules] is a difficult one." *Dobbs, supra* at 916. Dobbs discusses the pros and cons of a number of approaches and is unable to suggest a single best solution. The reader faced with this problem is referred to Dan B. Dobbs, *Handbook on the Law of Remedies*, § 12.24, at 915–18 (1973).

NJI2d Civ. 4.47**DAMAGES FOR BREACH OF CONTRACT FOR
CONSTRUCTION OR REPAIR—CONTRACTOR'S
DAMAGES WHERE CONTRACT COMPLETED BUT
OWNER'S BREACH CAUSED CONTRACTOR TO
INCUR EXTRA COST**

The plaintiff is entitled to recover the extra cost (he, she, it) reasonably incurred because of the breach (plus a reasonable allowance for overhead).

COMMENT

This instruction should be inserted into NJI2d Civ. 4.40. It applies where the contract is completed but where a breach by the owner caused the contractor to incur extra costs. This recovery is in addition to the contract price, and the part of this instruction in parentheses should be given when appropriate.

This instruction applies in breach of contract actions—actions at law. Some of the cases cited below speak of this as an equitable adjustment in favor of the contractor, but only one of them is an equity case. In the rest, the language “equitable adjustment” is not used in its technical legal sense: They are not equity cases and they do not involve “adjusting” or rewriting the contract; instead, they involve the computation of damages resulting from delays caused by the owner’s breach. True “equitable adjustment” involves a contractual provision for extra compensation if changes in conditions cause an increase in cost; it does not involve additional compensation as a result of a breach. The difference between the true equitable adjustment cases and the cases covered by NJI2d Civ. 4.47 is the difference between *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 288 N.W.2d 467 (1980) (increased cost to contractor caused by unforeseen circumstances; parties modified contract, increasing contractor’s compensation by unspecified amount), and the rest of the Nebraska cases cited below (increased cost to contractor caused by owner breach). Because “equitable adjustment” has a meaning in the law which is not its meaning in these cases, use of that language in this situation is discouraged.

Regarding special damages, see Restatement (Second) of Contracts § 347 (1981); *Spang Indus., Inc. v. Aetna Cas. & Surety Co.*, 512 F.2d 365 (2d Cir.1975). Regarding special damage instruction, see NJI2d Civ. 4.59.

Regarding recovering profits on the extra work, *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, stated: “Profits may be included as one of the elements of an equitable adjustment pursuant to the contract terms. Reasonable profits may also be allowed as part of an award of

damages in a breach of contract action where the damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred.” *Id.*, 205 Neb. at 500–01, 288 N.W.2d at 476. The general rule regarding lost profits on the extra work is that they are too speculative to be a part of the measure of damages. See NJI2d Civ. 4.59, Comment. *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.* stated that, in that case, at the trial court’s sole discretion, part of the measure of damages may be an allowance for lost profits. But that is a true equitable adjustment case, and that is the correct rule in equitable adjustment cases. *Meisinger Earth Moving, Inc. v. State*, 212 Neb. 554, 324 N.W.2d 387 (1982), which is not an equitable adjustment action, but an action for damages for breach of contract, cites *Omaha Pub. Power Dist.* for the proposition that disallowing profits is a discretionary decision for the trial judge. What the *Meisinger Earth Moving* case really seems to mean is that given the evidence there the trial court was correct in concluding that lost profits were too speculative and therefore not an appropriate element of the plaintiff’s damages. See also *Siefford v. Housing Auth. of City of Humboldt*, 192 Neb. 643, 658–59, 223 N.W.2d 816, 824 (1974). As noted, recovery under NJI2d Civ. 4.47 is in addition to the contract price. Therefore, profits on the work called for in the contract are included. If there is a case where lost profits on the extra work are not too speculative and should be included in NJI2d Civ. 4.47, then a phrase such as the following will have to be inserted after the phrase “(plus a reasonable allowance for overhead)”:

“plus a reasonable allowance for profit on that extra work.”

AUTHORITIES

Meisinger Earth Moving, Inc. v. State, 212 Neb. 554, 324 N.W.2d 387 (1982); *Siefford v. Housing Auth. of City of Humboldt*, 192 Neb. 643, 223 N.W.2d 816 (1974); *Lundt v. Parsons Constr. Co.*, 181 Neb. 609, 150 N.W.2d 108 (1967); *In re Roberts Constr. Co.*, 172 Neb. 819, 111 N.W.2d 767 (1961); and various parts of the Comment, *supra*.

NJI2d Civ. 4.47 states the rule that additional costs resulting from a breach are recoverable as consequential damages. Reasonable allowance for overhead is, of course, a cost and therefore recoverable. Regarding consequential damages generally, see NJI2d Civ. 4.59. Specifically regarding overhead, see *Lundt v. Parsons Constr. Co.*, 181 Neb. 609, 150 N.W.2d 108, 112 (1967).

See also the Comments and Authorities to NJI2d Civ. 4.40, 4.46, and 4.50, and the Introduction to Chapter 4.

NJI2d Civ. 4.48

DAMAGES FOR BREACH OF CONTRACT TO RETURN SPECIFIC PROPERTY

The plaintiff is entitled to recover the market value of the property at the time of the breach.

COMMENT

This measure of damages applies where there is a breach of a contract to return specific property. This instruction should be inserted into NJI2d Civ. 4.40. A more specific word of identification may be substituted for the word property. Regarding damages for conversion of property, see NJI2d Civ. 4.27.

Regarding special damages, see NJI2d Civ. 4.59. As an example of special damages that might be recoverable in this situation, and how they would be worked into NJI2d Civ. 4.59, it might be appropriate to insert the following into NJI2d Civ. 4.59 as a statement of the special damages involved:

“ . . . the reasonable value of the (gains, profits) the plaintiff was denied as a result of the defendant's failure to return the property.”

See Lincoln Welding Supply Co. v. Western Contracting Corp., 177 Neb. 160, 163, 128 N.W.2d 621, 623 (1964) (citing cases).

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comment and Authorities thereto.

AUTHORITIES

As to the measure of damages in a case of breach of contract to return specific property, the general rule is that it is the market value of the property at the time of breach. *Consumers Coop. Ass'n v. Sherman*, 147 Neb. 901, 25 N.W.2d 548 [(1947)]; *Mapledge Corp. v. Coker*, 167 Neb. 420, 93 N.W.2d 369 [(1958)].

Lincoln Welding Supply Co. v. Western Contracting Corp., 177 Neb. 160, 163, 128 N.W.2d 621, 623 (1964). Over and above that, see NJI2d Civ. 4.59 regarding special damages.

NJI2d Civ. 4.49

**DAMAGES FOR BREACH OF CONTRACT—
SELLER'S BREACH OF WARRANTY OR
MISREPRESENTATION AS TO CONDITION OF
REAL PROPERTY IN CONTRACT FOR SALE OF
REAL PROPERTY**

The plaintiff is entitled to recover the lesser of these two amounts:

1. The reasonable cost of placing the property in the condition warranted.

2. The value the property would have had were it in the condition it had been warranted to be in, minus its actual value, both measured as of the time of acceptance.

COMMENT

This measure of damages applies to the breach of a seller's warranty in a contract for the sale of real property or to the seller's misrepresentation as to the real property's condition. This instruction should be inserted into NJI2d Civ. 4.40. If, given the evidence and the pleadings, only one of the two numbered subparagraphs is appropriate, then only one should be given. The first subparagraph alone applies when, as a matter of law, the defect can be remedied and the property brought up to warranty at a cost not exceeding the diminution in the property's value. The second subparagraph alone applies where, as a matter of law, either the defect cannot be remedied at all or can be remedied only at a cost that is greater than the diminution in the property's value. Both apply when the question of whether the cost of the repairs exceeds the diminution in the property's value is a question of fact.

A more specific word of identification may be substituted for the word property. The pattern uses the word "acceptance," *i.e.*, "... both measured as of the time of acceptance." If another word is appropriate, it may be substituted. For example, if the time of acceptance and delivery are the same, and if delivery is the word used throughout the trial, then this instruction should use the word delivery instead of the word acceptance.

If special damages are pleaded and evidenced, see NJI2d Civ. 4.59 and particularly the Comment thereto.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comment and Authorities thereto.

On a related topic, lessee's damages for lessor's failure to install items required by the lease, see *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 63, 382 N.W.2d 303, 308 (1986).

Regarding misrepresentation of real property's condition and the distinction between fraud and "sales talk" or "puffing," see NJI2d Civ. 15.08.

AUTHORITIES

McCoolidge v. Oyvetsky, 292 Neb. 955, 967-73, 874 N.W.2d 892, 901-04 (2016) (in a contract for sale there is a warranty that the seller has good title in the goods sold, here an automobile; *id.* at 964, 874 N.W.2d at 899-900, citing Neb. U.C.C. § 2-312(1)); *Osborne v. Brunken*, 232 Neb. 481, 485, 441 N.W.2d 182, 184 (1989) (citing NJI2d Civ. 4.49); *Fink v. Denbeck*, 206 Neb. 462, 467, 293 N.W.2d 398, 401-02 (1980).

See also *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 30, 305 N.W.2d 896, 898 (1981); *Remington v. Bryan*, 205 Neb. 372, 379-80, 288 N.W.2d 253, 257-58 (1980); *Jacobs v. Korst*, 175 Neb. 639, 643, 122 N.W.2d 760, 762 (1963). See also *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 219 Neb. 775, 781, 366 N.W.2d 424, 428 (1985) (breach of warranty in sale of an automobile).

Regarding breach of contract in violating a warranty that there was no termite damage, see *Hansen v. Lien Termite and Pest Control Co.*, 229 Neb. 596, 428 N.W.2d 195 (1988). This case relies in part on "*L*" *Invs., Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982), which, as discussed in the Authorities to NJI2d Civ. 4.20, was partly overruled by *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986).

Regarding damages where a purchaser is induced by fraud to enter into a contract for the purchase of property, see *Little v. Gillette*, 218 Neb. 271, 278-79, 354 N.W.2d 147, 152-53 (1984), *appeal after remand* 225 Neb. 70, 402 N.W.2d 852 (1987). Regarding fraud in the inducement, see generally NJI2d Civ. 15.21 and 15.22.

NJI2d Civ. 4.50

DAMAGES FOR BREACH OF CONTRACT TO LEND MONEY WHERE A SUBSTITUTE LOAN IS OBTAINED

The plaintiff is entitled to recover the additional cost of a substitute loan, that is, the interest the plaintiff [reasonably] had to pay to procure a new loan minus the interest (he, she, it) would have paid under the contract that was breached.

COMMENT & AUTHORITIES

This measure of damages applies where a lender breaches a contract to lend money and a substitute loan is obtained. The instruction should be inserted into NJI2d Civ. 4.40. If this additional cost is spread out over a number of years into the future, then it must be reduced to its present cash value. In that regard, see NJI2d Civ. 4.13.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comments and Authorities thereto.

The bracketed word "reasonably" should be inserted when there is some question as to whether a new interest rate on a loan secured from a new lender is a reasonable rate.

In the exceptional case where special damages may be recovered, an appropriate instruction will have to be drafted. See NJI2d Civ. 4.59.

"The measure of damages for a branch [sic] of a contract to

lend money is usually . . . the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. There are certain exceptions to this rule, one of which is that, where it appears that the specific purpose for which the loan was made was communicated to the lender at the time the contract was entered into, and where it further appears that the borrower has suffered special damages by the breach, which are pleaded and proved, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time of making the contract, as the probable result of a breach of it."

Rubin v. Pioneer Fed. Sav. & Loan Ass'n, 214 Neb. 364, 370, 334 N.W.2d 424, 428 (1983), (quoting Shurtleff v. Occidental Bldg. & Loan Ass'n, 105 Neb. 557, 561, 181 N.W. 374, 375 (1921)).

It is improper to state as the measure of damages the dollar amount of the additional cost of a substitute actually obtained by the plaintiff. To do so is to direct a verdict as to amount. At best, that amount is evidence. *Rubin v. Pioneer Fed. Sav. & Loan Ass'n*, *supra*.

NJI2d Civ. 4.51

DAMAGES FOR BREACH OF COVENANT NOT TO COMPETE OR BREACH OF CONTRACT FOR EXCLUSIVE DISTRIBUTORSHIP

The plaintiff is entitled to recover the reasonable value of the (profits, business) (he, she, it) has lost [and is reasonably certain to lose in the future] as a result of the breach.

COMMENT

This measure of damages applies to a breach of a covenant not to compete or a breach of a contract for an exclusive distributorship. This instruction should be inserted into NJI2d Civ. 4.40.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comment and Authorities thereto. Regarding special damages, see NJI2d Civ. 4.59.

Nebraska cases discussing covenants not to compete include *Unlimited Opportunity, Inc. v. Waadah*, 290 Neb. 629, 861 N.W.2d 437 (2015); *Gaver v. Schneider's O.K. Tire Co.*, 289 Neb. 491, 856 N.W.2d 121 (2014) (particularly discussing such a covenant and the public policy against restraint of trade); *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011) (extensive discussion of the measure of damages); *H & R Block Tax Servs., Inc. v. Circle A Enters.,*

Inc., 269 Neb. 411, 693 N.W.2d 548 (2005) (extensive discussion); Professional Bus. Servs. Co. v. Rosno (*Professional Bus. Servs I*), 268 Neb. 99, 680 N.W.2d 176 (2004) (extensive discussion); Mertz v. Pharmacists Mut. Ins. Co., 261 Neb. 704, 625 N.W.2d 197 (2001); Professional Bus. Servs., Co. v. Rosno, 256 Neb. 217, 589 N.W.2d 826 (1999); Moore v. Eggers Consulting Co., Inc., 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute on other grounds as stated in Coffey v. Planet Group, 287 Neb. 834, 839–40, 845 N.W.2d 255, 261 (2014)); Whitten v. Malcolm, 249 Neb. 48, 541 N.W.2d 45 (1995); Brockley v. Lozier Corp., 241 Neb. 449, 488 N.W.2d 556 (1992); Vlasin v. Len Johnson & Co., 235 Neb. 450, 453–55, 455 N.W.2d 772, 775–76 (1990); Polly v. Ray D. Hilderman & Co., 225 Neb. 662, 407 N.W.2d 751 (1987); American Sec. Servs., Inc. v. Vodra, 222 Neb. 480, 385 N.W.2d 73 (1986).

Whether a covenant not to compete is valid depends on the answer to these three questions:

First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

Whitten 249 Neb. at 51–52, 541 N.W.2d at 48 (multiple quotation marks omitted) (citing cases). *Accord Unlimited Opportunity*, 290 Neb. at 637, 861 N.W.2d at 127 (including lengthy discussion of the reasonableness of restrictions, *Unlimited Opportunity*, 290 Neb. at 638–39, 861 N.W.2d at 443–44); *Gaver*, 289 Neb. at 498–99, 856 N.W.2d at 127; *Aon Consulting, Inc. v. Midlands Fin. Benefits, Inc.*, 275 Neb. 642, 653, 748 N.W.2d 626, 638 (2008); *Professional Bus. Servs. Co. v. Rosno (Professional Bus. Servs II)*, 268 Neb. 99, 110, 680 N.W.2d 176, 184 (2004); *Moore*, 252 Neb. at 401, 562 N.W.2d at 539. *See also Presto-X-Company v. Beller*, 253 Neb. 55, 60–65, 568 N.W.2d 235, 238–241 (1997) (discussing whether covenant injurious to public interest and whether restraint on competition greater than necessary to protect legitimate business interest).

Whether a noncompete clause is valid and enforceable requires us to categorize the covenant as either an employment contract or the sale of goodwill. . . . [We] are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than those made in connection with contracts of employment, under the reasoning that in the sale of a business, “[i]t is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits.

Unlimited Opportunity, 290 Neb. at 637–38, 861 N.W.2d at 442–43

(paragraph break and footnotes omitted). *Accord Presto-X-Company*, 253 Neb. at 60, 568 N.W.2d at 238 (quoting *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 338, 518 N.W.2d 652, 655 (1994), in turn quoting Restatement (Second) of Contracts § 188, comment b (1981)); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 755–56, 472 N.W.2d 391, 398 (1991).

“An employer has a legitimate business interest in protection against a former employee’s competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.” Same quotation: *Aon Consulting*, 275 Neb. at 653, 748 N.W.2d at 638 (discussing the difference between “ordinary competition” and “unfair competition”); *Mertz*, 261 Neb. at 711, 625 N.W.2d at 204 (discussing the difference between ordinary competition and unfair competition); *Professional Bus. Servs. I*, 256 Neb. at 223–24, 589 N.W.2d at 831. *Accord Professional Bus. Servs. II*, 268 Neb. at 110, 680 N.W.2d at 185.

As a general rule, “covenants not to compete are valid and enforceable where they were reasonably limited to restricting the former employee from contracting customers with whom the former employee had had personal contact while employed by the former employer and where they contained reasonable temporal and geographical restrictions.” *Gaver*, 289 Neb. at 499, 856 N.W.2d at 128 (citing and discussing cases).

Courts will not “reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.” *Gaver*, 289 Neb. at 509, 856 N.W.2d at 134 (citing cases). (Cases in accord and not cited in *Gaver* include *Presto-X-Company*, 253 Neb. at 65, 568 N.W.2d at 241 (“An unreasonable covenant not to compete is of no effect, and its scope cannot be judicially reformed in order to make it enforceable.”)).

See also *Boisen v. Petersen Flying Serv., Inc.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *Diamond Match Div. of Diamond Int’l Corp. v. Bernstein*, 196 Neb. 452, 243 N.W.2d 764 (1976). Though in each of these cases judgment was against the employer and, therefore, no damages were awarded, the opinions contain good early discussions of Nebraska’s law of restrictive employment agreements.

Likewise, a forfeiture-for-compensation clause in a deferred compensation plan, even though not a commonplace covenant not to compete, clause must be reasonable. And the same three reasonableness requirements stated above apply here as well as to a covenant not to compete. *Gaver*, 289 Neb. at 500, 856 N.W.2d at 127 (citing and discussing cases).

AUTHORITIES

This instruction was approved in *Gary’s Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 290, 799 N.W.2d 249, 258, 259 (2011).

The measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation; however, an injured party will not be precluded from recovering because of that fact. The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both the loss and the extent thereof. Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not. If sufficient evidence is presented that it clearly appears that a loss of profits was suffered, it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case allows. Our law limits recovery of lost profits only to the extent that they must not be based on mere speculation or conjecture.

Gary's Implement, 281 Neb at 292, 799 N.W.2d at 259 (footnotes omitted).

In cases involving breach of covenant not to compete or breach of exclusive distributorship:

"[D]amages are rarely susceptible of accurate proof; but the measure of damages, expressed generally, is the value of the business lost to the plaintiff—not the gain of defendant, which may be more or less than plaintiff's loss; though such gain may be considered in evidence, it should be shown to correspond in whole or in part with the loss of plaintiff."

D.W. Trowbridge Ford, Inc. v. Galyen, 200 Neb. 103, 107, 262 N.W.2d 442, 446 (1978) (brackets added) (involving a covenant not to compete) (quoting *Gallagher v. Vogel*, 157 Neb. 670, 679, 61 N.W.2d 245, 250 (1953)). *Accord Gary's Implement*, 281 Neb at 292, 799 N.W.2d at 259; *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 162, 368 N.W.2d 795, 796 (1985); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 439, 197 N.W.2d 646, 648 (1972); *Michael Todd & Co., Inc. v. Lacal Co., Inc.*, 583 F.2d 1056, 1058 (8th Cir.1978) (involving an exclusive distributorship). The value of the business lost to the plaintiff could be gains prevented as well as losses sustained. *Rambo v. Galley*, 188 Neb. 692, 697, 199 N.W.2d 14, 17 (1972).

Diesel Serv., Inc. v. Accessory Sales, Inc., 210 Neb. 797, 807, 317 N.W.2d 719, 725 (1982), a case concerning the termination of a distributorship agreement, quotes *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 144, 231 N.W.2d 110, 114 (1975) as follows:

The general rule is that prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is

reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty.

See also National Farmers Union Serv. Corp. v. Edwards, 220 Neb. 231, 235, 369 N.W.2d 76, 80 (1985); Dana F. Cole & Co. v. Byerly, 211 Neb. 903, 907, 320 N.W.2d 916, 919 (1982) (covenant not to compete; nominal damage award reversed—"no evidence adduced at trial which would support [it]"; refusal to grant injunction reversed; case remanded for issuance of injunction), *overruled on other grounds by* Mertz v. Pharmacists Mut. Ins. Co., 261 Neb. 704, 714, 625 N.W.2d 197, 206 (2001); Lincoln Carpet Mills, Inc. v. Singer Co., 549 F.2d 80, 83 (8th Cir.1977) ("[W]e do believe that existing Nebraska precedent does recognize the recovery of economic loss in a tort action between commercial parties even though no attendant loss of a personal or property nature is sustained.") (dictum).

On a related issue, specific performance of such "a contract may be refused if the performance is of such a character as to make effective enforcement unreasonably difficult or to unnecessarily require long-continued supervision by the court. Where specific enforcement of a contract is denied, the court may award damages in the same proceeding." D.W. Trowbridge v. Galyen, 200 Neb. 103, 111, 262 N.W.2d 442, 448 (1978) (citations omitted) (regarding specific performance generally, *see* part 4 of the Introduction to this chapter).

See also ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc., 296 Neb. 818, 870-77, 896 N.W.2d 156, (2017) regarding lost profits as a measure of damages under the Junkin Act, Nebraska's unlawful restraint of trade statutes found at Neb. Rev. Stat. §§ 59-801-59-831 (Reissue 2010).

NJI2d Civ. 4.52

DAMAGES FOR BREACH OF CONTRACT FOR PERSONAL SERVICES—EMPLOYEE'S DAMAGES FOR BREACH BY EMPLOYER

The plaintiff is entitled to recover the amount of the salary agreed upon, for the period agreed to, minus the amount of money (the plaintiff, he, she, it) (earned, reasonably could have earned) from other employment during that same time.

COMMENT

I. IN GENERAL

This measure of damages applies where an employer breaches a contract for employment or personal services. This instruction should be inserted into NJI2d Civ. 4.40.

See also the Introduction to Chapter 4 and NJI2d Civ. 4.40 and the Comment and Authorities thereto. Regarding tortious interference with a business relationship, see NJI2d Civ. 17.02.

"In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract." *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 151, 532 N.W.2d 316, 321 (1995).

In proving wrongful termination under an employment agreement, the employee must prove the terms of the contract, his compliance with the terms until discharge, the employers' breach, and damages. The burden then shifts to the employer to prove that good cause existed for discharge of the employee. However, the ultimate burden of proving wrongful termination remains with employee. [G]ood cause for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.

Koster v. P & P Enters., Inc., 248 Neb. 759, 763-64, 539 N.W.2d 274, 278 (1995) (citations and internal quotation marks omitted).

"A contract [for employment] for a definite term may not lawfully be terminated prior to the expiration of that term without good cause." *Schuessler v. Benchmark Mktg. and Consulting, Inc.*, 243 Neb. 425, 435, 500 N.W.2d 529, 537 (1993) (burden of proving wrongful termination is on employee). Misconduct during employment, learned of by the employer only after the employee had been terminated, is not admissible to the issue of employer's "cause," but is admissible to issue of employee's damages. *Id.* at 440, 500 N.W.2d at 540 ("if [such] evidence would justify termination, the employee may not recover any damages for the period following the actual discharge").

[O]rdinarily, "the measure of damages in a suit for breach of an employment contract for personal services is the amount of the salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned, from other employment." It is equally true, however, that parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach. This court has consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances.

Kozlik v. Emelco, Inc., 240 Neb. 525, 535, 483 N.W.2d 114, 120 (1992) (citations omitted).

In *Koster v. P & P Enters., Inc.*, 248 Neb. 759, 539 N.W.2d 274

(1995), the plaintiff recovered lost salary, commissions not paid, insurance benefits, *id.* at 763, 539 N.W.2d at 278, and lost retirement funds, *id.* at 766, 539 N.W.2d at 279. Though there are no Nebraska cases on point, there is authority for the proposition that a wrongfully discharged employee can include, as an element of special damages, “expenditures reasonably incurred in looking for another job, whether he gets the job or not.” A. Corbin, *Corbin on Contracts* § 1044, at 277 (1964). *Accord* S. Williston, *A Treatise on the Law of Contracts* § 1359, at 311 (1968). Regarding special damages generally, see *NJI2d Civ.* 4.59.

II. AT-WILL EMPLOYMENT

“Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.” *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 223, 512 N.W.2d 358, 361 (1994). *Accord* *Knapp v. Ruser*, 297 Neb. 639, 665, 901 N.W.2d 31, 49 (2017); *O’Brien v. Bellevue Pub. Schs.*, 289 Neb. 637, 648, 649 856 N.W.2d 731, 739, 740 (2014); *Wendlen v. Beatrice Manor*, 271 Neb. 373, 385, 712 N.W.2d 226, 238 (2006); *Blinn v. Beatrice Cmty. Hosp. and Health Ctr.*, 270 Neb. 809, 819, 708 N.W.2d 235, 245 (2006); *Jackson v. Morris Commc’ns. Corp.*, 265 Neb. 423, 425–26, 657 N.W.2d 634, 636 (2003) *Malone v. American Bus. Info.*, 262 Neb. 733, 735, 634 N.W.2d 788, 790 (2001); *Gillis v. City of Madison*, 248 Neb. 873, 877, 540 N.W.2d 114, 117 (1995); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 153, 532 N.W.2d 316, 322 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 159–60, 517 N.W.2d 382, 385–86 (1994); *Renner v. Wurdeman*, 231 Neb. 8, 14, 434 N.W.2d 536, 541 (1989); *Blair v. Physicians Mut. Ins. Co.*, 242 Neb. 652, 656, 496 N.W.2d 483, 487 (1993) (citing cases); *Goodlett v. Blue Cross*, 234 Neb. 5, 8, 449 N.W.2d 9, 11 (1989).

That is, an employer may terminate the employment of an at-will employee at any time and without reason *unless* the public policy exception applies, in which case the employee can claim damages for wrongful discharge. *Knapp*, 297 Neb. at 664, 901 N.W.2d at 49; *O’Brien*, 289 Neb. at 648–49, 856 N.W.2d at 739–40; *Coffey v. Planet Group*, 287 Neb. 834, 844, 845 N.W.2d 255, 263–64 (2014); *Wendlen v. Beatrice Manor*, 271 Neb. 373, 385, 712 N.W.2d 226, 238 (2006); *Malone v. American Bus. Info.*, 262 Neb. 733, 735–40, 634 N.W.2d 788, 790–93 (2001) (though the exception is found not to apply, it is discussed at length and cases supporting the doctrine are cited).

Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy. [This] exception is restricted to cases when a clear mandate of public policy has been violated In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

Oldfield v. Nebraska Mach. Co., 296 Neb. 469, 492-493, 894 N.W.2d 278, 295 (2017) (footnotes omitted) (“The [Age Discrimination in Employment Act, Neb. Rev. Stat. §§ 48-1001 to 48-1010 (Reissue 2010)] makes it unlawful for an employer to discharge or discriminate against any individual because of such individual’s age, unless the reasonable demands of the position require an age discrimination.” *Id.* at 487, 894 N.W.2d at 292. “Both federal law and [the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 2010 & Cum. Supp. 2016))] make it unlawful for an employer to discriminate against its employee on the basis of the employee’s opposition to an unlawful employment practice.” *Id.* at 490, 894 N.W.2d at 294.). *Accord Knapp*, 297 Neb. at 664-65, 901 N.W.2d at 49 (citing cases). *See also* *McPherson v. City of Scottsbluff*, 303 Neb 765, 776-83, 931 N.W.2d 451, 459-64 (2019) (citing statutes and cases and discussing the fact that requiring a disabled employee to undergo a medical examination can constitute employment discrimination, *id.* at 776-782, 931 N.W.2d at 459-63, and the fact that it is unlawful for an employer to discriminate against an employee because the employee opposed or refused to carry out any action that is unlawful under federal or state law, *id.* at 782-83, 931 N.W.2d at 462-63).

(In the interest of completeness, the Workers’ Compensation Court does not have jurisdiction over a tort action for wrongful discharge, including wrongful discharge for having filed a workers’ compensation claim. The district court has jurisdiction over such an action. *Bower v. Eaton Corp.*, 301 Neb. 311, 338, 918 N.W.2d 249, 270-71 (2018).)

“The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.” *Coffey*, 287 Neb. at 844, 845 N.W.2d at 263.

The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

Coffey, 287 Neb. at 844, 845 N.W.2d at 263. *Accord O’Brien*, 298 Neb. at 649, 856 N.W.2d at 740.

For a discussion of cases in which the Court has applied (and not applied) the public policy exception, see *Jackson v. Morris Commc’ns. Corp.*, 265 Neb. 423, 657 N.W.2d 634, 636-38 (2003).

Regarding the three-tiered burden-shifting analysis in a case involving an allowable claim of retaliatory discharge, see *O’Brien*, 298 Neb. at 649-51, 856 N.W.2d at 740-41.

For more on the covenant of good faith and fair dealing, see *NJI2d Civ. 15.40*, Comment.

"[E]xcept in cases where an employee is deprived of constitutional or statutory rights or where contractual agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination." *Renner v. Wurdeman*, 231 Neb. at 15, 434 N.W.2d at 541.

Among other places, contractual restrictions modifying an employee's at-will status may be found in employee handbooks and oral representations. *E.g.*, *Hamersky v. Nicholson Supply Co.*, *supra*; *Hillie v. Mutual of Omaha Ins. Co.*, *supra*; *Renner v. Wurdeman*, 231 Neb. at 15, 434 N.W.2d at 541. "To become part of the employment contract, the language of an employee handbook must meet the requirements for formation of a unilateral contract. In other words, the language must constitute *an offer definite in form which is communicated to the employee*, and the offer must be accepted and consideration furnished for its enforceability." *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. at 224, 512 N.W.2d at 361 (citations omitted) (burden of proof on person who asserts contract; no evidence Hillie ever received handbook or had its provisions communicated to him). *Accord* *Blinn v. Beatrice Cmty. Hosp. and Health Ctr.*, 270 Neb. 809, 820, 708 N.W.2d 235, 245 (2006) (oral representations); *Hamersky v. Nicholson Supply Co.*, *supra*. If an employee handbook is not a contract or if the handbook reserves the discretion to change the disciplinary or dismissal procedure at will, then said procedures set out in the handbook are not binding; it seems that employment otherwise at-will, remains effectively at-will, at least within the handbook's reservations to the employer. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 750-52, 523 N.W.2d 506, 509-10 (1994).

"[O]ral representations *may*, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee." *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 155, 532 N.W.2d 316, 323 (1995) (emphasis added) (statements during job interviews and at company meetings; insufficient allegations for modification here; summary judgment for employer affirmed). *Accord* *Blinn v. Beatrice Cmty. Hosp. and Health Ctr.*, 270 Neb. 809, 819, 708 N.W.2d 235, 245 (2006).

"An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect." *Hamersky v. Nicholson Supply Co.*, 246 Neb. at 160, 517 N.W.2d at 386 (citing cases). Designation of an employee as a "permanent" employee does not modify at-will status but distinguishes the employment from temporary employment. *Hamersky*, 246 Neb. at 161, 517 N.W.2d at 386.

An employer can alter the terms of compensation of an at-will employee but cannot do so either retroactively or without notice. *Malone v. American Bus. Info., Inc.*, 264 Neb. 127, 135, 647 N.W.2d 569, 575 (2002).

Tortious interference with a business relationship or expectancy,

including interference with that of an at-will employees, is the subject of NJI2d Civ. 17.02.

Regarding promissory estoppel in connection with an offer of at-will employment, see NJI2d 15.01, Comment. Regarding estoppel generally, see the references in the Index, under Equitable Estoppel.

III. FRONT PAY

Front pay is distinguished from back pay. Back pay looks back from the date of the judgement to that of the termination and front pay looks forward from the judgment. Back pay is money awarded for economic losses suffered by the terminated employee from the time from his or her termination to the time of a judgment in favor of said employee. Front pay is “‘money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.’” *Christopherson v. Nebraska Department of Health and Human Services*, 308 Neb. 610, 616, 956 N.W.2d 17, 22 (2021) (quoting *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846, 121 S. Ct. 1946, 150 L. Ed. 2d 62 (2001)). It is a substitute for reinstatement that can be awarded where “‘reinstatement is impractical or impossible due to circumstances not attributable to the plaintiff.’” *Christopherson*, 308 Neb. at 616, 956 N.W.2d at 22 (quoting *Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir. 2004)).

Said differently, “Front pay works in conjunction with . . . back pay . . . and ensures that the wronged employee is made whole,” *Christopherson*, 308 Neb. at 617, 956 N.W.2d at 22. And again, it is a substitute for reinstatement that is only available when, through no fault of the plaintiff, reinstatement is impractical or impossible.

Front pay is an equitable remedy. *Christopherson*, 308 Neb. at 616, 956 N.W.2d at 22.

IV. NEBRASKA WAGE PAYMENT AND COLLECTION ACT

In the interest of completeness, the reader’s attention is called to the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 *et seq.* (Reissue 2010 & Cum. Supp. 2016) (hereinafter NWPCA). “An employee having a claim for wages which are not paid within thirty days of the regular pay day” may institute suit; if successful, in addition to the wages and costs, the plaintiff can recover attorney fees of not less than twenty-five percent of the unpaid wages and costs. Neb. Rev. Stat. § 48-1231 (Reissue 2010) (emphasis added). *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 839 N.W.2d 703 (2013); *Schinnerer v. Nebraska Diamond Sales Co., Inc.*, 278 Neb. 194, 199, 769 N.W.2d 350, 355 (2009) (discussing recovery of commissions); *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008) (accrued, unused sick leave); *Pick v. Norfolk Anesthesia, P.C.*, 276 Neb. 511, 755 N.W.2d 382 (2008); *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 351–53, 747 N.W.2d 1, 14–16

(2008); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 405–07, 562 N.W.2d 534, 541–542 (1997) (under statute, wages include commissions; employment agreement cannot change statutory definition); *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 264, 376 N.W.2d 312, 319 (1985). *See also*, *Waite v. A.S. Battiatto Co.*, 238 Neb. 151, 161–63, 469 N.W.2d 766, 774–75 (1991) (wages versus sums collected under a risk sharing agreement); *Thompson v. City of Omaha*, 235 Neb. 346, 349, 455 N.W.2d 538, 540 (1990) (until 1988 amendment, act did not include claims against political subdivisions); *Babb v. United Food & Commercial Workers Dist. Union, Local 271*, 233 Neb. 826, 832, 448 N.W.2d 168, 172 (1989) (“[a]ct applies only to actions to recover wages due the employee for labor or services performed for the employer . . . [not] to severance payment which becomes due upon termination of employment”).

“An individual is not an employee under the [Wage Payment and Collection] Act if the ‘individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact.’” *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 910, 896 N.W.2d 612, 906 (2017).

“[A] payment will be considered a wage subject to NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all conditions stipulated have been met.” *Eikmeier v. City of Omaha*, 280 Neb. 173, 179, 783 N.W.2d 795, 798 (2010) (discussing the difference between wages and a severance agreement). *Accord* *Drought v. Marsh*, 304 Neb. 860, 866, 937 N.W.2d 229, — (2020); *Timberlake v. Douglas Cty.* 291 Neb. 387, 400–01, 865 N.W.2d 788, 798–99 (2015) (discussing wages and fringe benefits; the statute’s list of fringe benefits is not exclusive).

For an in-depth discussion of the status of paid time off, *see Drought*, 304 Neb. at 860, 937 N.W.2d at 229.

“[A]n employer may withhold payment for unused sick leave, but not unused vacation leave.” *Fisher*, 285 Neb. at 816, 839 N.W.2d at 711. *Fisher* involves a hybrid paid-time-off (PTO) benefits plan that combines vacation and sick leave into one pot and employees can use their PTO however they chose. Should they so choose, they can use all PTO for vacation leave. The Wage Payment and Collection Act is does not specifically deal with this kind of hybrid plan; the resulting ambiguity should be decided in favor of the employee until the Legislature changes the statute. *Fisher*, 285 Neb. at 813–22, 839 N.W.2d at 709–15. Therefore, held the Court, all of the plaintiffs’ “earned but unused PTO hours were for vacation leave” and all PTO credited to the plaintiffs at the time of their separation from the company must be paid to the plaintiffs. *Fisher*, 285 Neb. at 822, 839 N.W.2d at 715.

“[O]n the facts alleged by [the plaintiff]” in *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001), the Court held as a

matter of law that the NWPCA “does not represent a ‘very clear mandate of public policy’ which would warrant recognition of an exception to the employment-at-will doctrine.” *Id.* At 739, 643 N.W.2d at 793. “The act is primarily remedial in nature.” *Id.*

The NWPCA allows double or sometimes triple recovery for nonpayment of wages (punitive damages?) and states that the excess “shall be placed in a fund to be distributed to the common school fund of this state.” Neb. Rev. Stat. § 48-1232 (Reissue 2010). “Under § 48-1232, it is in the court’s discretion whether to order an employer to pay to the common schools fund an amount equal to the judgment.” *Roseland v. Strategic Staff Mgmt., Inc.*, 272 Neb. 434, 442, 722 N.W.2d 499, 504 (2006). *Accord Law Offices of Ronald J. Palagi*, 275 Neb. at 353, 747 N.W.2d at 16. For more on this aspect of the statute, see the discussion above, in the Introduction to chapter 4, under the subheading “Punitive Damages.”

The award of attorney’s fees under this statute is discussed at *Kercher v. Bd. of Regents*, 290 Neb. 428, 438–40, 860 N.W.2d 398, 406–07 (2015); *Fisher*, 285 Neb. at 819–22, 829 N.W.2d at 713–15; *Law Offices of Ronald J. Palagi*, 275 Neb. at 351–53, 747 N.W.2d at 14–16; *Rauscher*, 269 Neb. at 277–80, 691 N.W.2d at 853–55.

AUTHORITIES

[T]he proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period.

Lee v. Ralston Sch. Dist., 180 Neb. 784, 785–86, 145 N.W.2d 919, 921 (1966). *Accord Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 867, 438 N.W.2d 494, 498 (1989); *Mueller v. Union Pac. R.R.*, 220 Neb. 742, 747, 371 N.W.2d 732, 735 (1985); *Ridenour v. Kuker*, 185 Neb. 321, 327, 175 N.W.2d 287, 291 (1970); *Sullivan v. David City Bank*, 181 Neb. 395, 397–98, 148 N.W.2d 844, 846 (1967); *Schlueter v. School Dist. No. 42*, 168 Neb. 443, 449, 96 N.W.2d 203, 207 (1959); *Niccum v. Farmers Co-op. Elevator Co.*, 457 F.2d 453, 456 (8th Cir.1972).

Regarding subtracting actual earning from other employment, see *Sinnett v. Dial Constr. Co.*, 187 Neb. 190, 191, 188 N.W.2d 681, 682 (1971).

Regarding earnings in the form of tips, see *Airport Inn, Inc. v. Nebraska Equal Opportunity Comm’n*, 217 Neb. 852, 860–61, 353 N.W.2d 727, 733 (1984).

Regarding a bonus to be paid to an employee, see *Knutson v. Snyder Indus., Inc.*, 231 Neb. 374, 377–78, 436 N.W.2d 496, 498–99 (1989).

Commissions not paid: Regarding recovering commissions not paid, see *Koster v. P & P Enters., Inc.*, 248 Neb. 759, 763–64, 539 N.W.2d 274, 278–79 (1995) (plaintiff recovered lost salary, commissions not paid, insurance benefits, and lost retirement funds).

Insurance benefits: Regarding insurance benefits, see *Koster*, 248 Neb. at 763–64, 539 N.W.2d at 278–79 (plaintiff recovered lost salary, commissions not paid, insurance benefits, and lost retirement funds).

Retirement funds: Regarding lost retirement funds, see *Koster*, 248 Neb. at 766, 539 N.W.2d at 279 (plaintiff recovered lost salary, commissions not paid, insurance benefits, and lost retirement funds).

The burden of proving the salary agreed upon is on the plaintiff. The burden of proving the amount to be subtracted in mitigation is on the defendant. This should be taken care of in the burden of proof part of the instruction. See NJI2d Civ. 4.70 and Parts 3 and 6 of the Introduction to Chapter 4. See also *Stiles v. Skylark Meats, Inc.*; *Sullivan v. David City Bank*; *Schlueter v. School Dist. No. 42* (citing cases); *Niccum v. Farmers Co-op Elevator Co.*, all *supra*.

In *Henderson v. Joplin*, 191 Neb. 827, 834, 217 N.W.2d 920, 923 (1974) the plaintiff proved the agreed upon salary and the number of months involved, \$900.00 per month for five months. There was also evidence that the plaintiff was employed during at least part of that five months. Defendant contended that the lack of evidence of plaintiff's income during that time rendered his evidence of damages speculative and conjectural. The court disagreed, noting that while the plaintiff has a duty to mitigate, the defendant has the burden of proving matters in mitigation.

There are two stated elements: salary minus mitigation. Though no measure of damages should be included in the instructions without supporting evidence, it is worth particular note that the second element here, mitigation, should be included only when there is supporting evidence. See NJI2d Civ. 4.70 regarding mitigation of damages. See also, the discussion of the collateral source rule in part A(6) of the Introduction to this chapter.

"A suit under an employment contract is an action at law." *Unland v. City of Lincoln*, 247 Neb. 837, 838, 530 N.W.2d 624, 626 (1995). *Accord* *Hammond v. City of Broken Bow*, 239 Neb. 437, 438, 476 N.W.2d 822, 824 (1991); *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 651, 472 N.W.2d 381, 385 (1991) (action at law even though petition styled "Equity Action").

See generally Dan B. Dobbs, *Handbook on the Law of Remedies* § 12.25 (1973).

NJI2d Civ. 4.53**DAMAGES FOR BREACH OF CONTRACT—
SELLER'S DAMAGES FOR BUYER'S BREACH OF
CONTRACT TO PURCHASE GOODS****A.**

The plaintiff is entitled to recover the following:

1. The contract price,
2. Plus any expenses the plaintiff reasonably incurred as a result of the buyer's breach,
3. Minus the resale price,
4. Minus any expenses the plaintiff saved as a result of the breach.

B.

The plaintiff is entitled to recover the following:

1. The market price of the goods at the time and the place the plaintiff was to fulfill (his, her, its) part of the contract,
2. Plus any expenses the plaintiff reasonably incurred as a result of the breach,
3. Minus any (resale, salvage) value,
4. Minus any expenses the plaintiff saved as a result of the breach.

C.

The plaintiff is entitled to recover the following:

1. The profit (, including reasonable overhead,) (he, she, it) would have made if the defendant had not breached the contract,
2. Plus any costs reasonably incurred in the performance of the contract before the breach,
3. Plus any expenses the plaintiff reasonably incurred as a result of the breach.

COMMENT

These measures of damages are offered as alternatives applicable when the buyer breaches a contract to purchase goods from the seller. They are to be inserted into NJI2d Civ. 4.40. Where this instruction uses the words “the goods,” substitute a more exact description of the goods if doing so aids clarity. For the U.C.C.’s definition of goods, see Neb. Rev. Stat., U.C.C. § 2-105(1) (Reissue 2001).

Where the word “reasonable” or “reasonably” appears in the pattern, it should only be included in the instruction given to the jury when there is a genuine issue as to whether the expenditure referred to was reasonable. Otherwise, the jury will be invited to adjust a figure they should not be adjusting.

This instruction refers to expenses reasonably incurred by the plaintiff as a result of the breach. This is a reference to the incidental damages defined in Neb. Rev. Stat., U.C.C. § 2-710 (Reissue 2001) as follows:

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.

To confine the jury’s consideration of expenses to those that are included in the statute, it may be necessary to add a reference to the specific kind of incidental damage involved in the case at bar. For example, in an appropriate case, one might add the following to the end of subparagraph 2 of Part A of this instruction:

“and in connection with the return and resale of the goods.”

Where the word “expenses” is used, if another word, a word such as charges or commissions, is more precise, it should be substituted.

This pattern does not address the situation where the defendant has made payments under the contract. Where that is properly part of the case, then, to prevent double recovery, it will be necessary to add another numbered subparagraph to the instruction. This subparagraph should be added after the “plus” subparagraphs, and it should read as follows:

“minus any payments already made by the defendant.”

Part A of this pattern instruction is the proper measure for seller’s damages after a good faith and commercially reasonable resale of the

goods involved. Neb. Rev. Stat., U.C.C. § 2-706 (Reissue 2001). If there is a question of fact regarding either of those two conditions, *i.e.*, “good faith” or “commercially reasonable,” the instruction will have to be redrafted to indicate that this is the proper measure of damages only if the jury finds that the plaintiff has proved the element or elements in question.

Leaving out subparagraph 3, which reads “minus the resale price,” and subparagraph 4, which reads “minus any expenses the plaintiff saved as a result of the breach”, Part A of the pattern expresses the proper measure in an action for the price where the buyer has possession of the goods, or where conforming goods in the seller’s possession were damaged or lost after that risk passed to the buyer, or where the plaintiff is unable to resell the goods at a reasonable price and after a reasonable effort. Neb. Rev. Stat., U.C.C. § 2-709 (Reissue 2001). If there is a question of fact regarding those conditions, the instruction will have to be redrafted.

Parts B and C of this pattern instruction are the proper measures for a seller’s damages after a buyer’s nonacceptance or repudiation of the goods. Neb. Rev. Stat., U.C.C. § 2-708 (Reissue 2001). Regarding Parts B and C, Part B should be used unless it is inadequate to put the seller in as good a position as performance of the contract would have done, in which case Part C should be used. Neb. Rev. Stat., U.C.C. § 2-708(2) (Reissue 2001). If it is a jury question whether Part B is adequate to put the seller in as good a position as performance of the contract would have done, then Parts B and C will have to be combined. They can be combined by adding the following to the beginning of Part B and making this altered Part B the first paragraph of the instruction:

“The plaintiff is entitled to be put in as good a position as (he, she, it) would have been in had the contract not been breached. The general rule is that the plaintiff is entitled . . .”

And the following should be added to the beginning of Part C, which then will be the second paragraph of the instruction:

“However, if you find that that amount of money is not adequate to put the plaintiff in as good a position as (he, she, it) would have been in had the contract not been breached, then the plaintiff is entitled . . .”

Note that Part B of this pattern refers to “the market price of the goods at the time and the place the plaintiff was to fulfill (his, her, its) part of the contract.” The Uniform Commercial Code states: “the market price at the time and place of tender and the unpaid contract price together with any incidental damages.” Neb. Rev. Stat., U.C.C. § 2-708(1) (Reissue 2001). If, under the pleadings and evidence of a particular case, the language of the pattern is not a proper substitute for the word “tender”, then that part of the pattern will have to be redrafted.

Regarding Part C of the pattern, in an appropriate case, it will be necessary to add a fourth numbered subparagraph that reads as follows:

“minus any (resale, salvage) value.”

The numbered subparagraphs of Parts A, B, and C of this instruction should be given only when appropriate, that is, when supported by the pleadings and the evidence.

The subparagraphs of Parts A, B, and C are numbered and set out separately for ease of understanding. If only one or two of the subparagraphs are to be given, the format should be changed to the more ordinary sentence structure.

See also the Introduction to Chapter 4 and N.J.I.2d Civ. 4.40 and the Comments and Authorities thereto. Regarding special damages, see N.J.I.2d Civ. 4.59 and note that the Uniform Commercial Code specifically prohibits consequential or special damages except where specifically provided to the contrary, Neb. Rev. Stat., U.C.C. § 1-305(a) (Reissue 2001). Regarding mitigation of damages, including resale, see Part 6 of the Introduction to Chapter 4. *See also*, N.J.I.2d Civ 4.70.

AUTHORITIES

Neb. Rev. Stat., U.C.C. §§ 2-706, 2-708, 2-709, and 2-710 (Reissue 2001); J. White and R. Summers, Uniform Commercial Code Ch. 7 (3d ed. 1988).

Holiday Mfg. Co. v. B.A.S.F. Systems, Inc., 380 F.Supp. 1096, 1105 (D.Neb.1974), supports portions of Part A of this instruction.

Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co., 185 Neb. 515, 517-18, 177 N.W.2d 25, 27 (1970); *Holiday Mfg. Co. v. B.A.S.F. Systems, Inc.*, *supra*, and Neb. Rev. Stat., U.C.C. § 2-708(2) (Reissue 2001) support Part C of this instruction. *Chicago Roller Skate Mfg. Co.* states: “[T]he measure of damages is the profit which the seller would have made from full performance by the buyer, together with any incidental damages resulting from the breach and costs reasonably incurred.” As explained in the Comment, *supra*, this instruction uses the word “expenses” as a reference to incidental damages; if the facts and pleadings call for some other word, the appropriate substitution should be made.

See generally W. Dittrick, *Nebraska Law on the Measure of Damages*, Ch. 12, Specific Types of Breach, at 2-11 (NCLE, Inc. 1983).

NJI2d Civ. 4.54**DAMAGES FOR BREACH OF CONTRACT—BUYER'S
DAMAGES FOR SELLER'S BREACH OF CONTRACT
TO SELL GOODS****A.**

The plaintiff is entitled to recover the following:

1. The reasonable cost of goods purchased, in good faith and without unreasonable delay, in substitution for those due from the (defendant, seller),
2. Plus any expenses the plaintiff reasonably incurred as a result of the breach,
3. Plus any payments the plaintiff has made, under the contract, to the defendant,
4. Minus the contract price,
5. Minus any expenses the plaintiff saved as a result of the breach.

B.

The plaintiff is entitled to recover the following:

1. The market price at the time the plaintiff learned of the breach,
2. Plus any expenses the plaintiff reasonably incurred as a result of the breach,
3. Plus any payments the plaintiff has made, under the contract, to the defendant,
4. Minus the contract price,
5. Minus any expenses the plaintiff saved as a result of the breach.

COMMENT & AUTHORITIES

Parts A and B of this pattern are offered as alternative measures of damage applicable when the seller breaches a contract to sell goods to the buyer. They are to be inserted into NJI2d Civ. 4.40. Part A applies where the buyer does seek damages for cover. Neb. Rev. Stat., U.C.C. § 2-712 (Reissue 2001). *See also id.* at § 2-715, and NJI2d Civ. 4.70,

Comment. Part B applies where there is nondelivery or repudiation by the seller and the buyer has not elected to seek damages based on cover. Neb. Rev. Stat., U.C.C. § 2-713 (Reissue 2001). *See also id.* at § 2-715. If it is a jury question whether the plaintiff has effected cover or not, then Parts A and B will have to be combined. They can be combined in this way: Add the following to the beginning of Part A and make this altered Part A the first paragraph of the instruction:

“If you find that the plaintiff did procure goods to substitute for the goods that were the subject of the contract, then the plaintiff is entitled . . .”

And add the following to the beginning of Part B and make this altered Part B and second paragraph of the instruction:

“If you find that the plaintiff did not procure goods to substitute for the goods that were the subject of the contract, then the plaintiff is entitled . . .”

Part 2 of Parts A and B of the instruction are “translations” of Neb. Rev. Stat., U.C.C. § 2-715(1) (Reissue 2001). They are not the most precise possible statement of this part of the law. If this element of damages is in issue, then these parts of the instruction may have to be rewritten so that they more exactly state § 2-715(1)’s concept of incidental damages.

Regarding the buyer’s damages for breach in regard to accepted goods, see Neb. Rev. Stat., U.C.C. § 2-714 (Reissue 2001), and regarding a seller’s breach of warranty or misrepresentation as to the condition of property in a contract for sale, see *NJI2d Civ. 4.50*.

Where the word “reasonable” or “reasonably” appears in the pattern, it should only be included in the instruction given to the jury when there is a genuine issue as to whether the expenditure referred to was reasonable. Otherwise, the jury will be invited to adjust a figure they should not be adjusting.

Where this instruction uses the word “goods,” substitute a more exact description of the goods, if doing so aids clarity. For the U.C.C.’s definition of goods, see Neb. Rev. Stat., U.C.C. § 2-105(1) (Reissue 2001). Regarding the determination of the market price, see Neb. Rev. Stat., U.C.C. §§ 2-713(2) and 2-723 (Reissue 2001), and adapt subparagraph 1 of alternative A, if necessary.

Regarding proof of market price in a case of anticipatory repudiation, see Neb. Rev. Stat., U.C.C. § 2-723 (Reissue 2001). This instruction would have to be adapted before it could be used in such a situation.

Regarding subparagraph 4 of each alternative, see Neb. Rev. Stat., U.C.C. § 2-715(1) (Reissue 2001). The reference to expenses reasonably

incurred is a reference to incidental damages recoverable under that section of the Code. It may be preferable to substitute reference to the specific kind of incidental damage involved in the case at hand.

Regarding consequential damages, see Neb. Rev. Stat., U.C.C. § 2-715(2) (Reissue 2001) and *National Farmers Org., Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 243 N.W.2d 335 (1976). *See generally* NJI2d Civ. 4.59 and note that the Uniform Commercial Code specifically prohibits consequential or special damages except where specifically provided to the contrary, Neb. Rev. Stat., U.C.C. § 1-305(a) (Reissue 1992). In subparagraph 4, where this instruction refers to those damages, the pattern may have to be altered to make the reference more specific. Though it refers to a different statutory section, the discussion in the Comment to NJI2d Civ. 4.53 is relevant here.

Regarding mitigation of damages, including cover, see NJI2d Civ. 4.70. *See also*, the discussion of the collateral source rule in part A(6) of the Introduction to this chapter.

In addition to the statutory sections and the cases cited above see *J. White and R. Summers*, Uniform Commercial Code Ch. 6 and §§ 10-3, 10-4 (3d ed. 1988); *Carlson v. Nelson*, 204 Neb. 765, 769, 285 N.W.2d 505, 507 (1979), supplemental opinion, 205 Neb. 483, 288 N.W.2d 489 (1980); *Burgess v. Curly Olney's Inc.*, 198 Neb. 153, 159, 251 N.W.2d 888, 891 (1977); *Farmer's Union Co-op Co. of Mead v. Flamme Bros.*, 196 Neb. 699, 706, 245 N.W.2d 464, 468 (1976).

NJI2d Civ. 4.55

DAMAGES FOR BREACH OF CONTRACT— CLIENT'S DAMAGES FOR BREACH OF CONTRACT TO OBTAIN INSURANCE COVERAGE—NO COVERAGE OBTAINED

The plaintiff is entitled to recover the amount (he, she, it) would have been paid under the insurance policy the defendant should have obtained.

COMMENT & AUTHORITIES

This instruction is to be inserted into NJI2d Civ. 4.40. It applies "in a case where the insurance broker failed to obtain any coverage on the loss involved. It would not be proper where there was not a total lack of coverage." *Kearney Convention Ctr. v. Anderson-Divan-Cottrell Ins., Inc.*, 220 Neb. 319, 322, 370 N.W.2d 86, 89 (1985). In the latter situation, see NJI2d Civ. 4.56.

"An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by

such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent.” *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 803, 515 N.W.2d 767, 770 (1994) (also discussing issue of first impression in Nebraska: when agent has duty to explain policy terms). *Accord, e.g., Countryside Coop v. Harry A. Koch Co.*, 280 Neb. 795, 802, 790 N.W.2d 873, 881 (2010) (“[A] broker who agrees to obtain insurance for another but fails to do so is liable for damage proximately caused by such negligence, including the amount that would have been due under such policy if it had been obtained.”); *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 283, 570 N.W.2d 525, 529 (1997) (agent or broker); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 470, 476 N.W.2d 802, 806 (1991); *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 755, 438 N.W.2d 124, 131 (1989).

“An insurance agent has no duty to anticipate what coverage an insured should have.” *Dahlke*, above.

NJI2d Civ. 4.56

DAMAGES FOR BREACH OF CONTRACT— INSURED’S DAMAGES FOR BREACH OF CONTRACT TO OBTAIN INSURANCE COVERAGE— SOME COVERAGE OBTAINED

The plaintiff is entitled to recover the amount (he, she, it) would have been paid under the insurance policy the defendant should have obtained, minus any insurance recovery that was in fact paid.

COMMENT & AUTHORITIES

This instruction is to be inserted into NJI2d Civ. 4.40. It applies where partial coverage was effected; it does not apply where the broker failed to obtain any coverage on the loss involved. *Kearney Convention Ctr. v. Anderson-Divan-Cottrell Ins., Inc.*, 220 Neb. 319, 322, 370 N.W.2d 86, 89 (1985). In the latter situation, see NJI2d Civ. 4.55.

“[W]here some portion of the insurance was effectuated, although less than the broker had a duty to obtain, the measure of damages is the actual loss sustained which should have been insured less such insurance recovery as was in fact paid.” *Kearney Convention Ctr. v. Anderson-Divan-Cottrell Ins., Inc.*, 220 Neb. 319, 322, 370 N.W.2d 86, 89 (1985) (failure to instruct on this definite measure of damages, and giving general instruction on damages instead, reversible error).

NJI2d Civ. 4.59

**DAMAGES FOR BREACH OF CONTRACT—ACTUAL,
CONSEQUENTIAL, OR SPECIAL DAMAGE**

The plaintiff is also entitled to recover [here insert a statement of the special damages involved] provided (he, she, it) proves that such damages were proximately caused by the breach and that, at the time the contract was entered into, these damages were a foreseeable result of a breach of this nature. Damages are foreseeable when they are the kind that would ordinarily follow such a breach or when the defendant either knew, or should have known, that such damages were likely to result from such a breach.

COMMENT

General damages are those that the law presumes will result from any injury of a particular kind. Special or consequential damages—the two are interchangeable—are the actual result of the specific injury suffered, but not the necessary result of the kind of injury suffered. They are damages arising from the special circumstances of a specific case, which, if alleged and evidenced, may be added to or substituted for the general damages. Dan B. Dobbs, *Handbook on the Law of Remedies* § 12.3 (1973) has an excellent treatment of the subject of special damages.

Consequential damages, as opposed to direct damages, do not arise directly according to the usual course of things from a breach of contract itself. Rather, they occur as a consequence of special extracontractual circumstances known or reasonably supposed to have been contemplated by the parties when the contract was made. Direct damages refer to those which the party lost from the contract itself—in other words, the benefit of the bargain—while consequential damages is the lost profits or revenues from outside parties, lost business opportunities, or other sums forgone as a result of a breach of contract.

U.S. Pipeline v. Northern Nat. Gas Co, 303 Neb. 444, 466–67, 930 N.W.2d 460, — (2019) (footnotes citing cases and authorities omitted).

This instruction is to be inserted into NJI2d Civ. 4.40, as indicated. In a case where only special damages are alleged and evidenced, this pattern and the examples set out in this Comment will have to be modified by dropping the word “also.”

Special damages must be specifically pleaded: Neb. Ct. R. Pldg. § 6-1108 (“If the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated[.]” The following cases were decided under Neb. Rev. Stat.

§ 25-804 (Reissue 1989), which required that special damages be specifically pleaded; that statute has been repealed and replaced by Neb. R. Pldg. in Civ. Actions 9(g); the cases may cite the repealed statute but, under the replacement rule of pleading, there is no reason to suggest that they are anything but good law. *Washington v. American Cmty. Stores Corp.*, 196 Neb. 624, 629, 244 N.W.2d 286, 289 (1976). *See also* *George Rose Sodding & Grading Co. v. Omaha*, 190 Neb. 12, 13-14, 205 N.W.2d 655, 656 (1973) (quoting 22 Am.Jur.2d *Damages* § 294 at 390 as follows: “One who seeks to recover multiple—that is, double or treble—damages given by statute must distinctly claim them in his complaint.”); *Everton v. Esgate*, 24 Neb. 235, 38 N.W. 794 (1888) (the syllabus of the court states: “Where special damages are properly pleaded a recovery may be had for the same, although the prayer for relief is general.”).

“The issue of whether damages are consequential under a contract is a question of law that we review de novo, but the factual determinations underlying such a characterization are reviewed for clear error.” *U.S. Pipeline*, 303 Neb. at 464, 930 N.W.2d at — (footnotes citing cases omitted).

“Nebraska courts have consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract. . . . Generally, a contractual waiver or exclusion of consequential damages will be upheld unless the provision is unconscionable.” *U.S. Pipeline*, 303 Neb. at 465-66, 930 N.W.2d at — (2019) (footnotes citing cases omitted).

“Generally, a contractual waiver or exclusion of consequential damages will be upheld unless the provision is unconscionable.” *U.S. Pipeline*, 303 Neb. at 466-67, 930 N.W.2d at —.

Regarding language in some of the discussed cases that damages must be proved with “reasonable certainty,” *see* Part 3(c) of the Introduction to Chapter 4.

For reasons discussed below, a specially tailored instruction may better express the exact limits on the jury’s consideration of particular special damages. Therefore, when instructing on special damages, consideration should be given to whether a special instruction is called for, one tailored to the particulars of the rule of law being communicated to the jury. The above is a model for such special-damage instruction.

For a specific example of how this model may be used, consider a case involving a contract for a sale of property, where the plaintiff alleges the seller’s breach of warranty as to the condition of property. Assume that the pleadings and the evidence support special damage instruction on lost profits. That part of the instructions might read as follows:

"The plaintiff is also entitled to recover the profits (he, she, it) lost as a result of the breach of warranty if (he, she, it) proves that such lost profits were proximately caused by the breach and that, when the contract was entered into, such lost profits were a foreseeable result of a breach of warranty. Damages are foreseeable when they are the kind that would ordinarily follow such a breach or when the seller either knew or should have known that such a breach of warranty would result in this sort of damage."

If plaintiff's failure to "cover" is properly in issue, the instruction will have to be modified accordingly. If it would not result in double recovery, then this instruction should be given along with the appropriate general damage instruction, here NJI2d Civ. 4.49. (And this instruction and NJI2d Civ. 4.49 would be worked into NJI2d Civ. 4.40.) If giving both would result in double recovery then only one should be given. If lost profit is the sole measure of damages, then only the above should be given.

The Nebraska rule on the recovery of lost profits in this situation is stated in *El Fredo Pizza, Inc*

The principal issue raised in this case is whether the evidence was sufficient to permit Center Street Pizza to recover damages for lost business profits it allegedly incurred due to the defect in the oven. . . . Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be recovered under section 2-715, U.C.C., if proof of such loss is sufficient.

. . . . The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor, however, "is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty [regarding "reasonable certainty," see NJI2d Civ., Chapter 4, Introduction, Part 3(c)] both their occurrence and the extent thereof. . . . Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not." Therefore, although in many, if not most, instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, "where the evidence is available to furnish a reasonably certain factual basis for computation of probable losses, recovery of lost profits cannot be denied, even though a new business venture is involved." In prior Nebraska cases involving recovery of damages for lost profits, the focus has been on whether it was proven that it is reasonably certain such profits would have been realized, and that the lost profits

can be ascertained and measured from the evidence introduced with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary. . . .

Under the above authorities, the crucial issue in this case is . . . whether damages for lost profits were proven with reasonable certainty. . . . The fact that a business is new is relevant only insofar as that fact affects the certainty of proof of lost profits; it does not establish as a matter of law that damages for lost profits may not be recovered.

El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 704–06, 261 N.W.2d 358, 363–64 (1978) (citations omitted).: *Accord Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 204 Neb. 248, 254, 281 N.W.2d 778, 782 (1979) and the many cases and authorities in *El Fredo Pizza, Inc.*, *supra*. See also *Meisinger Earth Moving, Inc. v. State* 212 Neb. 554, 559, 324 N.W.2d 387, 389–90 (1982); 5 Corbin on Contracts § 1022, *et seq.* (1964); M. Kinney and D. Riekenberg, *Nebraska Law on the Measure of Damages*, Ch. 8, Loss of Profits (NCLE, Inc. 1983). See also *Kerrey Constr. Co. v. Hunt*, 213 Neb. 776, 780–81, 331 N.W.2d 519, 521 (1983) (profits lost on resale of land). Regarding lost profits, see also *NJI2d Civ. 4.01*, Comment, and *NJI2d Civ. 4.20*, Comment.

Regarding the general rules on the proper measure of damages, see *NJI2d Civ. 4.41* through 4.54. Regarding Nebraska law on special damages in any of the situations covered by those instructions, in addition to this Comment, see the Comments and the Authorities to the particular instruction.

The difficulty associated with drafting a general instruction on special damages is reflected in what Professor Dobbs says about the subject in his outstanding treatise on remedies: special-damage recovery depends upon the damage being the kind for which recovery ought to be allowed. Dan B. Dobbs, *Handbook on the Law of Remedies* § 12.3, at 798 (1973). It cannot, however, be stated to the jury this way; this is really a statement of the legal decision made by the judge. Regarding how this is to be communicated to the jury, some authorities say that special damages must have been “in the contemplation of the parties.” That language is traceable to *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), and “has been freely translated into a rule that the special damages must be ‘foreseeable.’” Dobbs, *supra* at 804 (1973). See also 5 A. Corbin, *Corbin on Contracts* § 1007 (1964). Many of the cases do use the language of foreseeability. See, e.g., *Birkel v. Hassebrook Farm Serv., Inc.*, 219 Neb. 286, 289, 363 N.W.2d 148, 150 (1985) (the premier Nebraska case on special damages). That, however, is not necessarily more generally applicable to all special damage situations than is the language regarding “the contemplation of the parties.”

Professor Dobbs also says this about special damages. At the two extremes are risks consciously allocated and risks clearly excluded. The area in the middle “calls for judgment; and no rule . . . can furnish a clear solution.” Dobbs, *supra*, § 12.3, at 815 (1973).

Probably no one has ever identified all the issues and policies . . . that go into the judgment about special damages. Until the policies of this sort are more carefully identified, courts will inescapably be forced into judgments perhaps somewhat personal in nature, and in any event, judgments not clearly dictated by a rule of law.

. . . [C]ourts must decide what risks the parties allocated, tacitly or expressly, between themselves, and when the parties' intent is unclear or nonexistent, the courts must allocate those risks themselves.

Id. at 816.

Whatever language is used is an oversimplification of the notion that the damages must be the kind that ought to be allowed because one party has suffered some unique injury that ought to be allocated to another party. In some cases, the law allocates certain risks to one party or the other in a way different from the allocation expressed in the general rule. What it takes to trigger that special allocation can differ from situation to situation. This is what makes the pattern instruction difficult to write in a way that is generally applicable. Ultimately, the instruction depends upon what the Supreme Court or the legislature has said about what kinds of damages ought to be allowed, and under what circumstances. It is true, however, that the language of the pattern instruction found above is the language that should be used most often. *See Birkel v. Hassebrook Farm Serv., Inc.*, 219 Neb. 286, 289–90, 363 N.W.2d 148, 151–52 (1985).

The Uniform Commercial Code, Neb. Rev. Stat. U.C.C. § 1-305(a) (Reissue 2001), states:

The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.

AUTHORITIES

Birkel v. Hassebrook Farm Serv., Inc., 219 Neb. 286, 289–90, 363 N.W.2d 148, 151–52 (1985); Restatement (Second) of Contracts § 351 (1981).

See the Comment, supra, and the Comment and Authorities to N.J.I.2d Civ. 4.01, 4.40, 4.41, 4.49, and 4.50. *See also* K. Johnson & R. Seckman, *Nebraska Law on the Measure of Damages*, Ch. 7, General Rules for Breach of Contract Damages, at 15–18 (NCLE, Inc. 1983).

F. WRONGFUL DEATH**NJI2d Civ. 4.60****WRONGFUL DEATH**

If you return a verdict for the plaintiff, then you must determine the amount of money, and the monetary value of the services, comfort, and companionship, that (the decedent) would have contributed to (spouse, next of kin), had (the decedent) lived. In making this determination, you should consider the following:

1. Any financial support, services, comfort, or companionship that (the decedent) gave to (spouse, next of kin) before (his, her) death, and the prospect that there would have been changes in the future;
2. The physical and mental health of (the decedent) had (he, she) not suffered the injuries that caused (his, her) death;
3. (The decedent)'s life expectancy immediately before the injuries that caused (his, her) death; and
4. The life expectancy of (spouse, each next of kin).

In considering these lost contributions, you may award damages only for the life expectancy of the decedent or (spouse, each next of kin), whichever is shorter. You may not award (spouse, next of kin) any damages for (his, her, their) grief or mental suffering. [(You may not award any damages for any pain and suffering that the decedent may have experienced before (his, her) death.) (You may not include here any money to compensate for any pain and suffering that the decedent may have experienced before (his, her) death. The decedent's pain and suffering is the subject of the (second, third, et cetera) cause of action and must be handled according to Instruction No. —.)]

[You should entirely disregard the fact that the surviving spouse (has remarried, may remarry), the fact that (spouse, next of kin) may receive an inheritance from the decedent's estate, and the fact that (spouse, next of kin) may receive insurance or workers' compensation benefits as a result of decedent's death].

[If you do return a verdict for the plaintiff, it must consist of a single sum of money representing the entire monetary loss of all of (spouse, next of kin). Do not divide the money (between, among) (spouse, next of kin); that will be done by the court. *(If the jury is to allocate the award, that will be handled in the verdict form. See Comment, below.)*]

SPECIAL NOTE

In 1992 Neb. Rev. Stat. §§ 25-21,185 through 25-21,185.12 (Reissue 2016) (L.B. 262 (92nd Legis. 2d Sess. 1992) changed Nebraska's contributory and comparative negligence law for certain specified kinds of cases. It seems to change how damages are awarded in some wrongful death actions. The statute applies to causes of action in negligence that accrue on or after February 8, 1992, and that are of a type to which contributory negligence is an allowable defense (as opposed to actions in intentional tort, strict liability, and perhaps others, where contributory negligence is not an allowable defense; see NJI2d Civ. 5.04, Comment) including those in which include joint and several liability is an issue. In such cases, noneconomic damages must be allocated among those jointly and severally liable. Neb. Rev. Stat. §§ 25-21,185.07 and 25-21,185.10 (Reissue 2016). See NJI2d Civ. 5.04, Comment.

The Committee has not drafted an L.B. 262 wrongful death, damage instruction. Where necessary, adapt this wrongful death instruction, NJI2d Civ. 4.60, so that it identifies and separately states economic and noneconomic damages: In adapting this instruction, use NJI2d Civ. 4.00 and the Verdict Form instructions, NJI2d Civ. 5.01 through 5.04, as models.

This comparative negligence statute—Neb. Rev. Stat. §§ 25-21,185 through 25-21,185.12 (Reissue 2016)—is discussed at NJI2d 5.04, Comment. Regarding wrongful death, see particularly part X of that Comment.

COMMENT

Of the above elements of damages, include only those properly raised by the pleadings and the evidence. Regarding reducing future damages to their "present value," see NJI2d Civ. 4.13.

"[The] wrongful death action does not exist at common law and thus exists solely by virtue of legislative enactment." *Nelson v. Dolan*, 230 Neb. 848, 851, 434 N.W.2d 25, 27 (1989). *Accord Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 850, 636 N.W.2d 170, 180 (2001). Its terms and conditions, including the measure of damages and the distribution of those recovered, are fixed by statute. *Paulk v. Central Lab. Assocs.*, *supra*; *Nelson v. Dolan*, *supra*. This "purely statutory remedy . . . may be enlarged, reduced, or completely eliminated at the pleasure of the Legislature." *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 851, 636 N.W.2d 170, 181 (2001) (it will be presumed that the Legislature acquiesces in judicial constructions of the statute that do not evoke an amendment).

Neb. Rev. Stat. § 30-809 (Reissue 2016) is the statute creating the right in Nebraska. Neb. Rev. Stat. § 30-810 (Reissue 2016) sets down various procedures for bringing a wrongful death action, including the statute of limitations.

An action for wrongful death allows the surviving spouse or the next of kin to recover the amount of damages they have sustained as a result of the decedent's death. Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 2016); *Corona de Camargo v. Schon*, 278 Neb. 1045, 1052, 776 N.W.2d 1, 8 (2009) (“[I]t provides no basis upon which to recover a decedent’s own damages.”); *Maloney v. Kaminski*, 220 Neb. 55, 69, 368 N.W.2d 447, 458 (1985). Next of kin means those persons nearest in degree of blood surviving the decedent. *Mabe v. Gross*, 167 Neb. 593, 597, 94 N.W.2d 12, 15 (1959). *Accord Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 851–52, 636 N.W.2d 170, 180–81 (2001) (declining appellant’s invitation to change the definition; any expansion of the class of persons entitled to recover is for the Legislature). As a practical matter, next of kin ordinarily means “those persons who take the personal estate of the deceased under the statutes of distribution.” *Mabe v. Gross*, 167 Neb. at 596, 94 N.W.2d at 15. *Accord Paulk v. Central Lab. Assocs.*, *supra*.

Regarding fraudulent concealment as grounds for equitable estoppel, precluding an alleged tortfeasor from asserting the statute of limitations as a bar to a wrongful death action, see *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). Regarding estoppel generally, see the references in the Index, under Estoppel. Different aspects of estoppel are discussed at different places herein: See NJI2d Civ. 1.45, (judicial estoppel: False Testimony (Falsus in Uno, Falsus in Omnibus)); NJI2d Civ. 6.26-6.28 (“Partner by Estoppel”); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract, including a discussion of damages). Regarding statutes of limitations generally, see NJI2d Civ. 2.02D and 12.04, Comment & Authorities, and cross-references therein.

The words “the decedent” are used throughout NJI2d Civ. 4.60. If it aids clarity, substitute the decedent’s name or some other identifying phrase. Similarly, where this instruction says “(spouse, next of kin),” insert a word or phrase identifying the person or persons on whose behalf the suit has been brought and to whose benefit any judgment will accrue. Depending on the facts, an appropriate substitution might be “the surviving spouse” or “the next of kin” or, in the case of the death of a child, “the parents.” (There is, however, no wrongful death action for negligence resulting in a stillbirth. *Smith v. Columbus Cmty. Hosp., Inc.*, 222 Neb. 776, 387 N.W.2d 490 (1986), discussed in the Authorities, below.)

Damages to decedent’s next of kin may be recovered in a wrongful death action; damages to decedent may not. A wrongful death action may, however, be joined with a separate action on behalf of decedent’s estate, in which decedent’s damages may be recovered. *Reiser v. Coburn*, 255 Neb. 655, 659, 587 N.W.2d 336, 339 (1998) (wrongful death action brought by surviving parents; action for damages to deceased child, brought by decedent’s estate, joined as separate cause of action in

wrongful death action); *Nelson v. Dolan*, 230 Neb. 848, 853–55, 434 N.W.2d 25, 29 (1989) (damages recoverable in the separate cause of action may include pre-and post-impact pain and suffering); *Kroeger v. Safranek*, 161 Neb. 182, 192, 72 N.W.2d 831, 840–41 (1955). *See also* *Missouri Pac. Ry. v. Baier*, 37 Neb. 235, 248, 55 N.W. 913, 917 (1893).

“[W]e agree with the reasoning of other states that proceeds from a wrongful death action are not the property of a decedent’s estate and are therefore not contemplated as a property right waived in a premarital agreement unless the language of the parties agreement specifically waives such right.” *In re Estate of McConnell*, 28 Neb. App. 303, 325, 943 N.W.2d 722, — (2020). Further regarding premarital agreements, *see* *NJI2d Civ. 15.01 Comment*, at X(C)(2).

A pre-existing action for decedent’s pain and suffering may be continued by the administrator of the estate as a separate suit or it may be revived and joined with an action for wrongful death by pleading the two separately, as two causes of action. *In re Estate of Panec*, 291 Neb. 46, 54, 864 N.W.2d 219, 225–26 (2015) (“A wrongful death action and a survival action are two distinct causes of action which may be brought by a decedent’s personal representative. Although they are frequently joined in a single action, they are conceptually separate.”) (footnoting cases; footnotes omitted); *See also* Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 2016) (survival and abatement of claims and actions). (For an excellent general discussion and comparison of survival and wrongful death actions, *see* the *Comment* just cited.) This is the reason that all but the first two sentences of the third from the final paragraph of the instruction is in brackets. The statement in each of the two sets of parentheses is an alternative to the other. The first is optional where decedent’s pain and suffering is not the subject of a separate cause of action in the same suit with the wrongful death action. The second is optional where decedent’s pain and suffering is the subject of a separate cause of action in the same suit with the wrongful death action.

In re Estate of Panec, 291 Neb. at 54-55, 864 N.W.2d at 225–26 discusses the difference between a wrongful death action and a survival action.

Corona de Camargo v. Schon, 278 Neb. 1045, 776 N.W.2d 1 (2009) discusses the difference between a “survival action,” which is a cause of action brought by decedent’s estate for damage to the decedent, and the “revival of an action” brought by the decedent prior to death. *Id.* at 1054-55, 776 N.W.2d at 9-10.

The statute of limitations for a wrongful death action is 2 years and the statute of limitations for a survival action is 4 years. *Id.* at 1056, 776 N.W.2d at 10. Regarding statutes of limitations generally, *see* *NJI2d Civ. 2.02D* and 12.04, *Comment & Authorities*.

The penultimate paragraph of this instruction is provided for the

case where it is likely that the jury will mistakenly consider one or more of the factors stated therein. This paragraph will have to be tailored to the individual case. Regarding these factors, see NJI 4.60 (1969) and various cases cited below, in the Authorities.

The 1969 version of this instruction contained a paragraph on medical and funeral expenses. Statutory beneficiaries may recover the fair and reasonable value of these expenses, but only in a separate cause of action. *E.g.*, *Reiser v. Coburn*, 255 Neb. 655, 659, 587 N.W.2d 336, 339 (1998) (separate cause of action may be joined with wrongful death action; see discussion above, this Comment); *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 329–30, 314 N.W.2d 19, 22 (1982); *Missouri Pac. Ry. v. Baier*, 37 Neb. 235, 248, 55 N.W. 913, 917 (1893). See also *Shields v. County of Buffalo*, 161 Neb. 34, 53, 71 N.W.2d 701, 714 (1955); *Becker v. Hasebroock*, 157 Neb. 353, 359, 59 N.W.2d 560, 564 (1953). Instruction on those expenses as a measure of damages belongs with the instructions on the appropriate separate cause of action, and not with the instruction on damages in the wrongful death cause of action.

The 1969 version of this instruction also specifically mentioned decedent's talents, successes, occupation, past earnings, personal living expenses, etc. These are simply some of the various kinds of evidence of decedent's contributions in the past and what they are likely to be in the future. Such evidence generally is admissible (see the Authorities, below) and may be argued to the jury. There is, however, no reason to single out these particular kinds of evidence and mention them in the instruction.

The petition in a wrongful death action must allege facts from which it may be inferred that the statutory beneficiaries sustained a monetary loss by reason of the decedent's death. *Mabe v. Gross*, 167 Neb. 593, 597, 94 N.W.2d 12, 16 (1959); *Greenwood v. King*, 82 Neb. 17, 20, 116 N.W. 1128, 1129–30 (1908). A monetary loss is inferred from an allegation that the decedent had a legal duty to support the beneficiaries. *Mabe v. Gross*, *supra*; *Wieck v. Blessin*, 165 Neb. 282, 293–94, 85 N.W.2d 628, 636 (1957); *Tate v. Barry*, 144 Neb. 517, 522, 13 N.W.2d 879, 882 (1944); *Greenwood v. King*, *supra*. See also *Kroeger v. Safranek*, 161 Neb. 182, 192, 72 N.W.2d 831, 841 (1955).

A monetary loss is also inferred from an allegation that the deceased and the beneficiary were "lineal kinsmen." *Millman v. County of Butler*, 244 Neb. 125, 135, 504 N.W.2d 820, 827 (1993) (quoting *Mabe v. Gross*, 167 Neb. at 599, 94 N.W.2d at 17). If proven, this relationship alone will support award of substantial damages, without proof of actual loss, and without a preexisting adjudication of paternity or order to pay child support. *Millman*, *supra*.

It is also enough if the beneficiaries allege that in fact they were dependent upon the decedent for support and sustained a monetary loss due to the decedent's death. In *re Vogler's Estate*, 197 Neb. 454, 456–57,

249 N.W.2d 729, 731 (1977); *Mabe v. Gross*, *supra*; *Killion v. Dinklage*, *supra*; *Greenwood v. King*, *supra*.

Regarding contributory negligence and the wrongful death action, see the Special Note, above. In addition, in cases that do not involve the newer allocation statute discussed in the Special Note, the court has said the following: "The general rule in a wrongful death case is that although the action will not be barred by the contributory negligence of one beneficiary, the amount of recovery will be reduced (if properly requested) to the extent of the contributorily negligent beneficiary's share in the recovery." *Richardson v. State, Dept. of Rds.*, 200 Neb. 225, 232-33, 263 N.W.2d 442, 447 (1978). *Accord* *Crandall v. Ladd*, 142 Neb. 736, 743, 7 N.W.2d 642, 646 (1943). Where the sole beneficiary "was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for the defendant." *Weber v. Southwest Neb. Dairy Suppliers, Inc.*, 187 Neb. 606, 609, 193 N.W.2d 274, 276 (1971). *Accord* *Wieck v. Blessin*, 165 Neb. 282, 295, 85 N.W.2d 628, 637 (1957); *Ecker v. Union Pac. R.R. Co.*, 164 Neb. 744, 750, 83 N.W.2d 551, 555 (1957); and the cases cited therein. This instruction or the instruction on contributory and comparative negligence may need to be modified in a case properly raising those issues.

The relation-back doctrine applies to amendments to wrongful death petitions. *Genthon v. Kratville*, 270 Neb. 74, 83-84, 701 N.W.2d 334, 345 (2005).

On the subject of the contributory negligence of a deceased minor, the following cases are particularly relevant. *Brahatcek v. Millard Sch. Dist.*, 202 Neb. 86, 99, 273 N.W.2d 680, 688 (1979); *Caradori v. Fitch*, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978); *Vandenberg v. Langan*, 192 Neb. 779, 224 N.W.2d 366 (1974); *South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710, 713, 87 N.W. 536, 537 (1901). For general discussions of Nebraska law on the subject of the negligence and contributory negligence of minors, see *NJI2d Civ. 3.05*, and the Comment and Authorities thereto.

The Nebraska Supreme Court has abrogated the common-law doctrine of interspousal tort immunity. The fact that a wrongful death action is based on the alleged negligence of the decedent's spouse is not a bar. *Imig v. March*, 203 Neb. 537, 543-44, 279 N.W.2d 382, 386 (1979).

If the wrongful death is alleged to have been caused by the malpractice of a health-care professional, see *Neb. Rev. Stat. § 44-2819* (Reissue 2010). This is discussed at *NJI2d 12.01*, Comment.

A wrongful death action is distinguished from a "survival action."

See also J. Meusey, *Nebraska Law on the Measure of Damages*, Ch. 3, Wrongful Death (NCLE, Inc. 1983).

AUTHORITIES

I. JURY QUESTION

The amount of damages to be awarded in a wrongful death action is a question for the jury. *E.g.*, *Maloney v. Kaminski*, 220 Neb. 55, 69–70, 368 N.W.2d 447, 458 (1985); *Mabe v. Gross*, 167 Neb. 593, 597, 94 N.W.2d 12, 16 (1959); *Kroeger v. Safranek*, 161 Neb. 182, 192, 72 N.W.2d 831, 840 (1955), and the decision on reappeal, 165 Neb. 636, 642, 87 N.W.2d 221, 226 (1957); *Draper v. Tucker*, 69 Neb. 434, 439, 95 N.W. 1026, 1028 (1903); Lynn A. Mitchell, Comment, Recovery Under the Nebraska Survival and Wrongful Death Statutes, 16 Creighton L.Rev. 182, 204–05, 208 (1983).

II. DECEDENT'S LIKELY FUTURE CONTRIBUTIONS

The measure of damages in such a case is the contributions the decedent would have made to the statutory beneficiaries had the decedent not died. The amount recoverable is the financial loss, including lost money and lost services that have a monetary value, which the statutory beneficiaries have suffered as a result of decedent's death. *See, e.g.*, Neb. Rev. Stat. § 30-810 (Reissue 2016); *Maloney v. Kaminski*, 220 Neb. 55, 69, 368 N.W.2d 447, 458 (1985) ("We have held that a wrongful death plaintiff may only recover for . . . a loss which has a money value."); *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 329–30, 314 N.W.2d 19, 22 (1982); *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 346, 190 N.W.2d 789, 791 (1971) *aff'd in part, rev'd in part*, 189 Neb. 334, 202 N.W.2d 625 (1972); *Darnell v. Panhandle Co-op Ass'n*, 175 Neb. 40, 51, 120 N.W.2d 278, 286 (1963); *Kroeger v. Safranek*, *supra* (both cases); *Killion v. Dinklage*, 121 Neb. 322, 324–25, 236 N.W. 757, 759 (1931); *Fisher v. Trester*, 119 Neb. 529, 535, 229 N.W. 901, 903 (1930); *Gundy v. Nye-Schneider-Fowler Co.*, 89 Neb. 599, 607–08, 131 N.W. 964, 968 (1911) (value of decedent's estate is irrelevant); *Crabtree v. Missouri Pac. R.R.*, 86 Neb. 33, 41, 124 N.W. 932, 934–35 (1910) (not how much obligated to contribute, but how much likely to contribute); *Chicago, R.I. & P. Ry. v. Holmes*, 68 Neb. 826, 829, 94 N.W. 1007, 1008 (1903) ("A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar." The amount of property left by decedent is irrelevant.); *Chicago, St. P., M. & O. Ry. v. Lagerkrans*, 65 Neb. 566, 575, 91 N.W. 358, 362–63 (1902) (surviving spouse's remarriage is irrelevant); *Chicago, R.I. & P. Ry. v. Zerneck*, 59 Neb. 689, 697–98, 82 N.W. 26, 29 (1900), *aff'd*, 183 U.S. 582, 22 S.Ct. 229, 46 L.Ed. 339 (1902); *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 100–01, 52 N.W. 840, 841 (1892).

Loss of earnings is not a proper measure of damages in a wrongful death action. Evidence of lost earnings is, however, ordinarily admissible: the proper measure—pecuniary loss to the beneficiaries—includes the amount the beneficiaries would have received from the lost earnings. *Darnell v. Panhandle Coop. Ass'n*, *supra*.

Once again, the decedent's legal or moral obligation to support the beneficiaries, if any, is not the key. The key is decedent's likely contributions. *Crabtree v. Missouri Pac. R.R. Co.*, 86 Neb. 33, 41, 124 N.W. 932, 936 (1910); *Johnson v. Missouri Pac. R.R. Co.*, 18 Neb. 690, 700, 26 N.W. 347, 350 (1886). The former may be admissible, but only as relevant to the latter. *Dorsey v. Yost*, 151 Neb. 66, 70, 36 N.W.2d 574, 576 (1949), *overruled on other grounds by Selders v. Armentrout* (No. 1), 190 Neb. 275, 207 N.W.2d 686 (1973). *See also Wieck v. Blessin*, 165 Neb. 282, 294, 85 N.W.2d 628, 636 (1957) (parent cannot rely on Nebraska law requiring child to support impoverished parent if likelihood of parent becoming impoverished is remote).

Two more cases: In *Lambert v. Nebraska Crime Victim's Reparations Bd.*, 214 Neb. 817, 823, 336 N.W.2d 320, 324 (1983), the court discussed "pecuniary loss" under the Nebraska Crime Victim's Reparations Act, and the rules and regulations promulgated thereunder, by reviewing the meaning of "pecuniary loss" under Nebraska's wrongful death act. In *Thevenot v. Sieber*, 204 F.Supp. 15 (S.D.N.Y.1962), a federal district court in New York interpreted Nebraska law in a wrongful death action brought by a surviving husband and children. That court recognized that Nebraska law restricts recovery to pecuniary value lost and stated that, under Nebraska law, that can include loss of "services and consortium." *Id.* at 16.

III. LOSS OF COMPANIONSHIP

"A plaintiff in a wrongful death case can only recover damages for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value." *Reiser v. Coburn*, 255 Neb. 655, 659, 587 N.W.2d 336, 340 (1998) (discussing meaning of "pecuniary" and "society").

Regarding loss of companionship, in *Wood v. City of Omaha*, 87 Neb. 213, 220, 127 N.W. 174, 176 (1910), the court approved a damage instruction that included the following: "the loss of companionship and advise, insofar as you find from the evidence such elements to be of a pecuniary loss to said [beneficiary]." In *Vandenberg v. Langan*, 192 Neb. 779, 787, 224 N.W.2d 366, 371 (1974), the court stated that the verdict there was not excessive and partly supported that conclusion as follows: "The evidence established that [the decedent] would, indeed, have been a source of great comfort and companionship to his parents, and that the loss of his society was very real." Also, in *Selders v. Armentrout* (No. 2), 192 Neb. 291, 293, 220 N.W.2d 222, 224 (1974), the court refused to find that a verdict was inadequate and partly supported that conclusion by stating that the pecuniary loss, "including the value of society and companionship, was relatively small." In 1979, the Court stated that including loss of companionship as an element of damages

"does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or

bereavement or as a solace on account of such death. Only such damages can be recovered as are shown by the evidence to have a monetary value."

Garvin v. Coover, 202 Neb. 582, 585, 276 N.W.2d 225, 227 (1979) (quoting *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923)). *Ensor* goes on to say that loss of services and companionship can only be an element of damages where "a disallowance thereof would cause a pecuniary loss." *Id. Accord Dow v. Legg*, 120 Neb. 271, 273-75, 231 N.W. 747, 749 (1930) ("No attempt was made to prove any circumstances, special or otherwise, where the companionship of the [decedent] had any pecuniary value."). On the other hand, "[t]here is no requirement that there be evidence of the dollar value of companionship, counseling, or advice. It is a matter left to the sound discretion of the jury." *Maloney v. Kaminski*, 220 Neb. 55, 69-70, 368 N.W.2d 447, 458 (1985).

These rules were reaffirmed in *Nelson v. Dolan*, 230 Neb. 848, 852-53, 434 N.W.2d 25, 27 (1989): The wrongful death statute, as interpreted, limits recovery to pecuniary loss suffered by decedent's next of kin. The sorrow, suffering, or bereavement of the next of kin does not have a financial value and is not recoverable. The loss of society, comfort, and companionship to next of kin can have a financial value and, when they do, they are recoverable. Decedent's damages are not recoverable in the wrongful death action.

IV. THE PROSPECT THAT THERE WOULD HAVE BEEN CHANGES IN THE FUTURE

The decedent's prospects of bettering him- or herself are relevant to whether decedent's contributions would have changed in the future. *Garvin v. Coover*, 202 Neb. 582, 586, 276 N.W.2d 225, 227 (1979); *Vandenberg v. Langan*, 192 Neb. 779, 787, 224 N.W.2d 366, 371 (1974); *Selders v. Armentrout* (No. 2), 192 Neb. 291, 292-93, 220 N.W.2d 222, 224 (1974); *Peetz v. Masek Auto Supply Co., Inc.*, 161 Neb. 588, 599, 74 N.W.2d 474, 480 (1956); *Post v. Olmsted*, 47 Neb. 893, 896, 66 N.W. 828, 829 (1896) ("next in line for a permanent position"). See also the cases cited in part II of these Authorities, and *Hoffman v. Chicago & N.W. R. Co.*, 91 Neb. 783, 785, 137 N.W. 878, 879 (1912) ("Whatever may be the merit of this argument as a general proposition, it is clear that decedent's prospect of advancement was . . . too remote and speculative to be made the basis of damages.").

Some of the factors the jury may take into account when considering decedent's prospects include health, see part V, below; habits, *Post v. Olmstead*, *supra* (industrious and frugal); *Hoffman v. Chicago, N.W. R. Co.*, 91 Neb. 783, 785, 137 N.W. 878, 879-80 (1912) (drinking relevant to likelihood of promotion); *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 102, 52 N.W. 840, 841 (1892) ("addicted to the use of intoxicating liquors and . . . careless in his work"); and his ambition, *Shields v. Buffalo Cty.*, 161 Neb. 34, 55-56, 71 N.W.2d 701, 715 (1955) ("capable, ambitious, and industrious").

V. DECEDENT'S PHYSICAL AND MENTAL HEALTH

Garvin v. Coover, supra; *Selders v. Armentrout*, 192 Neb. 291, 292, 220 N.W.2d 222, 223 (1974); *Davis v. Borland*, 83 Neb. 281, 285, 119 N.W. 454, 455 (1909) (mental health); *Chicago, R.I. & P. Ry. v. Zerneck*, 59 Neb. 689, 697, 82 N.W. 26, 28 (1900), *aff'd*, 183 U.S. 582, 22 S.Ct. 229, 46 L.Ed. 339 (1902); *City of Friend v. Ingersoll*, 39 Neb. 717, 723-24, 58 N.W. 281, 283-84 (1894).

VI. DECEDENT'S LIFE EXPECTANCY

Rhein v. Caterpillar Tractor Co., 210 Neb. 321, 329-30, 314 N.W.2d 19, 22 (1982); *Kroeger v. Safranek*, 165 Neb. 636, 642, 87 N.W.2d 221, 226 (1957); *Chicago, R.I. & P. Ry. v. Holmes*, 68 Neb. 826, 829, 94 N.W. 1007, 1008 (1903); *Chicago, R.I. & P. Ry. v. Zerneck*, 59 Neb. 689, 697, 82 N.W. 26, 30 (1900), *aff'd*, 183 U.S. 582, 22 S.Ct. 229, 46 L.Ed. 339 (1902). *See also* NJI2d Civ. 4.12 and the Authorities thereto.

VII. THE LIFE EXPECTANCY OF THE SURVIVING SPOUSE AND NEXT OF KIN

If the life expectancy of the deceased was longer than that of the statutory beneficiary, then the latter is used in computing that statutory beneficiary's loss. *Kroeger v. Safranek*, 165 Neb. 636, 643, 87 N.W.2d 221, 225 (1957); *Fisher v. Trester*, 119 Neb. 529, 532, 534, 229 N.W. 901, 903 (1930). *See also* NJI2d Civ. 4.12 and the Authorities thereto.

VIII. NO DAMAGES FOR BENEFICIARIES' GRIEF OR MENTAL SUFFERING OR AS COMFORT

Williams v. Monarch Transp., Inc., 238 Neb. 354, 361, 470 N.W.2d 751, 756 (1991); *Crowdson v. Burlington N. R.R. Co.*, 234 Neb. 631, 643-44, 452 N.W.2d 270, 280 (1990) (parent may recover "for loss of society, comfort, and companionship" of child, but only in so far as shown to have a monetary value, see Part XII of these Authorities; parent may not recover for "mental suffering or bereavement or as solace" on account of child's death); *Garvin v. Coover*, 202 Neb. 582, 587, 276 N.W.2d 225, 227 (1979); *In re Lucht's Estate*, 139 Neb. 139, 146, 296 N.W. 749, 751-52 (1941); *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923); *Elliott v. City of Univ. Place*, 102 Neb. 273, 276, 166 N.W. 621, 622 (1918); *Wood v. City of Omaha*, 87 Neb. 213, 219-20, 127 N.W. 174, 176 (1910) (no vindictive or punitive damages); *Johnson Cty. v. Carmen*, 71 Neb. 682, 685, 99 N.W. 502, 503 (1904).

IX. PAIN AND SUFFERING EXPERIENCED BY DECEDENT

Damages may not be awarded in a wrongful death action for the decedent's pain and suffering. Those damages must be recovered, if at all, in a separate suit or a separate cause of action. *See the Comment, supra.*

X. REMARRIAGE

Chicago, St. P., M. & O. Ry. v. Lagerkrans, 65 Neb. 566, 577, 91 N.W. 358, 363 (1902), *aff'd*, 65 Neb. 566, 95 N.W. 2 (1903), *disapproved on other grounds*, D.J. O'Brien Co. v. Omaha Water Co., 83 Neb. 71, 77-78, 118 N.W. 1110, 1113 (1908); NJI 4.60(6) (1969).

XI. DISTRIBUTION OF A WRONGFUL DEATH AWARD

The distribution of any wrongful death award is through the court. Ordinarily, according to the cases cited below, the jury returns a verdict in a single sum; the county court decides how that sum is to be divided and so distributes it. It is not error, though, to require the jury to specify the amount of damage awardable to each individual beneficiary. So, the jury may return either a verdict in a single sum or a verdict specifying amounts of damage to particular beneficiaries. *Peetz v. Masek Auto Supply Co.*, 161 Neb. 588, 600-01, 74 N.W.2d 474, 481 (1956); *Tate v. Barry*, 144 Neb. 517, 523-24, 13 N.W.2d 879, 883 (1944); *Lynn A. Mitchell*, Comment, *Recovery Under the Nebraska Survival and Wrongful Death Statutes*, 16 Creighton L.Rev. 182, 203-04 (1983). It is not entirely clear, however, whether the court is bound to follow the jury's division. Compare Comment to NJI 4.60 (1969) with *Peetz v. Masek Auto Supply Co.*, *supra*. See also *Tate v. Barry*, *supra*; *In re Lucht's Estate*, 139 Neb. 139, 144, 296 N.W. 749, 752 (1941); *Oyster v. Burlington Relief Dept. of the Chicago, B. & Q. R.R.*, 65 Neb. 789, 792-93, 91 N.W. 699, 700 (1902), which state that the fact that the petition in a wrongful death action fails to mention some of the beneficiaries does not prevent such beneficiaries from participating in the distribution of the money recovered.

In any event, the jury should be told which type of verdict—single sum or divided among the beneficiaries—they are to return. If the verdict is to be a single sum and there is more than one beneficiary, then it is appropriate to give the bracketed final paragraph of this instruction. If there is only one beneficiary, that paragraph should be omitted. Likewise, if the verdict is to include a separate finding of damage for each beneficiary, that paragraph should be left out and the matter should be handled in the verdict form.

XII. WRONGFUL DEATH OF A CHILD

The amount which should be awarded in any wrongful death case is incapable of computation and is largely a matter for the jury. As stated in *Dorsey v. Yost*, 151 Neb. 66, 36 N.W.2d 574, 14 A.L.R.2d 544 [(1949)]: "The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition

of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness."

Selders v. Armentrout (No. 2), 192 Neb. 291, 292-93, 220 N.W.2d 222, 223-24 (1974).

[I]n an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship. "[S]ociety" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.

When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed. Destruction of such value is recognized whether the child is a minor or an adult. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well being.

. . . [T]he relationship between parent and child has "intrinsic value" . . . Because [it] has intrinsic value, once a parent-child relationship is proved to exist, the destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. [In this circumstance, damage awards of zero have been reversed.]

. . . .

. . . We have previously recognized that [we] will not enter into a discussion in which we compare the relative accomplishments of deceased children in wrongful death actions.

Brandon v. County of Richardson (Brandon II), 261 Neb. 636, 664-67, 624 N.W.2d 604, 625-26 (2001) (multiple quotation marks and citations omitted) (finding a damage award of \$0 inadequate as a matter of law). *See also* *Brandon v. County of Richardson* (Brandon III), 264 Neb. 1020, 1024-28, 653 N.W.2d 829, 834-37 (2002).

"[I]n an action for wrongful death of a child, "money value" of parental loss is not limited to, always equated with, or necessarily dependent on deprivation of the child's monetary contribution toward parental well-being." *Williams v. Monarch Transp., Inc.*, 238 Neb. 354, 360, 470 N.W.2d 751, 755 (1991).

In a wrongful death action where the deceased is a minor child, the damage will more often be based on the life expectancy of the parent-beneficiaries rather than on the life expectancy of the deceased. *Dorsey v. Yost*, 151 Neb. 66, 70, 36 N.W.2d 574, 576 (1949), *overruled on other grounds by Selders v. Armentrout* (No. 1), 190 Neb. 275, 207 N.W.2d 686 (1973); *Fisher v. Trester*, 119 Neb. 529, 532, 229 N.W. 901, 903 (1930); *Greenwood v. King*, 82 Neb. 17, 22, 116 N.W. 1128, 1130 (1908).

The measure of damages in an action for the wrongful death of a minor child is the monetary loss the statutory beneficiaries sustain as the result of being deprived of the child's services during minority plus the monetary value of the contributions the child might reasonably be expected to have made after reaching majority. *E.g.*, *Garvin v. Coover*, 202 Neb. 582, 585, 276 N.W.2d 225, 226-27 (1979); *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 346, 190 N.W.2d 789, 791 (1971), *aff'd in part, rev'd in part*, 189 Neb. 334, 202 N.W.2d 625 (1972); *In re Lucht's Estate*, 139 Neb. 139, 146, 296 N.W. 749, 752 (1941) (regarding father who had neither seen deceased, 16-year-old son, nor contributed to his support, since son was one-year-old, court held father was "not shown to have suffered any pecuniary loss by the death of his son"); *Fisher v. Trester*, 119 Neb. 529, 533-34, 229 N.W. 901, 903 (1930); *Crabtree v. Missouri Pac. R.R. Co.*, 86 Neb. 33, 40-41, 124 N.W. 932, 935 (1910) (jury may consider child's legal obligation to support parents, financial circumstances of parents, size of parents' family, as relevant to amount child likely to contribute to parents); *Greenwood v. King*, 82 Neb. 17, 23, 116 N.W. 1128, 1130-31 (1908) (jury may consider "the relationship existing between the parties, their mode of living, and the habits of the deceased with reference to contributing to the support of her family, and the probability of her continuing to do so"); *Draper v. Tucker*, 69 Neb. 434, 439-40, 95 N.W. 1026, 1028 (1903) (reversible error to instruct jury that parent may only recover value of deceased child's services contributed during minority); *Post v. Olmsted*, 47 Neb. 893, 896, 66 N.W. 828, 829-30 (1896) (jury may consider deceased's habits—here he was naturally industrious and economical—, fact that he was next in line for a permanent position, and relevant life expectancies).

Loss of companionship as an element of damages in a case involving the wrongful death of an adult is dealt with above. The law regarding companionship as an element of damages in a case involving the wrongful death of a minor seems to be the same. *Reiser v. Coburn*, 255 Neb. 655, 659-60, 587 N.W.2d 336, 339-40 (1998) (surviving parents can recover for monetary value of loss of society, comfort, and companionship of deceased child; only such losses shown by evidence to have pecuniary value; discussing meaning of "pecuniary" and of "society"); *Williams v. Monarch Transp., Inc.*, 238 Neb. 354, 359, 470 N.W.2d 751, 755 (1991) ("recoverable damages include parental loss of the child's society, comfort, and companionship"; "society" discussed); *Crewdson v. Burlington N. R. Co.*, 234 Neb. 631, 644, 452 N.W.2d 270, 281 (1990) (parent may not recover for "mental suffering or bereavement or as solace" on account of child's death, see Part VIII of these Authorities; par-

ent may recover “for loss of society, comfort, and companionship” of child, but only in so far as shown to have a monetary value); *Creason v. Myers*, 217 Neb. 551, 556, 350 N.W.2d 526, 529 (1984) (dictum: damages for death of child can “include the loss of the society, comfort, and companionship of the child”); *Garvin v. Coover*, 202 Neb. 582, 585, 276 N.W.2d 225, 227 (1979); *Brahatcek v. Millard Sch. Dist.*, 202 Neb. 86, 99, 273 N.W.2d 680, 688 (1979) (“[T]he measure of damages for the wrongful death of a minor child includes the loss of society, comfort, and companionship of the child.”); *Caradori v. Fitch*, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978) (\$40,000 was allowed for death of 11-year-old girl who “was a normal, bright child, companionable and popular with her playmates and teachers, and loved by her parents; the jury was in a position, to evaluate the care, companionship, and comfort that [the deceased] would have given her parents, her brothers, and sister.”); *Vandenberg v. Langan*, 192 Neb. 779, 224 N.W.2d 366 (1974) (over \$32,000 was awarded for the loss of services, contributions society, comfort, and companionship of a 16-year-old boy); *Selders v. Armentrout* (No. 1), 190 Neb. 275, 280, 207 N.W.2d 686, 689 (1973) (“recovery for wrongful death of minor extends beyond monetary contributions and services to include the loss of the society, comfort, and companionship of the child;” new trial ordered on damages only, because trial court failed to give that part of wrongful death instruction which covers loss of companionship, counseling, and advice); *Dorsey v. Yost*, 151 Neb. 66, 36 N.W.2d 574 (1949) (zero sum verdict covering loss of services and future contributions of 11-year-old), *overruled on other grounds by Selders v. Armentrout* (No. 1), 190 Neb. 275, 207 N.W.2d 686 (1973).

“[T]he adequacy or excessiveness of a verdict awarded as the result of the wrongful death of unmarried young adults” is discussed in *Reiser v. Coburn*, 255 Neb. 655, 661, 587 N.W.2d 336, 340 (1998).

Under Nebraska’s statute, a wrongful death action may not be maintained on behalf of a viable fetus born dead. *Smith v. Columbus Cmty. Hosp., Inc.*, 222 Neb. 776, 387 N.W.2d 490 (1986) (quoting *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977)); *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951).

Caradori v. Fitch, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978), where the deceased was a minor child, is a particularly noteworthy case. In dictum and regarding the definition of next-of-kin, the court stated that, in addition to the loss experienced by parents of the deceased, the jury may consider the loss experienced by the siblings of the deceased.

G. MITIGATION OF DAMAGES

NJI2d Civ. 4.70

MITIGATION OF DAMAGES

If you assess damages, then you must consider the defendant’s

claim that the plaintiff failed to take reasonable steps to minimize (his, her) damages. The defendant is not liable for any damages that could have been prevented if the plaintiff had done so. The defendant has the burden of proving that the plaintiff failed to take reasonable steps to minimize (his, her) damages.

SPECIAL NOTE

Effective for causes of action in negligence accruing on or after February 8, 1994, Neb. Rev. Stat. § 25-21,185 (Reissue 2016) changes Nebraska's contributory and comparative negligence law. As to how that may affect the instruction on mitigation of damages, read part V of the Comment to NJI2d Civ. 5.04. Do not use this instruction without reading that first.

COMMENT

I. IN GENERAL

This instruction should, of course, only be given where supported by the pleadings and the evidence. *See* Roth v. Wiese, 271 Neb. 750, 767, 716 N.W.2d 419, 435 (2006) (“[We agree] that the tendered mitigation damages instruction was an accurate statement of the law but was not supported by the evidence.”). In that regard, and as discussed in the Authorities, below, mitigation of damages is an affirmative defense.

Whether the doctrine of mitigation of damages applies is a question of law, for the court; the question for the jury is how it applies. *Tedd Bish Farm v. Sw. Fencing Servs.*, 291 Neb. 527, 533, 867 N.W.2d 265, 270 (2015); *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 752, 429 N.W.2d 328, 333 (1988). “[W]hether an injured party actually exercised reasonable efforts in mitigating the damage is a question of fact.” *Tedd Bish Farm*, *supra*.

As drafted, this instruction is for use in the usual case where it is the defendant who is claiming that the plaintiff failed to mitigate damages. In addition, the alternative pronouns in the pattern only apply where a party is a natural person. In other situations, the instruction will have to be changed as appropriate.

In a case where, as a matter of law, the jury must assess some damages, it will be necessary to delete the following from the beginning of the instruction: “If you assess damages, then.”

“[M]itigation . . . looks to the acts of the injured party only after the injury has occurred.” *Welsh v. Anderson*, 228 Neb. 79, 83, 421 N.W.2d 426, 429 (1988) (quoting *State v. Ingram*, 427 N.E.2d 444, 448 (Ind.1981)). *Accord* *Roth v. Wiese*, 271 Neb. 750, 767, 716 N.W.2d 419, 435 (2006). The duty to mitigate arises only after the negligence, *Welsh v. Anderson*, 228 Neb. at 83, 421 N.W.2d at 429, or the breach of

contract, see *Harmon Cable Commc'ns v. Scope Cable Television*, 237 Neb. 871, 890, 468 N.W.2d 350, 363 (1991). For example, provocation cannot be considered in mitigation of damages for assault and battery, *Vacanti v. Master Elecs. Corp.*, 245 Neb. 586, 589, 514 N.W.2d 319, 322 (1994), and mitigation is not applicable where no further damage occurred after the breach. *Harmon Cable Commc'ns v. Scope Cable Television*, *supra*. “[T]he doctrine of mitigation applies only to postevent occurrences.” *Welsh v. Anderson*, 228 Neb. at 84, 421 N.W.2d at 429. If the above instruction might mislead the jury into mitigating damages as a result of pre-event occurrences, the instruction will have to be tailored to do away with that possibility.

“‘[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.’” *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 520, 925 N.W.2d 39, 47 (2019) (quoting Restatement (Second) of Contracts § 350(1) at 126 (1981)).

When a tenant abandons leased premises during the life of the lease, the landlord has a duty to take reasonable steps to relet the premises in order to mitigate damages. *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb, Inc.*, 298 Neb. 705, 718–21, 905 N.W.2d 644, 657–59 (2018) (discussing the reasonableness or the landlord’s effort to mitigate); *Hilliard v. Robertson*, 253 Neb. 232, 237, 570 N.W.2d 180, 183 (1997) (in landlord’s action to recover unpaid rent, tenant has burden to show landlord failed to mitigate); *Bachman v. Easy Parking of Am.*, 252 Neb. 325, 331, 562 N.W.2d 369, 373 (1997); *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 445–46, 495 N.W.2d 624, 628–29 (1993); *Middagh v. Stanal Sound Ltd.*, 234 Neb. 576, 580, 452 N.W.2d 260, 262 (1990); *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 346, 451 N.W.2d 259, 262 (1990). See also N.JI2d Civ. 4.40 for the general rule regarding the damages a landlord may recover when a tenant abandons the leased property.

Regarding mitigation of damages, *see also*, the discussion of the doctrine of avoidable consequences, just below, and the collateral source rule in part A(6) of the Introduction to this chapter.

On a related matter, under the terms of the insurance policy involved in *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co.*, 247 Neb. 526, 528 N.W.2d 329 (1995), the insured had a duty to mitigate damages. The general rule here is that, as part of the insurance recovery, the insured may recover expenses necessarily incurred in the course of mitigation. *Id.* at 533, 528 N.W.2d at 334.

“[L]iquidated damages and mitigation of damages are antithetic doctrines.” *Browning Ferris Indus. of Neb. v. The Eating Establishment*, 6 Neb.App. 608, 614, 575 N.W.2d 885, 889 (1998). When contract contains a valid liquidated damage clause, there is no duty to mitigate. However, a contracting party cannot “negate the general duty to mitigate damages by merely inserting a liquidated damages provision in a

contract.” *Browning Ferris Indus. of Neb. v. The Eating Establishment*, 6 Neb.App. 608, 614, 575 N.W.2d 885, 889 (1998). The liquidated-damages provision must be valid and enforceable. Regarding liquidated damages, see the Introduction to Chapter 4, above.

II. THE DOCTRINE OF AVOIDABLE CONSEQUENCES

“[T]he ‘doctrine of avoidable consequences’ is but another name for that which is more commonly referred to as the failure to mitigate damages.” *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 752, 429 N.W.2d 328, 333 (1988). *Accord* *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 625, 901 N.W.2d 1, 24 (2017); *Borley Storage & Transfer Co. v. Whitted (Borley Storage & Transfer II)*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006).

“The avoidable consequences doctrine creates responsibility only for ‘those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care.’” *Tedd Bish Farm v. Sw. Fencing Servs.*, 291 Neb. 527, 535, 867 N.W.2d 265, 271 (2015) (case involving property damage, *i.e.*, damage to crops). *Accord* *Armstrong*, 297 Neb. at 625, 901 N.W.2d 1, 24.

“[I]t is not technically correct to talk about mitigation of damages in negligence. Rather, it is the doctrine of avoidable consequences. *See* 22 Am. Jur. 2d *Damages* § [340] (2003). In the instant case, however, due to the fact that the measure of damages is determined at the moment the gain was lost, there is no doctrine of avoidable consequences applicable. Therefore, evidence regarding avoidance of consequence was not relevant and the district court was correct in not admitting it into evidence.” *Tetherow v. Wolfe*, 223 Neb. 631, 637, 392 N.W.2d 374, 379 (1986). *Accord* *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 752, 429 N.W.2d 328, 333 (1988); *Beatty v. Davis*, 224 Neb. 663, 668–69, 400 N.W.2d 850, 854 (1987).

III. ON APPEAL

“In reviewing the reasonableness of a party’s actions to mitigate damages, we often consider three factors: (1) the cost or difficulty to the plaintiff of mitigation, (2) the plaintiff’s financial ability to mitigate, and (3) the defendant’s actions to inhibit the plaintiff the plaintiff from mitigating damages.” *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 625, 901 N.W.2d 1, 24 (2017).

IV. THE NEED FOR A SEPARATE INSTRUCTION?

In *Beatty v. Davis* a case where the plaintiff claimed damages for lost wages, the court stated:

In our view the policy considerations encompassed in the doctrine of avoidable consequences were adequately protected

by the instruction given. Because the instruction limited recovery for lost wages to those proximately caused by [defendant's] negligence *and* due to [plaintiff's] inability or diminished ability to work, the jury was not permitted to award any amounts which may have arisen from an unreasonable refusal to return to work. Thus, the instruction was adequate to fairly submit the case and could not have misled the jury. *See* *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). There was no prejudice in refusing to instruct the jury on the duty to mitigate damages.

Beatty v. Davis, 224 Neb. 663, 669–70, 400 N.W.2d 850, 855–56 (1987). This is not to say, of course, that giving the instruction on mitigation of damages would not have been preferable, but only that the instructions given were adequate and not in error.

V. SEAT BELTS

Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

Neb. Rev. Stat. § 60-6,273 (Reissue 2010).

Regarding seat belts and mitigation of damages, see NJI2d Civ. 7.70.

VI. THE UNIFORM COMMERCIAL CODE

Regarding the rule that mitigation is an affirmative defense, care must be taken in the area of the Uniform Commercial Code. Under the Uniform Commercial Code, “mitigation of damages” is mainly a function of “cover” (“mitigation” by the buyer) and “resale” (“mitigation” by the seller).

The specific Code section on cover, Neb. Rev. Stat., U.C.C. § 2-712 (Reissue 2001), allows the buyer to effect cover, but does not require it. Regarding the consequential damages resulting from a seller's breach, however, the buyer does have some duty to mitigate. Neb. Rev. Stat., U.C.C. § 2-715 (Reissue 2001) limits the buyer's recovery of consequential damages to those that “could not reasonably be prevented by cover or otherwise.” *See also id.* at § 2-712, Comment (3). If consequential damages could “reasonably be prevented,” then, in the parlance of Nebraska common law, they could be mitigated. *See* *National Farmers Org., Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 243 N.W.2d 335 (1976).

Regarding the seller, Neb. Rev. Stat., U.C.C. § 2-706 (Reissue 2001)

“authorizes an aggrieved seller to resell [but r]esale is not mandatory.” J. White and R. Summers, Uniform Commercial Code § 7-6, at 301–02 (3d ed. 1988). White and Summers do argue, however, “that where a seller has completed goods on hand and brings an action under 2-708(2), the court should treat him as though he had resold.” (The quotation is from § 7-6, at 302, n. 2, of the White and Summers treatise just cited; the argument referenced is in § 7-15 of that same treatise.) These are the only Code provisions regarding the seller’s mitigation of damages from the buyer’s breach. This does not seem to be true mitigation of damages in the sense that it is not an affirmative defense.

In the cover or resale situation, the plaintiff has elected a remedy, and the plaintiff has the burden of proving facts that make the particular remedy appropriate. For example, if the plaintiff has chosen to effect cover, and to use that measure of damages, then the plaintiff will have to prove cover. *See National Farmers Org., Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 431, 243 N.W.2d 335, 340 (1976).

On the other hand, the rule regarding mitigation under the U.C.C. and its status as an affirmative defense may be a sort of a hybrid. While there are no Nebraska cases on point, some courts have made statements such as this: “The U.C.C. permits recovery only of those consequential damages ‘which could not reasonably be prevented by cover or otherwise.’ However, the plaintiffs [buyers] were only required to take reasonable efforts to mitigate their damages, and the burden of proving that the damages could have been minimized was on the defendants [sellers].” *Clark v. International Harvester Co.*, 99 Idaho 326, 347, 581 P.2d 784, 805 (1978) (citations omitted). *See also*, *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 520, 925 N.W.2d 39, 47 (2019) (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.” (quoting Restatement (Second) of Contracts § 350(1) at 126 (1981))).

AUTHORITIES

“NJI2d Civ. 4.70 . . . is a correct statement of the law.” *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006) (*Borley Storage & Transfer II*). *Accord* *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 624, 901 N.W.2d 1, 23 (2017) (“There is no question that Clarkson’s tendered instruction is a correct statement of law. It is nearly identical to NJI2d Civ. 4.70.”); *Roth v. Wiese*, 271 Neb. 750, 767, 716 N.W.2d 419, 435 (2006) (“[We agree] that the tendered mitigation damages instruction [based on NJI2d Civ. 4.70] was an accurate statement of the law . . .”).

An injured party must use reasonable care to mitigate damages. *Armstrong*, 297 Neb. at 625, 901 N.W.2d at 24; *Airport Inn, Inc. v. Nebraska Equal Opportunity Comm’n*, 217 Neb. 852, 859, 353 N.W.2d 727, 732 (1984); *Lake v. Southwick*, 188 Neb. 533, 537, 198 N.W.2d 319,

322 (1972); *Ridenour v. Kuker*, 185 Neb. 321, 327, 175 N.W.2d 287, 291 (1970); *Colton v. Benes*, 176 Neb. 483, 497, 126 N.W.2d 652, 661 (1964); *Golder v. Lund*, 50 Neb. 867, 868, 70 N.W. 379, 379-80 (1897). See *Steinauer v. Sarpy Cty.*, 217 Neb. 830, 844, 353 N.W.2d 715, 724 (1984) regarding the distinction between mitigating the effects of an injury by seeking medical care and mitigating the expenses incurred for medical care by seeking less expensive care.

Mitigation of damages is an affirmative defense. Failure to plead mitigation of damages waives the defense. *Maricle v. Spiegel*, 213 Neb. 223, 230, 329 N.W.2d 80, 86 (1983). The burden of proof is upon the party against whom damages are sought. *O'Connor v. Kearny Junction, L.L.C.*, 295 Neb. 981, 988, 893 N.W.2d 684, 691 (2017); *O'Connor v. Kaufman*, 260 Neb. 219, 231, 616 N.W.2d 301, 311 (2000); *Hilliard v. Robertson*, 253 Neb. 232, 237, 570 N.W.2d 180, 183 (1997) (discussing cases regarding what it takes to satisfy burden); *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 445-46, 495 N.W.2d 624, 628-29 (1993); *Middagh v. Stanal Sound Ltd.*, 234 Neb. 576, 580, 452 N.W.2d 260, 262 (1990) (tenant abandoned premises; landlord sued; tenant's burden to show landlord unreasonably failed to relet and mitigate damages); *Airport Inn v. Nebraska Equal Opportunity Comm.*, *supra*; *Henderson v. Joplin*, *supra*; *Lake v. Southwick*, *supra*; *Colton v. Benes*, *supra*. But, regarding the Uniform Commercial Code, see the Comment, *supra*.

"A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts." *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006) (*Borley Storage & Transfer II*).

See generally, Dan B. Dobbs, *Handbook on the Law of Remedies* §§ 3.7, 12.6, 12.25 (1973) (Dobbs prefers to address this area as "the avoidable consequences rules.").

CHAPTER 5

SUBMISSION TO THE JURY

TABLE OF INSTRUCTIONS

Instruction Number	Subject Matter
5.01	Submission to the Jury
5.02	Verdict Form 5.02: Tort Action of a Kind to Which Contributory Negligence Is an Allowable Defense but in Which It Is Not Submitted to the Jury and Where Joint and Several Liability Is an Issue
5.03	Verdict Form 5.03: Tort Action Where Contributory Negligence Is Submitted to the Jury and Joint and Several Liability Is an Issue and the Jury Finds Plaintiff's Burden of Proof Has Been Met and Defendants' Burden Has Not
5.04	Verdict Form 5.04: Tort Action Where Contributory Negligence Is Submitted to the Jury and Joint and Several Liability Is an Issue and the Jury Finds That Both Plaintiff and Defendants Have Met Their Burdens of Proof
5.05	Verdict Form 5.05: Tort Action Where Contributory Negligence Is Submitted to the Jury and Joint and Several Liability Is Not an Issue and the Jury Finds That Both Plaintiff and Defendants Have Met Their Burdens of Proof

NJI2d Civ. 5.01

SUBMISSION TO THE JURY

This case is now ready to be submitted to you for your consideration. [As I said to you at the beginning of the trial,] (It, it) is your duty to determine what the facts are. You must approach this task with open minds—consulting with one another, freely and honestly exchanging your views concerning this case, and respectfully considering the views of the other jurors.

Please remember that, you are not partisans or advocates. Do not hesitate to reexamine your own views and to change your mind if reason and logic so dictate.

You must reach your verdict based only on the evidence presented to you during this trial, within the four walls of this courtroom, and that general knowledge that everyone has.

No matter where you are—in the jury room, at home, or anywhere else—and until after you are discharged from this trial and I tell you that it is alright to do so, do not talk to anyone about this case except your fellow jurors. Do not use any reference materials [that are not in evidence] or any electronic devices to obtain information about this case. [Do not visit any of the places mentioned in this case.]

While you are in the jury room, you may not use any electronic devices at all.

When you get to the jury room, the first thing you must do is to select one of you to be the presiding juror, the person who will preside over your deliberations. It is the presiding juror's job to see that a verdict is fairly reached and that each juror has a chance to speak fully and freely on the issues in this case.

A verdict reached during the first six hours of your deliberation must be agreed to by all of you, that is, it must be unanimous. After six hours of deliberation, you may reach a verdict agreed to by ten or eleven of you. If your verdict is unanimous, it should be signed by the presiding juror only. If your verdict is not unanimous, it should be signed by each of the ten or eleven jurors who do agree to it.

(If you do not agree on a verdict by ____ o'clock (this afternoon, this evening, ____m.), you may separate, You may separate for noon and evening meals whenever you choose and, if you do not reach a verdict today, you may separate at any time you choose) and return for further deliberation at ____ o'clock (tomorrow morning, ____m. tomorrow, etc.). If you do separate, then, during that time, you are not allowed to discuss this case with anyone, even another juror.

____ verdict forms have been prepared for you, and you will have them in the jury room. You are to complete only one of them, but you are to return them all.

[In the jury room, you will have these instructions and the exhibits in this case and forms on which you are to record your verdict (and here identify anything else the jury will take with them to the jury room).]

[If you have any questions, please write them out and give them to (here designate appropriate person), who will give them to me. I may need to assemble the attorneys and confer with them before I respond.]

[While you are in the jury room, do not attempt to contact anyone outside of the jury room on your own. Do not call anyone, text anyone, or use Facebook, Twitter, My Space, or any other social network to communicate with anyone. If you need to get a message to anyone

outside of the jury room, for example, to tell a family member that you will be home late, let (here designate appropriate person) know [in writing].]

This case is submitted to you at ____ o'clock ____ m., at which time your deliberations are deemed to commence.

Dated _____, 20__.

BY THE COURT:

Judge

COMMENT

This is the submission instruction for civil cases only. See the pattern instructions for criminal cases for the submission instruction in criminal cases. There are significant differences in how the two submissions are handled, including the fact that juries in criminal cases must be sequestered after final submission unless “the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after final submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation.” *State v. Robbins*, 205 Neb. 226, 231–32, 287 N.W.2d 55, 58 (1980), *appeal after remand* 207 Neb. 439, 299 N.W.2d 437 (1980) (interpreting Neb. Rev. Stat. § 29-2022 (Reissue 2016)). Absent express agreement (failure of counsel to object is not enough), separation of the jury is error and, on defendant’s appeal, the burden is on the prosecutor to show that it was not prejudicial error. *State v. Robbins*, *supra*.

In *Cartwright & Wilson Constr. Co. v. Smith*, 155 Neb. 431, 52 N.W.2d 274 (1952), the defendant argued that a five-sixths verdict was void because the jury had not deliberated for at least six hours as required by Neb. Rev. Stat. § 25-1115 (Reissue 2016). The length of time between submission to jury and return of verdict was six hours and 20 minutes, but an hour of that time was spent eating in a restaurant. The court reasoned as follows: “[D]uring retirement the jurors are presumed to be properly performing their duties [A] juror may deliberate as wisely and to as good effect when he is considering and weighing the evidence in his own mind as when he is pressing his conclusions on his fellows.” *Cartwright & Wilson Constr. Co.*, 155 Neb. at 442, 52 N.W.2d at 280–81. *See also* *Keating v. Klemish*, 214 Neb. 458, 334 N.W.2d 440 (1983) (plaintiff argued five-sixths verdict void because supplemental instruction given after deliberations had begun constituted resubmission of case and requisite six hours should be measured from time of the supplemental instruction; court refused to

pass directly on this issue because record did not indicate with any certainty what time supplemental instruction was given).

Lovelace v. Boatman, 113 Neb. 145, 148, 202 N.W. 418, 419 (1925) notes the presumption that the proceedings of a court of general jurisdiction are regular and applies that presumption to defeat defendant's claim that it did not appear the jury had deliberated at least six hours.

A part of this pattern instruction deals with juror uses of electronic devices. See NJI2d Civ. 1.00, Comment for a discussion of this problem and how these instructions as a whole deal with the problem.

Regarding admonitions to the jury pool see NJI2d Civ. 1.00, Comment. For the admonitions given to the jury just after they are sworn, see NJI2d Civ. 1.00. For the admonitions at recess, see NJI2d Civ. 1.00A. For the admonition against quotient verdicts, see NJI2d Civ. 4.02.

"Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted." Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc., 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990) (meaning, among other things, at instruction conference, counsel must object to errors in verdict forms). For a general discussion of how instructions are to be treated, see Introductory Comment, Statement Adopted by the Supreme Court with Reference to Nebraska Jury Instructions, which precedes Chapter 1, above.

AUTHORITIES

Neb. Const. art. I, § 6; Neb. Rev. Stat. §§ 25-1109 through 25-1111, 25-1115, 25-1116, 25-1119 through 25-1125 (Reissue 2016).

NJI2d Civ. 5.02

VERDICT FORM 5.02: TORT ACTION OF A KIND TO WHICH CONTRIBUTORY NEGLIGENCE IS AN ALLOWABLE DEFENSE BUT IN WHICH IT IS NOT SUBMITTED TO THE JURY AND WHERE JOINT AND SEVERAL LIABILITY IS AN ISSUE

VERDICT FORM NO. _____

We the jury find that the plaintiff has met (his, her, its) burden of proof, and our verdict is for the plaintiff. We answer the questions on this Verdict Form _____ as follows:

LIST OF PERCENTAGES:

What percent, if any, of the negligence was (here name defendant 1)'s? _____%

What percent, if any, of the negligence was (here name defendant 2)'s? _____%

[Repeat as necessary, specifying each defendant.] _____%

What percent, if any, of the negligence was (here identify entity 1, discharged as specified in 25-21,185.11)'s? _____%

What percent, if any, of the negligence was (here identify entity 2, discharged as specified in 25-21,185.11)'s? _____%

[Repeat as necessary, specifying each entity discharged as specified in 25-21,185.11.] _____%

The total negligence must add up to 100%. TOTAL = 100%

DECISIONS REGARDING DAMAGES:

Decide the plaintiff's economic damages, if any. \$ _____

Decide the plaintiff's noneconomic damages, if any. \$ _____

Add those two numbers together to determine the total amount of damages, if any, suffered by the plaintiff. \$ _____

ANSWERS TO THE "COMMON ENTERPRISE OR PLAN" QUESTIONS:

Did any or all of the following defendants cause harm acting in concert with one another as part of a common enterprise or plan? Yes _____ No _____

If your answer is yes, then complete the following checklist, noting which were and which were not.

(Name of defendant 1) Yes _____ No _____

(Name of defendant 2) Yes _____ No _____

(Name of defendant 3) Yes _____ No _____

[Repeat as necessary, specifying each defendant.]

Dated _____, 20__

Presiding Juror _____

SPECIAL NOTE

Nebraska's comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07, *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998) (“[I]t is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09.” *Id.* at 239, 575 N.W.2d at 620.). *See also* NJI2d Civ. 5.04 Comment, part III(C). There must be instruction on the effects of the allocation of negligence and this verdict form does not accomplish that.

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska's comparative negligence statute. *Russell v. Stricker*, 262 Neb. 853, 857, 635 N.W.2d 734, 738 (2001); *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998).

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in the *Wheeler* case and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02–5.05. Regarding this whole problem in general and a discussion of the relevant parts of the *Wheeler* case in particular, see the discussion at NJI2d Civ. 5.05, Comment.

COMMENT

The Verdict Forms that are used must be read to the jury. Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). *See* part I(C) of the Comment to NJI2d Civ. 5.04. *See also* part III(C) of the Comment to NJI2d Civ. 5.04. They will be read right before NJI2d Civ. 5.01, Submission to the Jury.

For a general discussion of this instruction, see NJI2d Civ. 5.04, Comment. The controlling statute is quoted at length at NJI2d Civ. 5.04, Authorities.

This particular instruction is written to be used in combination with NJI2d Civ. 2.01A. This is the verdict form referenced in NJI2d Civ. 2.01A, *i.e.*, the verdict form in a tort action of a kind to which contributory negligence is an allowable defense, whether it could have been

asserted as a defense on the facts of the case at hand or not, but in which contributory negligence is not submitted to the jury. (See part II(C) of the Comment to NJI2d Civ. 5.04 for further discussion of this point.)

Use only those parts of this instruction as are applicable in the case under instruction.

“Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted.” *Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc.*, 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990). This is further discussed at NJI2d Civ. 5.01, Comment. See also NJI2d Civ. 5.04, Comment, part I.

The statutory requirement that the jury be instructed on the effect of their allocation of some of the negligence to the plaintiff—Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016); *Russell v. Stricker*, 262 Neb. 853, 857–60, 635 N.W.2d 734, 738–40 (2001) (a verdict form may not serve as a substitute for the jury instruction required by the statute); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998); NJI2d Civ. 5.05, Authorities—does not affect this pattern instruction. This instruction only applies where contributory negligence, although an allowable defense to the cause of action under litigation, is not present as a defense in the actual cause of action under litigation. Therefore, in a case where this instruction applies, none of the negligence will be allocated to the plaintiff.

AUTHORITIES

Neb. Rev. Stat. §§ 25-21,185 and 25-21,185.07 through 25-21,185.12 (Reissue 2016) (L.B. 262, 2d Session, 92nd Legislature (1992)). These sections of the Nebraska Revised Statutes are discussed at length at NJI2d Civ. 5.04, Comment, and quoted at length at NJI2d Civ. 5.04, Authorities. See also NJI2d Civ. 5.05, Comment and Authorities.

NJI2d Civ. 5.03

**VERDICT FORM 5.03: TORT ACTION WHERE
CONTRIBUTORY NEGLIGENCE IS SUBMITTED TO
THE JURY AND JOINT AND SEVERAL LIABILITY
IS AN ISSUE AND THE JURY FINDS PLAINTIFF'S
BURDEN OF PROOF HAS BEEN MET AND
DEFENDANTS' BURDEN HAS NOT**

VERDICT FORM NO. _____

We the jury find that the plaintiff has met (his, her, its) burden of proof and the defendant has not met (his, her, its) burden of proof, and our verdict is for the plaintiff. We answer the questions on this Verdict Form as follows:

LIST OF PERCENTAGES:

What percent, if any, of the negligence was (here name defendant 1)'s? _____%

What percent, if any, of the negligence was (here name defendant 2)'s? _____%

[Repeat as necessary, specifying each defendant.] _____%

What percent, if any, of the negligence was (here identify entity 1, discharged as specified in 25-21,185.11)'s? _____%

What percent, if any, of the negligence was (here identify entity 2, discharged as specified in 25-21,185.11)'s? _____%

[Repeat as necessary, specifying each entity discharged as specified in 25-21,185.11.] _____%

The total negligence must add up to 100%. TOTAL = 100%

DECISIONS REGARDING DAMAGES:

Decide the plaintiff's economic damages, if any. \$ _____

Decide the plaintiff's noneconomic damages, if any. \$ _____

Add those two numbers together to determine the total amount of damages, if any, suffered by the plaintiff. \$ _____

ANSWERS TO THE "COMMON ENTERPRISE OR PLAN" QUESTIONS:

Did any or all of the following defendants cause harm acting in concert with one another as part of a common enterprise or plan? Yes _____ No _____

If your answer is yes, then complete the following checklist, noting which were and which were not.

(Name of defendant 1) Yes _____ No _____

(Name of defendant 2) Yes _____ No _____

(Name of defendant 3) Yes _____ No _____

[Repeat as necessary, specifying each defendant.]

Dated _____, 20__

Presiding Juror

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

SPECIAL NOTE

Nebraska's comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07, *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). There must be instruction on the effects of the allocation of negligence and this verdict form does not accomplish that. *See also* NJI2d Civ. 5.04, Comment, part III(C).

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska's comparative negligence statute. *Russell*, 262 Neb. at 857, 635 N.W.2d at 738; *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620.

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in the *Wheeler* case and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02–5.05. Regarding this whole problem in general and a discussion of the relevant parts of the *Wheeler* case in particular, see the discussion at NJI2d Civ. 5.05, Comment.

COMMENT

The Verdict Forms that are used must be read to the jury. Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). *See* part I(C) of the Comment to NJI2d Civ. 5.04. *See also* part III(C) of the Comment to NJI2d Civ. 5.04. They will be read right before NJI2d Civ. 5.01, Submission to the Jury.

For a general discussion of this instruction, see NJI2d Civ. 5.04, Comment. The controlling statute is quoted at length at NJI2d Civ. 5.04, Authorities.

This particular instruction is written to be used in combination with NJI2d Civ. 2.02A-1. This is the verdict form referenced in paragraph 2 of NJI2d Civ. 2.02A-1, *i.e.*, the verdict form to be used in a

tort action where contributory negligence is submitted to the jury and joint and several liability is an issue and the jury finds that the plaintiff's burden has been met and the defendants' burden has not been met.

Use only those parts of this instruction as are applicable in the case under instruction.

"Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted." *Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc.*, 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990). This is discussed further at NJI2d Civ. 5.01, Comment. *See also* NJI2d Civ. 5.04, Comment, part I.

The statutory requirement that the jury be instructed on the effect of their allocation of some of the negligence to the plaintiff—Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016); *Russell v. Stricker*, 262 Neb. 853, 857–60, 635 N.W.2d 734, 738–40 (2001) (a verdict form may not serve as a substitute for the jury instruction required by the statute); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998); *see also* NJI2d Civ. 5.04, Comment, part III(C) and 5.05, Authorities—does not affect this pattern instruction. This instruction only applies where contributory negligence is present as a defense in the kind of cause of action under litigation, but the jury finds that the defendant has not met its burden of proof on the issue. Therefore, in a case where this instruction applies, none of the negligence will be allocated to the plaintiff.

AUTHORITIES

Neb. Rev. Stat. §§ 25-21,185 and 25-21,185.07 through 25-21,185.12 (Reissue 2016) (L.B. 262, 2d Session, 92nd Legislature (1992)). These sections of the Nebraska Revised Statutes are discussed at length at NJI2d Civ. 5.04, Comment, and quoted at length at NJI2d Civ. 5.04, Authorities. *See also* NJI2d Civ. 5.05, Comment and Authorities.

NJI2d Civ. 5.04

VERDICT FORM 5.04: TORT ACTION WHERE CONTRIBUTORY NEGLIGENCE IS SUBMITTED TO THE JURY AND JOINT AND SEVERAL LIABILITY IS AN ISSUE AND THE JURY FINDS THAT BOTH PLAINTIFF AND DEFENDANTS HAVE MET THEIR BURDENS OF PROOF

VERDICT FORM NO. _____

We the jury find that both the plaintiff and the defendants have met their burdens of proof. We answer the questions on this Verdict Form as follows:

LIST OF PERCENTAGES:

- What percent of the negligence was (here insert name of plaintiff)'s? _____%
- What percent, if any, of the negligence was (here name defendant 1)'s? _____%
- What percent, if any, of the negligence was (here name defendant 2)'s? _____%
- [Repeat as necessary, specifying each defendant.] _____%
- What percent, if any, of the negligence was (here identify entity 1, discharged as specified in § 25-21,185.11)'s? _____%
- What percent, if any, of the negligence was (here identify entity 2, discharged as specified in § 25-21,185.11)'s? _____%
- [Repeat as necessary, specifying each entity discharged as specified in § 25-21,185.11.] _____%
- The total negligence must add up to 100%. TOTAL = 100%

If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court, and do not answer the rest of these questions. If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, to decide the plaintiff's damages, you must answer the rest of these questions.

DECISIONS REGARDING DAMAGES:

- Decide the plaintiff's economic damages, if any. \$ _____
- Decide the plaintiff's noneconomic damages, if any. \$ _____
- Add those two numbers together to determine the total amount of damages, if any, suffered by the plaintiff. \$ _____
- Add together the percent of negligence attributable to (here name everyone but the plaintiff and those discharged as specified in § 25-21,185.11, that is, name the defendants). _____%
- Multiply the total damages, from above, by the number you arrived at by adding together the percent of negligence attributable to (here name everyone but the plaintiff and the discharged parties specified in § 25-21,185.11, that is, name the defendants), to determine the maximum amount of damages that will be awarded to the plaintiff. \$ _____

ANSWERS TO THE "COMMON ENTERPRISE OR PLAN" QUESTIONS:

Did any or all of the following defendants cause harm acting in concert with one another as part of a common enterprise or plan? _____ Yes _____ No

If your answer is yes, then complete the following checklist, noting which were and which were not.

(Name of defendant 1)	_____ Yes	_____ No
(Name of defendant 2)	_____ Yes	_____ No
(Name of defendant 3)	_____ Yes	_____ No

[Repeat as necessary, specifying each defendant.]

Dated _____, 20__

Presiding Juror	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

SPECIAL NOTE

Nebraska’s comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07, *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence. *Sinsel v. Olsen*, 279 Neb. 38, 46-47, 777 N.W.2d 54, 59–60 (2009); *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). There must be instruction on the effects of the allocation of negligence and this verdict form does not accomplish that. *See also* the Comment to this instruction generally, and particularly at part III(C).

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska’s comparative negligence statute. *Russell*, 262 Neb.at 857, 635 N.W.2d at 738; *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620. *See also* *City of Wahoo v. NIFCO Mechanical Systems* 306 Neb. 203, 214–15, 944 N.W.2d 757, — (2020); *Sinsel*, 279 Neb. at 46-47, 777 N.W.2d at 59–60 (court notes there was no objection to the separate verdict forms, nor was alternative instruction offered, and finds the separate verdict forms erroneous).

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in the *Wheeler* case and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02–5.05. Regarding this whole problem in general and a discussion of the relevant parts of the *Wheeler* case in particular, see the discussion at NJI2d Civ. 5.05, Comment.

COMMENT

- I. IN GENERAL
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 - B. AN INTRODUCTION TO THE COMPLEXITIES OF THESE INSTRUCTIONS AND THEIR INTERWORKING
 - C. GENERAL COMMENTS REGARDING THIS PARTICULAR INSTRUCTION, NJI2D CIV. 5.04
- II. THE LIMITED APPLICATION OF THESE L.B. 262 INSTRUCTIONS
 - A. OPERATIVE DATE OF THE LAW CONTAINED IN THESE INSTRUCTIONS
 - B. WHEN A CAUSE OF ACTION ACCRUES
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- III. ALLOCATION OF NEGLIGENCE
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 - B. “. . . IF ANY . . . ”
 - C. THE NEED FOR INSTRUCTION ON THE ALLOCATION OF NEGLIGENCE, WHETHER REQUESTED OR NOT
 - D. THE INSTRUCTION ON THE EFFECTS OF THE ALLOCATION OF NEGLIGENCE TO THE PLAINTIFF
 - E. USE OF THE CORRECT STANDARD OF CARE
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- IV. ECONOMIC AND NONECONOMIC DAMAGES
- V. MITIGATION OF DAMAGES
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- C. THE ARGUMENT AGAINST THE COMMITTEE'S POSITION ON THIS ISSUE
- VII. HOW DAMAGES ARE APPORTIONED
 - A. IN GENERAL
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 - C. WORKER'S COMPENSATION
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 - E. REGARDING "RELEASE" IN GENERAL
- VIII. [PART VIII OF THIS COMMENT HAS BEEN MOVED]
- IX. JOINT AND SEVERAL LIABILITY
 - A. DEFENDANTS WHO ARE PART OF A COMMON ENTERPRISE OR PLAN AND ACTING IN CONCERT TO CAUSE HARM
 - B. JOINT AND SEVERAL LIABILITY AND VICARIOUS LIABILITY
 - C. WHAT THE JURY IS NOT TOLD
- X. WRONGFUL DEATH ACTIONS
- XI. STRICT LIABILITY AND INTENTIONAL TORTS AND COMPARATIVE NEGLIGENCE
- XII. OWNERS OF LEASED TRUCKS AND L.B. 262
- XIII. THE AUTOMOBILE GUEST STATUTE AND L.B. 262
- XIV. EXTRAORDINARY FORCES OF NATURE AND COMPARATIVE NEGLIGENCE
- XV. THE IMPUTATION OF PARENTS' NEGLIGENCE TO THEIR CHILDREN AND VICE VERSA—A CROSS REFERENCE
- XVI. THE APPORTIONMENT OF FAULT IN A CASE WHERE THERE IS MORE THAN ONE PLAINTIFF PRESENTING A JOINT CLAIM, FEWER THAN ALL OF THE PLAINTIFFS SHARE IN THE FAULT, AND THE ACTUAL DAMAGES EXCEED A STATUTORY CAP ON DAMAGES
- XVII. A FINAL POINT REGARDING A 10 TO 2 VERDICT

I. IN GENERAL

A. THE STATUTES

Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. Under tort law, where joint tortfeasors do not act as part of a common enterprise or plan, Neb. Rev. Stat. § 25-21,185.10 (Reissue [2016]) alters the common law by limiting a plaintiff's recovery of noneconomic damages

from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant.

Genetti v. Caterpillar, Inc. 261 Neb. 98, 123, 621 N.W.2d 529, 548 (2001) (citations omitted).

For decades, Nebraska operated under the gross-slight negligence standard codified in Neb. Rev. Stat. § 25-21,185 (Reissue 2016). That was changed in Legislative Bill 88, First Session, 92nd Legislature (1991), enacted into law in 1991, with an effective date of January 1, 1992, codified as Neb. Rev. Stat. §§ 25-21,185.01 through 25-21,185.06 (Reissue 2016). L.B. 88 enacted a new standard of comparative negligence. Thirty-eight days after L.B. 88 became effective, and because of a number of problems with L.B. 88, including (most obviously) internal inconsistencies and cross-references to nonexistent statutory sections, the Legislature repealed and replaced it with the very similar provisions of Legislative Bill 262, Second Session, 92nd Legislature (1992). L.B. 262 was signed into law with an emergency clause and an effective date of February 8, 1992. (Regarding the effective date, see parts II(A) and (B) of this Comment, below.) L.B. 262 is codified as Neb. Rev. Stat. §§ 25-21,185 and 25-21,185.07 through 25-21,185.12 (Reissue 2016).

B. AN INTRODUCTION TO THE COMPLEXITIES OF THESE INSTRUCTIONS AND THEIR INTERWORKING

The computations under Nebraska's comparative negligence statute are complex. They are so complex, and the situations so varied, that drafting pattern instructions is particularly difficult. The totally complete, ideal pattern-instruction must take into account percentages of negligence for persons who are in the litigation and sometimes for persons who are not. It must take into account the two kinds of damages under Nebraska's statute: economic and noneconomic. It must take into account whether the tortfeasors who remain in the case were acting in concert with one another as part of a "common enterprise or plan."

In general, it seems, the best way of handling all of this in terms of jury instructions is to ask the jury to come up with the percentages of negligence and the total for each of the economic and noneconomic damages, and to have the jury answer the "common enterprise or plan" question, and then have the judge do the math. The Committee recommends that, to the extent possible, these instructions be written so that the jury finds the necessary facts and the judge does the often quite difficult mathematical computations based thereon. *See also* NJI2d Civ. 5.05, Comment.

Further complicating the matter, the Verdict Form will vary depending on whether or not contributory negligence is submitted to the jury. If contributory negligence is submitted to the jury, the Verdict

Form will vary depending on whether the jury finds, on the one hand, that the plaintiff has met his or her burden of proof on negligence but the defendant has not met his or her burden of proof on contributory negligence or, on the other hand, both the plaintiff and the defendant have met their burdens on these issues.

As a result of Neb. Rev. Stat. §§ 25-21,185 through 25-21,185.12 (Reissue 2016), the Committee has prepared eight new instructions. Three of them are additional effect of findings instructions: NJI2d Civ. 2.01A, NJI2d Civ. 2.01A-1, and NJI2d Civ. 2.02A-2. One of them is a new damage instruction: NJI2d Civ. 4.00. (*And see* the discussion of wrongful-death damages under the new statute, in part IX of this Comment, below.) Four of them are all-new verdict-form instructions: NJI2d Civ. 5.02, NJI2d Civ. 5.03, NJI2d Civ. 5.04, and NJI2d Civ. 5.05. Those instructions, along with preexisting NJI2d Civ. 2.01 are the L.B. 262 instructions. This Comment explains NJI2d Civ. 2.01A, NJI2d Civ. 2.02A-1, NJI2d Civ. 2.02A-2, NJI2d Civ. 5.02, NJI2d Civ. 5.03, NJI2d Civ. 5.04, NJI2d Civ. 5.05, and, to a lesser extent, NJI2d Civ. 4.00. There is one additional instruction needed, a variation of NJI2d Civ. 4.60, the wrongful death instruction. This is discussed below in part X of this Comment.

Before getting into the details, here is a summary of the situations to which these various instructions and parts of instructions apply:

■ The general statement of the case instruction in a negligence case—NJI2d Civ. 2.01.

■ The statement of the case instruction where contributory negligence is an allowable defense to the type of cause of action alleged, but it is not submitted to the jury, the plaintiff satisfies his or her burden of proof, and joint and several liability is an issue—NJI2d Civ. 2.01A and NJI2d Civ. 5.02.

■ The general statement of the case instruction on “slight” and “gross” negligence, which applies only to cases, if there still are any, that accrued prior to February 8, 1992—NJI2d Civ. 2.02A.

■ The effect of findings part of the statement of the case instructions where contributory negligence is an allowable defense to the type of cause of action, the cause of action accrued on or after February 8, 1992, and joint and several liability *is an issue*:

1. Where contributory negligence is submitted to the jury, the plaintiff fails to satisfy his or her burden of proof, and, therefore, defendant’s burden of proof and joint and several liability become irrelevant—NJI2d Civ. 2.02A-1(1) and Verdict Form NJI2d Civ. 5.02 apply.
2. Where contributory negligence is submitted to the jury, the plaintiff satisfies his or her burden of proof, and the

defendant does not, and joint and several liability is an issue—NJI2d Civ. 2.02A-1(2) and Verdict Form NJI2d Civ. 5.03 apply.

3. Where contributory negligence is submitted to the jury, both the plaintiff and the defendant satisfy their burdens of proof, and joint and several liability is an issue—NJI2d Civ. 2.02A-1(3) and Verdict Form NJI2d Civ. 5.04 apply.

■ The effect of findings part of the statement of the case instructions where contributory negligence is a possible defense to the type of cause of action alleged, the cause of action accrued on or after February 8, 1992, and joint and several liability *is not an issue*:

1. Where contributory negligence is submitted to the jury, the plaintiff does not satisfy his or her burden of proof, and, therefore, defendant's burden of proof becomes irrelevant—NJI2d Civ. 2.02A-2(1).
2. Where contributory negligence is submitted to the jury, the plaintiff satisfies his or her burden of proof and the defendant does not—NJI2d Civ. 2.02A-2(2).
3. Where contributory negligence is submitted to the jury and both the plaintiff and the defendant satisfy their burdens of proof—NJI2d Civ. 2.02A-2(3).

C. GENERAL COMMENTS REGARDING THIS PARTICULAR INSTRUCTION, NJI2d Civ. 5.04

The instruction to which this Comment is attached, NJI2d Civ. 5.04, is written to be used in combination with NJI2d Civ. 2.02A-1. NJI2d Civ. 5.40 is the verdict form referenced in paragraph 2 of NJI2d Civ. 2.02A-1, *i.e.*, the verdict form to be used in a tort action where contributory negligence is submitted to the jury and joint and several liability is an issue and the jury finds that both plaintiff and defendants have met their burdens of proof.

Use only those parts of this instruction as are applicable in the case under instruction.

"Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted." *Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc.*, 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990). This is further discussed at NJI2d Civ. 5.01, Comment. Regarding how jury instructions are to be treated, *see generally* Rule Adopted by the Supreme Court of Nebraska with Reference to Nebraska Jury Instructions, which precedes Chapter 1, above.

The Verdict Forms that are used must be read to the jury. *See* Neb.

Rev. Stat. § 25-21,185.09 (Reissue 2016), quoted at NJI2d Civ. 5.04, Authorities. In addition, the jury must be instructed on the effect of their allocation of negligence. *Russell v. Stricker*, 262 Neb. 853, 857–60, 635 N.W.2d 734, 738–40 (2001); *Pleiss v. Barnes*, 260 Neb. 770, 774, 619 N.W.2d 825, 828 (2000); *Wheeler v. Bagley*, 254 Neb. 232, 241, 575 N.W.2d 616, 621 (1998). This instruction must be separate from the verdict form. That is, it is not enough that the jury is given and that they complete a verdict form that explains the effect of their allocation of negligence. They must be instructed on its effect and a verdict form may not serve as a substitute for the jury instruction required by the statute. *Sinsal v. Olsen*, 279 Neb. 38, 46–47, 777 N.W.2d 54, 59–60 (2009); *Russell*, 262 Neb. at 857–60, 635 N.W.2d at 738–40; *Pleiss*, 260 Neb. at 774, 619 N.W.2d at 828. See also part III(C) of this Comment. The Verdict Forms will be read right before NJI2d Civ. 5.01, Submission to the Jury.

II. THE LIMITED APPLICATION OF THESE L.B. 262 INSTRUCTIONS

A. OPERATIVE DATE OF THE LAW CONTAINED IN THESE INSTRUCTIONS

Nebraska's old contributory negligence law, with its gross- and slight-negligence standard for allocating comparative negligence, "applies only to what must be an ever-shrinking category of cases that accrued before February 8, 1992." *City of Wahoo v. NIFCO Mech. Sys.*, 306 Neb. 203, 210, 944 N.W.2d 757, — (2020). See Neb. Rev. Stat. § 25-21,185 (Reissue 2016). Nebraska's new comparative negligence law applies to all civil actions that accrue on or after February 8, 1992, and are a of a type where contributory negligence is an allowable defense. Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016); *City of Wahoo*, 306 Neb. at 210, — N.W.2d at —; *Tadros v. City of Omaha*, 273 Neb. 935, 939, 735 N.W.2d 377, 380 (2007); *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998).

B. WHEN A CAUSE OF ACTION ACCRUES

1. The General Rule

As a general rule, a cause of action accrues on the date the act or omission occurs. *E.g.*, *In re Adelung*, 306 Neb. 646, 670–71, 947 N.W.2d 269, — (2020); *Strode v. City of Ashland*, 295 Neb. 44, 53, 886 N.W.2d 293, 302 (2016) ("... when the injured party has the right to institute and maintain a lawsuit . . ."); *Linder v. Kindig*, 285 Neb. 386, 392, 826 N.W.2d 868, 873 (2013); *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 425, 730 N.W.2d 376, 380 (2007) ("It has generally been stated that a statute of limitations begins to run as soon as the claim accrues, and an action in tort accrues as soon as the act or omission occurs."); *Smith v. State*, 250 Neb. 291, 293, 549 N.W.2d 149, 151 (1996) ("A cause of action accrues . . . when the aggrieved party has the right to institute and maintain suit. Generally, this is true even though the plaintiff may

be ignorant to the existence of the cause of action.”) (citing cases); *Nichols v. Ach*, 233 Neb. 634, 639, 447 N.W.2d 220, 224 (1989); *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 246, 440 N.W.2d 664, 666–67 (1989) (holding that a cause of action accrues when the aggrieved party has a right to institute and maintain suit, even if the nature and extent of damage not known); *Frerichs v. Neb. Harvestore Sys., Inc.*, 226 Neb. 220, 227, 410 N.W.2d 487, 492 (1987). *See also McCaulley v. C L Enterprises, Inc.*, 309 Neb. 141, 147, 959 N.W.2d 225, 230 (2021). (holding that the 4-year limitation Neb. Rev. Stat. § 25-223 (Reissue 2016) “applies to defective construction claims brought against contractors and builders, whether such claims are based on negligence or breach of warranty.” *Id.* As a general rule, when the basis of a claim against a builder or contractor ‘is improper workmanship resulting in defective construction, [this] statute . . . runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.’” *Id.* at 147–48, 959 N.W.2d at 230–31.)

As discussed in part I of this Comment, the comparative negligence statute under discussion here was briefly preceded by L.B. 88. The legislative history of L.B. 88 is also the legislative history for the accrual-date part of the new statute. L.B. 88’s legislative history recognizes that the accrual date, as used therein, is generally, though not always, the date on which the accident occurs. Floor Debate, L.B. 88, First Session, 92nd Legislature, at 877 (Senator Kristensen, Feb. 13, 1991).

“The accrual of a cause of action means the right to maintain and institute a suit and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So, whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.” *Adelung*, 306 Neb. at 671, 947 N.W.2d at ____.

2. Accrual where There Is a Series of Transactions

Where there is a series of transactions, “the cause of action accrue[s] with each transaction.” *Adelung*, 306 Neb. at 672, 947 N.W.2d at ____ (involving Nebraska’s probate statute and an accounting of estate property); *Accord Ohio Nat’l Life Ins. Co. v. Rust*, 255 Neb. 372, 379, 585 N.W.2d 438, 443 (1998) (involving a series of dividend payments erroneously made; holding that the cause of action for return of each payment accrues on date each payment is made). Therefore, transactions part of the series that occurred prior to 4 years ago are barred by the statute, while transactions part of the series that occurred within the past four years are not barred by the statute.

“A cause of action cannot ‘accrue’ before occurrence of all the elements which constitute a defendant’s violation of a plaintiff’s judicially protected right.” *Henderson v. Forman*, 240 Neb. 939, 945, 486 N.W.2d 182, 186 (1992).

A cause of action for negligence in professional services accrues “when the alleged act or omission in rendering or failure to render professional services takes place.” *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 504, 519 N.W.2d 530, 538 (1994). For more, see NJI2d 12.01, Comment & Authorities, part VI, and 12.04, Comment & Authorities, part VIII.

3. The Discovery Rule

A cause of action on the ground of fraud does not accrue “until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.” *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 461, 562 N.W.2d 714, 717 (1997).

There are exceptions to this general rule. One is called the discovery rule; sometimes a cause of action accrues on the “discovery date.” For example, Neb. Rev. Stat. § 25-222 (Reissue 2016) provides that a damage action based on professional negligence or professional breach of warranty shall be commenced within two years after the act or omission in question.

Provided, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

Id. This statute is subject to two interpretations: either it changes the date the statute of limitations begins to run from the accrual date to the discovery date; or it changes the accrual date, which, in turn, changes and the date the statute begins to run to the discovery date. The Court has applied the latter interpretation. Referencing § 25-222: “A cause of action accrues, and the statute of limitations begins to run, when there has been discovery” *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988) (more recently quoted in *Nichols v. Ach* and *L.J. Vontz Constr. Co.*, above). Though the statute of limitations

provides no exception for causes of action that are not discovered before the statute of limitations expires, we have held that in certain categories of cases, the statute of limitations begins to run on the date when the party holding the claim discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.

Alston v. Hormel Foods Corp., 273 Neb. 422, 425-26, 730 N.W.2d 376, 380-81 (2007) (footnotes omitted). Also see generally NJI2d Civ. 2.02D, Comment & Authorities. Regarding the accrual date and the discovery rule in actions against state and local government, see NJI2d Civ. 8.72, Comment & Authorities.

Regarding the accrual date and the discovery rule for professional negligence actions, *see particularly* NJI2d Civ. 12.04, Comment & Authorities. Regarding the accrual date for contract actions, *see particularly* NJI2d Civ. 15.01, Comment.

4. The Continuing Tort Exception

In addition to the discovery rule, there is the continuing tort doctrine. “[A] claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period.” *Alston*, 273 Neb. at 429, 730 N.W.2d at 383. If some of the damage caused by the continuing tort falls within the time limit of the statute of limitations and some falls after that time limit, the statute does not bar suit on the part of the tortuous act or omission that would have otherwise been barred because it falls within the statute’s time limit. This, however, is neither a separate doctrine nor an exception to the statute, but simply “a straightforward application of the statute of limitations.” *Id.* at 430, 730 N.W.2d at 383.

Regarding the continuing tort doctrine, *see also* NJI2d Civ. 2.02D and 12.04, Comment & Authorities.

C. APPLICATION TO CIVIL ACTIONS “INVOLVING MORE THAN ONE DEFENDANT” AND THE CLASS OF TORTS TO WHICH CONTRIBUTORY NEGLIGENCE MAY BE A DEFENSE

Among other things, this instruction deals with the rules regarding joint and several liability found in Nebraska’s comparative negligence statute. It changes some defendants’ liability from joint and several to only several and not joint. Neb. Rev. Stat. § 25-21,185.10 (Reissue 2016).

1. Actions Involving More Than One “Defendant”

Section 25-21,185.10 applies to civil actions “involving more than one defendant.” Neb. Rev. Stat. § 25-21,185.10 (Reissue 2016). The triggering time for the application of § 25-21,185.10 is when the case is submitted to the trier of fact. This does not mean, however, that there must be more than one defendant left in the case at the time the case is submitted. This comparative negligence statute applies to all negligence cases that accrue on or after February 8, 1992, and are in a class of cases to which contributory negligence is an allowable defense. “[I]nvolving more than one defendant” includes defendants left in the case when submitted plus any other liable entities either not sued or dismissed from the suit by a “release, covenant not to sue, or similar agreement.” *City of Wahoo v. NIFCO Mech. Sys.*, 306 Neb. 203, 210, 944 N.W.2d 757, — (2020). *See also* *Tadros v. City of Omaha*, 273 Neb. 935, 939, 735 N.W.2d 377, 380 (2007) holding that a “release, covenant not to sue, or similar agreement” includes a settlement agreement).

“Defendant” includes third-party defendants. *Lackman v. Rousselle*, 257 Neb. 87, 96, 596 N.W.2d 15, 22 (1999) (“[U]nder the plain language

of § 25-21,185.10, the term ‘defendant’ includes a third-party defendant brought into an action pursuant to § 25-331.”). A settlement agreement is a “similar agreement.” Tardos, 273 Neb. at 939, 735 N.W.2d at 380 (stating that when there was at least one more alleged joint tortfeasor who was dismissed from the case pursuant to a settlement agreement, the trier of fact shall consider the negligence, if any, of the dismissed defendant in allocating the negligence and apportioning the damages).

2. The Class of Torts to Which Contributory Negligence May Be a Defense

Nebraska’s comparative negligence statute applies only to, and in all, “civil actions to which contributory negligence may be, pursuant to law, a defense. . . .” Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016). That is, the statute applies to all negligence actions in a class of such actions where contributory negligence is an allowable defense. See § 25-21,185.11; *City of Wahoo*, above; *Tardos*, above.¹

Contributory negligence is not a defense to an intentional tort.

5.04

¹L.B. 88, the short-lived predecessor of L.B. 262, the current comparative negligence statute, stated that it applied to “civil actions to which contributory negligence is a defense.” L.B. 262 deleted “is” and substituted “may be, pursuant to law.” (Codified at Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016).) That was done, in the opinion of the Committee, in an attempt to clear up the following ambiguity. The just quoted part of L.B. 88 could have had any of several meanings. It could have meant the new comparative negligence statute applied: (1) to every case that is in a category of cases to which contributory negligence is an allowable defense, without regard to whether contributory negligence is properly in the case at bar (noting that in a case in a class of cases where contributory can be a defense, but contributory negligence has not been pled or the trier of fact finds that the plaintiff was not negligent, then the plaintiff’s proportionate share of the negligence is zero); (2) to every case where defense counsel pleads contributory negligence; (3) only to particular cases in which the pleadings and the evidence support submitting contributory negligence to the trier of fact; or (4) to those cases

where the greater weight of the evidence persuades the jury that the plaintiff was contributorily negligent.

The Committee took the first interpretation—both L.B.s were meant to apply in all cases involving classes of torts to which contributory negligence is a defense, whether contributory negligence is in the particular case or not.

This is the approach of the legislative history. For example, the floor debate on the final version of L.B. 88 includes this exchange. Senator Kristensen asked Senator Ashford, “is it your intention that the phrases (sic) ‘to which contributory negligence is a defense’ means to the classes of torts, not the individual cases at issue. . . . Floor Debate, L.B. 88, First Session, 92nd Legislature, at 1149 (Feb. 12, 1991). Senator Ashford agreed that was the case. *Id.* at 1150. (Regarding comparative negligence and strict liability, see part XI of this Comment, below.)

It is the majority approach. In other jurisdictions, these kinds of rules are not limited in their application to cases where the trier of fact actually finds the plaintiff contributorily negligent. It is not the pleadings or the prima facie case or trier of fact’s finding of contributory negligence that

When a case contains a negligent tort and an intentional tort, damages are not allocated to or among the intentional tortfeasor. The negligent tortfeasors are not off the hook for any damage allocated to the intentional tortfeasors because there is no allocation in so far as the latter is concerned. *Brandon v. County of Richardson*, 261 Neb. 636, 654–55, 624 N.W.2d 604, 619–20 (2001).

Contributory negligence is not a defense to strict liability. See part XI of this Comment, below.

Regarding wrongful death actions to which contributory negligence could be a defense, see Part X of this Comment, below.

Contributory negligence is discussed at length at NJI2d Civ. 2.02A.

And note that in a case in a class of cases where contributory negligence can be a defense, but has not been pled or the trier of fact finds that the plaintiff was not negligent, then the plaintiff's proportionate share of the negligence is zero.

triggers the change in the rules of joint and several liability.

And, overall, it is the most sensible approach. The Committee also rejected the third choice because L.B. 88 said it applied “to all civil actions to which contributory negligence is a defense.” L.B. 88, § 1 (emphasis added). The proper way to word a statute designed to accomplish the third choice would be to make it applicable “to all civil actions in which contributory negligence is a defense.” It is a defense “in” a particular action if it is submitted, but just submitting it does not make it a defense “to” the action. And the Committee rejected the fourth choice because the wording of L.B. 88 seemed to support the first over the fourth: L.B. 88 did not say that the new rules applied to “cases to which contributory negligence is a defense,” but “to civil actions” to which it is a defense. The latter language more broadly encompasses kinds of civil actions, rather than limiting the contributory negligence limitation to individual civil actions.¹ The Committee rejected the second interpretation because the defendants, when they drew their pleadings, would have too much control over whether their liability was joint and several or only several.

And, it is the approach most recently taken by the Nebraska Supreme Court. *City of Wahoo v. NIFCO Mech. Sys.*, 306 Neb. 203, 944 N.W.2d 757 (2020).

But see *Gonzales v. Union Pac. RR. Co.*, 292 Neb. 281, 288, 872 N.W.2d 579, 584 (2015) and *Brandon v. County of Richardson*, 261 Neb. 636, 654, 624 N.W.2d 604, 619 (2001), each of which states that the comparative negligence statute “applies only to civil actions in which contributory negligence is a defense.” (Emphasis added.) In each case the Court does not discuss its choice of “in which” over the statute’s choice of “to which.” Subsequent cases, such as *City of Wahoo* and *Tardos*, make it clear that in *Gonzales* and *Brandon* “in which” does not mean that the statute only applies to individual cases in which contributory negligence is pled (and perhaps sent to the jury). It does mean that the statute applies to every negligence action that is in a class of actions in which contributory negligence is a defense. See the statute and cases cited in the paragraph to which this footnote is attached. This distinguishes the appropriate class of actions from, for example, cases in intentional tort or strict liability.

III. ALLOCATION OF NEGLIGENCE

A. THE PURPOSE OF COMPARATIVE NEGLIGENCE

“The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis.”²

B. “. . . IF ANY . . . ”

Pursuant to § 3 of L.B. 262, part 2 of this instruction reads:

“What percent of the negligence was (here insert name of plaintiff)’s?”

“What percent, if any, of the negligence was (here name defendant 1)’s?”

Regarding the negligence of defendants and persons discharged pursuant to Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016), the instruction asks the jury to list the “percent, if any,” of their negligence. That accounts for the possibility that the jury may find that some (but, if the jury has come this far, not all) of the specified entities were not negligent. Regarding the negligence of the plaintiff, the instruction omits the “if any” modifier. This is because if the jury has gotten this far into the instructions, they must have found at least some negligence on the part of the plaintiff.

C. THE NEED FOR INSTRUCTION ON THE ALLOCATION OF NEGLIGENCE, WHETHER REQUESTED OR NOT

The final sentence of Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016) states, “The jury shall be instructed on the effects of the allocation of negligence.” Failure to so instruct is prejudicial error. “[F]or those cases where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense, we hold that it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with [Neb. Rev. Stat.] § 25-21,185.09.”³

²*Aguallo v. City of Scottsbluff*, 267 Neb. 801, 805, 678 N.W.2d 82, 88 (2004). *Accord Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754 (2007).

³*Wheeler*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998) (error in instruction on allocation leads to remand for retrial of liability and damages).

Accord Sinsel v. Olsen, 279 Neb. 38, 46–47, 777 N.W.2d 54, 59–60 (2009); *Pleiss v. Barnes*, 260 Neb. 770, 773–73, 619 N.W.2d 825, 828–29 (2000); *Wheeler*, above at 241, 575 N.W.2d at 621.

While a verdict form must be read to the jury,⁴ it may not be substituted for proper jury instruction.⁵ It is not enough that the jury completes a verdict form that contains the effect of its allocation of negligence, the jury must be instructed on same.⁶

See also NJI2d Civ. 5.05.

D. THE INSTRUCTION ON THE EFFECTS OF THE ALLOCATION OF NEGLIGENCE TO THE PLAINTIFF

The instruction states, "If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court, and do not answer the rest of these questions. If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, to decide the plaintiff's damages, you must answer the rest of these questions." This part of the instruction is required by Neb. Rev. Stat. § 24-21,185.09 (Reissue 2016). This part of the instruction is followed by a series of "Damages" questions. These questions instruct the jury on the effects of their allocation of negligence.⁷

There is an alternative way of satisfying the statutory requirement that the jury be instructed on the effect of its allocation of part of the negligence to the plaintiff. That is the approach taken in NJI2d Civ. 5.05, as explained in the Authorities thereto. The approach in this pattern instruction has the jury do the math. That is how they are told of the effect of allocating negligence to the plaintiff. The approach in NJI2d Civ. 5.05 has the judge do the math and satisfies the statutory requirement by telling the jury what the judge will do. The 5.05 approach may be preferable, for it takes some rather complicated math—multiplication by percentages, etc.—out of the hands of the jury and puts it into the hands of the judge. For more on that approach, consult NJI2d Civ. 5.05 and its Authorities.

E. USE OF THE CORRECT STANDARD OF CARE

As stated above, "The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages

⁴Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016).

⁵*Russell v. Stricker*, 262 Neb. 853, 859, 635 N.W.2d 734, 740 (2001) (discussing the point and citing cases and holding that a verdict form may not serve as a substitute for the jury instruction required by the statute).

⁶*Pleiss v. Barnes*, 260 Neb. at 774, 619 N.W.2d at 828–29.

⁷*Russell v. Stricker*, 262 Neb. at 859, 635 N.W.2d at 740 (discussing the point and citing cases). *See also* Floor Debate, L.B. 88, First Session, 92nd Legislature, at 837 (Senator Kristensen, Feb. 12, 1991).

on the basis.”⁸ “To compare fault, it is critical that the fact finder knows the correct standard of care for each party.”⁹ “[I]t would be impossible for a fact finder to accurately gauge how far a party has deviated from its standard of care if the fact finder does not have the correct understanding of the party’s standard of care.”¹⁰

“Thus, when a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy generally will be to remand for a new trial so that the fact finder can employ the correct standard in its apportionment analysis.”¹¹

F. ALLOCATION OF NEGLIGENCE AND THE TORT CLAIMS ACTS

Tort actions against the state or political subdivisions of the state are tried to the court, not to a jury. See *NJI2d Civ. 8.72* for citations and discussion. In a multiple-defendant jury trial where the state or a political subdivision of the state is a defendant, though the negligence of the governmental body is not determined by the jury for purposes of the judgment for or against that body, its negligence must be determined by the jury for purposes of the allocation required by § 3 of L.B. 262 (*Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016)*)).

During the floor debate on the short-lived L.B. 88, the predecessor to and model for L.B. 262, while addressing L.B. 88’s effect on political subdivisions, Senator Ashford said, “Under L.B. 88 the judge determines the degree of fault of that municipality.” Floor Debate, L.B. 88, First Session, 92nd Legislature, at 806 (Feb. 12, 1991). For purposes of the judgment against the municipality, this is true. Still, however, the jury has to make a decision regarding the percent of negligence attributable to the municipality because they must allocate each other party’s negligence as a percent of a total that includes the negligence of the municipality.

The jury cannot figure the allocation of 100% of the negligence among the plaintiff and the other defendants without taking into account the percent attributable to the municipality. Before they can take into account the percent of the negligence attributable to the municipality, someone must determine what it is. The someone who determines that percent must be either the judge or the jury. To have the judge do it and then announce to the jury that they must take that number as a given, presents two problems. First, and perhaps most importantly, it

⁸*Aguallo v. City of Scottsbluff*, 267 Neb. 801, 805, 678 N.W.2d 82, 88 (2004). *Accord Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754, *clarified at* 274 Neb. 267, 735 N.W.2d 754 (2007).

⁹*Aguallo*, 267 Neb. at 808, 678 N.W.2d at 90.

¹⁰*Id.*

¹¹*Id.*

encroaches a great deal on the jury's function: it removes their ability to attribute either more or less than the remainder to other parties. Second (and in some cases this will be a problem, in others it will not), the judge would have to decide the municipality part of the case before the jury began any real deliberation.

So, it seems to the Committee, the jury will determine the percent of fault of the municipality when they determine the percent of fault of everyone else. This leaves the court with two choices: to accept the jury's determination as its own; or to re-decide the question of the percent of negligence attributable to the municipality. Either is possible. Or the trial could be bifurcated. Or could it? Would the party removed from the trial by the bifurcation be considered released? If so, then that party's negligence will still be part of the trial and, to that extent, the municipality is still in the case as a phantom party. If not, then how does L.B. 262 fit into the bifurcated trials? Surely bifurcation is not a way to get around L.B. 262. In short, if a trial is bifurcated, what does that do to the required allocation of negligence and the figuring of several liability?

If, however, the court comes to a separate, independent, different decision than the jury on this question of the percent of negligence attributable to the municipality, then one of two things must happen: the judge must either refigure all of the jury's other allocations, up or down, so all of the negligence adds up to exactly 100%, or leave the jury's other allocations where they are, so that the plaintiff ends up with partial double-coverage or less-than-full single-coverage.

Consider three examples: First, if the jury assigns a 20% share of the negligence to the municipality, 80% to the other defendants, and none to the plaintiff, and the court decides that the municipality was not negligent, and dismisses the municipality, then either:

- the judge reallocates the damages so that the civilian defendants the jury found 80% negligent are now 100% negligent; or

- the municipality is simply dropped, nothing else is changed, and the non-negligent plaintiff recovers only 80% of the damages found by the jury.

And the damages might be reallocated in this additional way, too: reallocation regarding individual responsibility for any noneconomic damages. Regarding economic and noneconomic damages, *see* NJI2d Civ. 4.00.

Either way the jury's verdict is changed by the judge and the damages might be reallocated regarding individual responsibility. Regarding economic and noneconomic damages, *see* NJI2d Civ. 4.00.

Second example: Consider an accident involving four potentially negligent entities. Assume each of the four ends up in a lawsuit, one as the plaintiff and the other three as defendants. And make two of the defendants individuals and one a city. If the jury determines the plaintiff is responsible for 10% of the negligence and the individual defendants are responsible for 20% and 30% of the negligence, respectively, then the jury's opinion is that the city is responsible for 40% of the negligence. What happens if the court decides that the city's share was 10%? In this example, then, the recovery of a 10% negligent plaintiff will be reduced by 40% (his or her own 10% plus the 30% difference between the jury and the judge's decision on the city's share of the negligence). Either that or the judge has to refigure the amount of damages owed by the two individual defendants—which the judge does not seem to have the power to do. Similarly, if the court decides the city's share was 70%, then either a 10% negligent plaintiff would recover more than 100% of his or her damages or the judge would have to undo the jury's verdict and refigure the shares of the individual defendants.

Third example: the jury decides the municipality is 80% negligent and the only other defendant 20% negligent and the judge decides the municipality was only 20% negligent and does not change the allocation of negligence to the other defendant. Now the combined negligence of the defendants is 40%. Does this mean that, since all of the defendants' negligence combined is less than 50%, the plaintiff cannot recover anything?

It strikes the Committee as unlikely, for these reasons and others, that the court will make a different decision than the jury on this question of the municipality's negligence—unlikely the jury will decide it for purposes of allocation and then the judge will re-decide it for purposes of the judgment against the municipality. What seems more likely is that the judge will have the jury act in an advisory capacity. In this regard, see Neb. Rev. Stat. § 25-1105 (Reissue 2016); *In re Estate of Layton*, 212 Neb. 518, 522–23, 323 N.W.2d 817, 820 (1982) (statute continues court's right, in equitable action, to submit question of fact to jury; jury's function is advisory only) (citing cases).

On this point, see *Ways v. City of Lincoln*, 871 F.2d 750 (8th Cir. 1989), finding that a jury's verdict on a section 1983 claim could not be constrained by the court's judgment on an accompanying Title VII claim. *Accord*, e.g., *Dasler v. E.F. Hutton & Co.*, 694 F.Supp. 624 (D.Minn. 1988) (when legal and equitable issues tried together, right to jury trial in legal action encompasses issues common to both) (citing cases). As a practical matter, with respect to liability and damage issues the parties in the tort claim cases are probably collaterally estopped by the jury's decision in the non-tort claim case because it will have to determine the percentage of negligence attributable to the state or the political subdivision.

In a related vein, “a jury empaneled in an equitable action . . . serves only in an advisory role, and its findings are not binding on the trial court.” *Wolf v. Walt*, 247 Neb. 858, 864, 530 N.W.2d 890, 895 (1995). *Accord D & S Realty, Inc. V. Markel Ins. Co.*, 2089 Neb. 567, 573, 789 N.W.2d 1, 9 (2010).

G. FAILURE TO WEAR A SEATBELT

“The failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party.” *Fickle v. State*, 273 Neb. 990, 1004, 735 N.W.2d 754 (2007). “[It] is admissible only as evidence concerning the mitigation of damages.” *Id.*

If damages are to be reduced in mitigation of damages, pursuant to Neb. Rev. Stat. § 60-6,273 (Reissue 2010), because a recovering party was not wearing a seatbelt, then instruction on that point will also have to be worked into these instructions. This statute is quoted, discussed, and instructed at NJI2d Civ. 7.70. Presumably, the reduction applies to economic and noneconomic damages alike.

Mitigation of damages generally and the reduction of damages by reason of failure to wear a seatbelt is also discussed in part V of this Comment, below.

H. APPEAL OF THE ALLOCATION

Because its purpose is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.

Baldwin v. City of Omaha, 259 Neb. 1, 18, 607 N.W.2d 841, 853 (2000). *Accord Hall v. County of Lancaster*, 287 Neb. 969, 987, 846 N.W.2d 107, 120 (2014); *Fickle v. State*, 273 Neb. 990, 1003–04, 735 N.W.2d 754, 768 (2007); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 805, 678 N.W.2d 82, 88 (2004).

“[T]he determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.” *Fickle*, 273 Neb. at 1003–04, 735 N.W.2d at 768.

IV. ECONOMIC AND NONECONOMIC DAMAGES

This instruction asks the jury to figure economic and noneconomic damages, and, from them, total damages. Economic and noneconomic

damages are discussed and defined in NJI2d Civ. 4.00, Comment and Authorities. Please see that discussion.

V. MITIGATION OF DAMAGES

A. IN GENERAL

If mitigation of damages is in issue in a case where NJI2d Civ. 5.02, NJI2d Civ. 5.03, NJI2d Civ. 5.04, or NJI2d Civ. 5.05 is the appropriate instruction, then the pattern will have to be changed to reflect mitigation.

As an example of how this might be done, a portion of NJI2d Civ. 5.04 is quoted below with the additions underlined and the deletions omitted:

DECISIONS REGARDING DAMAGES:

Decide the plaintiff's economic damages, if any. \$ _____

Decide the plaintiff's noneconomic damages, if any. \$ _____

Add those two numbers together to determine the total amount of damages, if any, suffered by the plaintiff. \$ _____

If, pursuant to Instruction No. ____, you find that the plaintiff failed to take reasonable steps to minimize (his, her) damages, deduct the amount of damages that could have been prevented if the plaintiff had done so. \$ _____

Add together the percent of negligence attributable to (here name everyone but the plaintiff and those discharged as specified in § 25-21,185.11, that is, name the defendants). _____%

To determine the total amount of damages that the plaintiff may recover, do the following: take the number from Line ____ and multiply it by the number from Line ____.

\$ _____

The cross reference to "Instruction No. ____" is a reference to NJI2d Civ. 4.70. The changes suggested above require numbering the various lines in the instruction, the lines where the jury is to write in percentages or dollar amounts or to check off alternatives. The first cross reference to "Line ____" is a cross reference to the fourth subparagraph, the one on mitigation of damages, and the second is a cross reference to the fifth subparagraph, the one following after the one on mitigation.

B. FAILURE TO WEAR A SEATBELT

This is discussed in part III(G) of this Comment, above.

VI. PLAINTIFF'S CONTRIBUTORY NEGLIGENCE "SHALL DIMINISH PROPORTIONATELY" PLAINTIFF'S DAMAGE AWARD

A. THE AMBIGUITY

The statute states: "Any contributory negligence chargeable to the

claimant shall diminish proportionately the amount awarded as damages” Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). Arguably, the interpretation this instruction places on this part of the statute is not the only possible interpretation. The statute states the amount awarded “shall diminish proportionately.” The arguable ambiguity is in the word proportionately: What exactly is meant by proportionately? Is it the proportion of plaintiff’s negligence to the whole negligence, so that a 49% negligent plaintiff loses 49% of his or her damages, and recovers 51%? Or is it the proportion of plaintiff’s negligence subtracted from the proportion of defendant’s negligence, so that a 49% negligent plaintiff loses 98% of his or her damages, and recovers 2%?

Say that $P\%$ represents the plaintiff’s percentage share of the whole negligence, and $D\%$ represents the defendant’s percentage share of the whole negligence, and TD represents the total damages. Using the former approach, a plaintiff recovers $TD - (TD \times P\%)$. Using the latter, a plaintiff would recover $TD \times (D\% - P\%)$.

The Committee believes that the statute means the former. Though confident of this position, the Committee explains its basis at some length for three reasons: the words of the statute itself do not necessarily lead to the Committee’s conclusion; as further discussed below, in Part VI(C) of this Comment, not all of the evidence supports the Committee’s conclusion; and the question of which interpretation is proper has been the subject of a debate among Nebraska lawyers whose practices are affected by this change. The Committee believes the statute means the former for the following reasons.

B. THE COMMITTEE’S BASIS FOR ITS RESOLUTION OF THE AMBIGUITY

First, the Committee’s view seems intuitively correct. In a pure comparative negligence jurisdiction, plaintiff’s recovery is reduced by the percent of plaintiff’s negligence. A plaintiff 1% negligent recovers 99% of his or her total damages; a plaintiff 99% negligent recovers 1% of his or her total damages (discussing theory here, and not what a plaintiff would recover under this statute, which provides that a plaintiff whose negligence is equal to or greater than the total negligence of all persons against whom recovery is sought . . . shall be totally barred from recovery; Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016)); a plaintiff 49% negligent recovers 51% of his or her total damages. Nebraska’s new statute seems to be a compromise that cuts a plaintiff off when he or she is 49% negligent.

Second, in answering the question What exactly is meant by “proportionately”? the Committee has followed the approach of other jurisdictions with this kind of statute. L.B. 262 is a “modified comparative negligence” statute. There are two kinds of modified comparative negligence: “equal fault bar” and “greater fault bar.” Under the former,

the tie goes to the defendant: if each side of the “versus” is 50% negligent, plaintiff recovers nothing. Under the latter, the tie goes to the plaintiff: if each side is 50% negligent, plaintiff recovers 50% of his or her total damages. Prosser and Keeton *On the Law of Torts* § 67, at 473 (W. Keeton gen. ed. 5th ed. 1984). Under each of the only two kinds of modified comparative negligence identified by Prosser, the Committee’s approach to this “proportionality” problem is the correct one. The Committee has followed the general rule. Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 350, 354 (1980). In fact, this approach is so generally accepted that the Committee did not find one legislature or court adopting another approach; neither did the Committee find anything in the general literature on the subject even arguing in support of another approach.

Third, but for the exchange set out below, in Subpart C of this Part of this Comment, the legislative history of L.B. 88, the predecessor to L.B. 262, seems to support this conclusion. During the floor debates, there were many statements that the intent of the legislature was to bring Nebraska in line with the majority rule. *E.g.*, Floor Debates, L.B. 88 at 425, 433, 440, 860 (1st Sess. 92nd Legis. 1991). As noted just above, the Committee’s approach is the majority rule.

The hearings in the Judiciary Committee also support the instruction as drafted. (Much of L.B. 88 was amended on the floor of the legislature. Much of the material in the committee hearings does not address L.B. 88 as finally passed, and, therefore, does not address L.B. 262. The part in question here, however, survived essentially intact through the Committee hearings, through L.B. 88 and into L.B. 262. *See*, for example, Rough Draft, Judiciary Committee Hearing on L.B. 88, at 46 (January 25, 1991).) “The principle is that a person, whether a plaintiff or a defendant, should pay in accordance with a percentage of his contribution to an accident.” Rough Draft, Judiciary Committee Hearing on L.B. 88, at 23 (January 25, 1991) (statement by one of the authors of the original, unamended Bill, then-Dean Harvey Perlman). The 51% negligent defendant has contributed 51% to the accident. $TD - (TD \times P\%)$.

And this instruction’s approach to this question is supported by the statement of “Summary of Purpose and/or Changes” prepared for L.B. 88 and signed by Senator Chizek, Chairperson of the Committee on Judiciary: “Any recovery would be reduced by the percentage of the injured party’s negligence which contributed to the injury.”

Fourth, under the statute that preexisted L.B. 88 and L.B. 262, certain plaintiffs recovered proportionate shares of their total damages. Their proportionate shares were figured by reducing plaintiffs’ total damages by their percentage share of the total negligence. The number used was the plaintiff’s percentage share of the total negligence, not the plaintiff’s percentage share subtracted from the defendant’s percentage share. The formula used was $TD - (TD \times P\%)$, not $TD \times (D\% - P\%)$. But

for Subpart C of this Part of this Comment, below, the Committee has not found anything to suggest that the Unicameral meant for L.B. 88 or L.B. 262 to change that aspect of the preexisting law.

Fifth, the new comparative negligence law is a compromise between preexisting Nebraska law and pure comparative negligence. When it comes to reducing the amount of damages awarded to the plaintiff, both preexisting Nebraska law and pure comparative negligence reduce it by plaintiff's share of the negligence, rather than the difference between plaintiff's share and defendant's—both use the formula $TD - (TD \times P\%)$. Again, but for Subpart (C) of this part of the Comment, below, there is no evidence that L.B. 88 or L.B. 262 meant to use a different formula. Preexisting Nebraska law was that a plaintiff more than slightly negligent could not recover anything. A plaintiff less than slightly negligent could recover his or her total damages reduced by the plaintiff's percentage share of the total negligence. Now, a plaintiff can recover if his or her share of the negligence is more than slight; in fact, a plaintiff can recover if his or her share of the negligence is as high as 49%. And, it seems to the Committee, that a plaintiff can still recover his or her total damages reduced by the plaintiff's percentage share of the total negligence. *See, e.g., Gonzales v. Union Pac. RR. Co.*, 292 Neb. 281, 288, 872 N.W.2d 579, 584 (2015) (“To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought.”).

What, then, about this: the plaintiff who is assigned 50% of the negligence recovers nothing; the plaintiff who is assigned 49% of the negligence recovers 51% of his or her total damages. That shift in 1% in the allocation of total negligence results in plaintiff's recovery moving from zero to 51% of the total damages. Isn't that a bit arbitrary? Perhaps so. More than anything else, this arbitrariness is a reflection of the fact that L.B. 262 (as was L.B. 88 before it) is a compromise.

A partial answer to the charge that this is somehow unfair is this: The “unfairness” of this kind of damage movement as a result of a 1% negligence movement is a tradeoff for the “unfairness” in a pure comparative negligence system of allowing a plaintiff to recover damages when he or she is 50% or more at “fault.” Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 351 (1980).

In addition, if it is unfair, it does not seem more unfair than the other approach, where a 49% negligent plaintiff would recover 2% of his or her total damages or, looking at it another way, a 49% negligent plaintiff would have to bear 98% of his or her own loss.

L.B. 88 followed by L.B. 262 enacts a compromise between the “slight” and gross formulation in preexisting Nebraska law and pure

comparative negligence. Preexisting Nebraska law was that plaintiffs more than slightly negligent could not recover anything. Plaintiffs less than slightly negligent could recover their total damages reduced by the percentage share of the total negligence. Now, plaintiffs 50% or more negligent cannot recover anything and plaintiffs 49% or less negligent can recover their total damages reduced by their percentage share of the total negligence.

In general, Nebraska's new system of modified comparative negligence is a compromise (as was Nebraska's former system of gross-slight negligence) between contesting groups in a legislative body, a compromise between contributory negligence as a complete bar and pure comparative negligence, a compromise that Prosser "dismissed" as "political in character." Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 351 (1980) (quoting William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 484 (1953)).

C. THE ARGUMENT AGAINST THE COMMITTEE'S POSITION ON THIS ISSUE

There are two pieces of legislative history that run counter to the Committee's position:

SENATOR PIRSCH: . . . You made a big point about if fault is 50/50 that the plaintiff does not recover. But what really bothers me is if the plaintiff is 49 percent at fault or less, they (sic) have an action.

SENATOR ASHFORD: They only collect 1 percent. They only collect 1 percent.

SENATOR PIRSCH: Okay.

SENATOR ASHFORD: So if there's a \$100,000, they would collect what, a \$1,000.

Floor Debate, L.B. 88, First Session, 92nd Legislature, at 855 (Feb. 13, 1991).

Second, during the floor debates, speaking of a floor amendment offered by Senator Abboud, Senator Landis stated:

It says, if I harm you, and in this accident, I am more responsible than you I owe you the amount by which I am more responsible than you are. If I harm you, and we're both at fault, I owe you the amount that I am more at fault than you are. One sentence, simple as that. You can draw it with two numbers, 60 and 40. I'm 60 percent responsible, you are 40 percent responsible, I owe you 20 percent of the recovery. See,

simple You want a simple rule, it says this, if there is an injury and we're both at fault and I do you harm, I owe you that amount of harm that I am more responsible than you are And that's good policy that every other state has moved to.

Floor Debate, L.B. 88, First Session, 92nd Legislature, at 440 (Feb. 1, 1991).

Two things about this: First, though the amendment Senator Landis was addressing was defeated, *id.* at 441, the language to which he referred did end up in L.B. 88, *id.* at 464, and in L.B. 262. Second, even so, this part of the floor debate is internally inconsistent: was the point to enact the majority rule, as stated in the last sentence of the quotation, where a 60% responsible defendant would pay 60% of the damages; or was it intended to enact the rule otherwise described where the 60% responsible defendant, opposed to a 40% negligent plaintiff, would pay 20% of the damages?

Contrary to these two pieces of legislative history, throughout the floor debates, there are statements that the intent of L.B. 88 is to bring Nebraska in line with other jurisdictions. Throughout the floor debates, there is evidence that the intent of the legislature was to adopt the majority approach to modified comparative negligence. (See subpart B of this part of this Comment, above.) And the approach described in the above quotation is not the majority approach. (Regarding the majority rule, see Prosser and Keeton On the Law of Torts § 67, at 473 (W. Keeton gen. ed. 5th ed. 1984); Richard N. Pearson, Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives, 40 La. L. Rev. 343, 350, 354 (1980), both discussed above, in subpart B of this part of the Comment.)

If the Committee is incorrect, then the portions of NJI2d Civ. 5.03 and NJI2d Civ. 5.04, each headed "Decisions Regarding Damages," has to be changed.

VII. HOW DAMAGES ARE APPORTIONED

A. IN GENERAL

One question in this part of this Comment is how to apportion damages, including when there are tortfeasors who settled with the plaintiff and are not in the case when it is submitted to the trier of fact.

As will be explained, the short answer is this. If the plaintiff's share of the total negligence is 50% or more, then the plaintiff cannot recover any damages. Otherwise, the individual percentage shares of the all of the negligence shall be used to calculate the plaintiff's damages. To make this happen, the trier of fact must calculate the negligence, if any, of the plaintiff, all defendants remaining in the case when it is submit-

ted to the trier of fact, and any "other persons liable on the same claim." Third-party defendants are included. Other persons liable on the same claim include both entities never named in the suit and entities dismissed from the suit because of a pre-suit release, covenant not to sue, or similar agreement, including a settlement. Those shares of negligence "shall" be used to calculate each such entities' share of the damages.

The plaintiff bears the risk if the plaintiff settles with another for less than the amount of money the trier of fact determines to be the other's percentage share of the negligence and, therefore, of the damages. And the other person bears the risk if he or she settles for more than what the jury determines was his or her share of the negligence and, therefore, his or her share of the total damages.

But first, by way of background, in *Maxwell v. Montey*, Maxwell sued Stebbins and Montey. At the close of the Maxwell's case in chief, the trial court granted Stebbins' motion for a directed verdict and excused him from the case. Montey did not object, *Maxwell v. Montey*, 262 Neb. 160, 163, 631 N.W.2d 455, 459 (2001); Montey "did not timely preserve in the district court the issue whether Stebbins should have remained a part of the trial for apportionment purposes," *Id.* at 169, 631 N.W.2d at 462-63. *Maxwell* states that,

in situations where there is only one defendant remaining in a case, the provisions of § 25-21,185.10 simply do not operate. . . . In its application, § 25-21,185.10 only operates at the point when a finder of fact has determined the liability of the parties involved in a case and is apportioning damages between those parties. Because the statute's effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. In other words, if there is only one defendant in a particular case at the point the case is submitted to a jury, the jury will not be allowed to allocate a percent of damages or negligence to "phantom" defendants who have never been part or are no longer part of a proceeding. Again, only when there are multiple defendants in a case at the time the case is submitted to the finder of fact can there be the possibility of an allocation of damages between defendants under § 25-21,185.10.

....

Because the Monteys did not timely present the issue whether Stebbins should have remained a part of the litigation in the district court, we will not address such question on appeal. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.

Maxwell, 262 Neb. at 168–69, 631 N.W.2d at 462–63 (emphasis added).

As stated in the lengthy quotation just above, that part of *Maxwells* cites § 25-21,185.10 of Nebraska's comparative negligence statute. The next section of the statute states, "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other person liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact." Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016). The words "similar agreement" include a settlement. *Tadros v. City of Omaha*, 273 Neb. 935, 942, 735 N.W.2d 377, 381 (2007).

Actions in intentional torts (see part XI of this Comment, below, and part II(C)(2) of this Comment above) and in strict liability (see NJI2d Civ. 11.20 through 11.26), for example, are not negligence actions and the comparative negligence statute does not apply to either.

In *City of Wahoo*, there was only one defendant in the case by the time it was submitted to the jury. *City of Wahoo*, 306 Neb. at 205, 203 N.W.2d at —. Two other defendants had been dismissed by stipulation. *Id.* The judge's instructions included the pre-February 8, 1992, "slight" and "gross" negligence formulation. *Id.* at 205-06, 203 N.W.2d at —. *City of Wahoo* makes it clear that the "slight" and "gross" formulation for contributory negligence does not apply to, and should not be given in, any action that accrued on or after February 8, 1992. *Id.* at 210, 203 N.W.2d at — ("[T]he 'slight' and 'gross' formulation applies only to what must be an ever-shrinking category of cases that accrued before February 8, 1992."). The comparative negligence statute applies to *all negligence cases* that accrue on or after February 8, 1992.

The lengthy quotation from *Maxwell* a few paragraphs above follows § 25-21,185.10. *City of Wahoo* follows Section 25-21,185.11, which provides,

(1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but that person's

negligence, if any, shall be considered in accordance with section 25-21,185.09.

Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016). As noted elsewhere, *Tardos v. City of Omaha* holds that a defendant who is discharged from a suit by a settlement agreement falls under this statute. *Tardos v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007). It is a “similar agreement.”

The plain language of § 25-21,185.11 means that if there is one or more defendants in the case when it goes to the trier of fact but there were other persons liable who were not in the case for one of the specified reasons, then the negligence of those other persons “shall be considered” by the trier of fact; the trier of fact must determine whether or not each other person was negligent and, if so, their share of the negligence; and that person’s share of the negligence shall be considered in accordance with § 25-21,185.09, the section dealing with the calculation of damages.

Section 25-21,185.09 statute states that, “Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant’s contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery” Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). In cases accruing on or after February 8, 1992, it is error if the instructions to the jury include a “slight” and “gross” formulation. *City of Wahoo*, 306 Neb at 211, 203 N.W.2d at ____.¹²

For example, in *Tardos v. City of Omaha*, the trial court found that the plaintiff was 20% negligent, Bowley (the party dismissed pursuant to a settlement) was 30% negligent, and the city (the sole defendant remaining in the case when it was submitted to the trier of fact) was 50% negligent. The trier of fact found that the plaintiff “suffered total economic damages in the amount of \$1,258,999.81 and total noneconomic damages in the amount of \$300,000.” The plaintiff had settled with Bowley for \$35,000. *Tardos v. City of Omaha*, 273 Neb. 935, 937, 737 N.W.2d 377, 379 (2007). The amount of the settlement is far less than the amount of Bowley’s proportionate share of the total damages.

The question was whether the damages owed by the city should be reduced by 20% for the plaintiff’s negligence plus the dollar amount of the plaintiff’s settlement with Bowley (\$35,000) or reduced by 20% for the plaintiff’s negligence and 30% Bowley’s share of the total negligence.

¹²The 50% cutoff is the product of of this Comment, above. a compromise discussed at part VI(B)

The court holds that the total amount of economic damages must be reduced by 20% for the plaintiff's share of the negligence and then that number must be reduced by 30% for Bowley's share of the negligence. The same math must be applied to reduce plaintiff's noneconomic damages.

This leaves one question. In *Tadros*, Bowley had been a named party in the suit and was dismissed pursuant to a settlement agreement during the progress of the litigation. What about a potential party defendant who enters into a settlement agreement with the plaintiff before the suit is filed and therefore is never named in the suit in the first place? The statute is clear on this point as well. "[A] release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but that person's negligence, if any, shall be considered in accordance with § 55-21,185.09." Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016). An entity never named in the suit because of a pre-suit settlement is treated just the same as a party dismissed from the suit because of a settlement. (There will, in this situation, of course have to be some evidence of the nonparty's negligence before the trier of fact can allocate a share of the negligence to that nonparty.)

B. REASONS BEHIND APPLYING THIS STATUTE TO ALL NEGLIGENCE CASES IN A CLASS WHERE CONTRIBUTORY NEGLIGENCE IS AN ALLOWABLE DEFENSE

Regarding § 25-21,185.10, if the action never involved more than one defendant the idea of apportioning damages may seem to make little sense. However, if the plaintiff prevails and either contributory negligence is not in the case or the trier of fact finds that the plaintiff was not contributorily negligent, then all of the damages are allocated to the defendant. If the plaintiff prevails and the trier of fact finds the plaintiff was contributorily negligent, then the damages are allocated between the plaintiff and the defendant.

And each party has the ability to bring into the case other potentially liable entities. This is so whether a liable entity was never named as a defendant, was dismissed from the suit because the plaintiff failed to properly plead a case against that entity, etc. *See Lackman v. Rousselle*, 257 Neb. 87, 96, 596 N.W.2d 15, 22 (1999) (holding that "defendant," as used in § 25-21,185.10, "includes a third-party defendant brought into an action pursuant to § 25-331.")

Furthermore, not all of the evidence against a party defendant has to come from the plaintiff. One defendant can, and often will, introduce evidence against another in an attempt to decrease the former's share of the negligence, and increase the latter's. If a party is dismissed or a verdict is directed for failure to make a *prima facie* case against that

party, then the failure is as much the remaining defendant's as it is the plaintiff's.

Under this statutory scheme the plaintiff takes the risk of a disadvantageous settlement and gets the benefit of an advantageous settlement. *Tadros*, 273 Neb. at 941, 735 N.W.2d at 382 (a claimant should not be able to "recover from the nonsettling joint tort-feasor more than that tort-feasor's proportionate share in order to compensate for the fact that the claimant made settlement with another that may prove to be inadequate."). The defendant does not take the risk of a settlement disadvantageous to the plaintiff, a settlement in which the defendant had no part and over which the defendant had no control and the defendant does not get the benefit of a settlement advantageous to the plaintiff. *Tadros*, 273 Neb. at 942, 735 N.W.2d at 382 ("[F]airness is achieved to the extent that the nonsettling tort-feasor will not be prejudiced by a settlement amount over which he or she had no control.").

Take this case. The plaintiff was not contributorily negligent. There are five tortfeasors. One tortfeasor's acts constituted 60% of the total negligence, and the acts of each of the other four constituted 10% of the negligence. If the 60% tortfeasor settled with the plaintiff pretrial or was dismissed from the case after settling with the plaintiff and the settling-tortfeasor's share of the total was counted when figuring damages, then each of the 10% negligent defendants left in the case would be liable for 25% of the damages. This is self-evidently unfair to the 10%-negligent tortfeasors and unfairly rewards the plaintiff for whom the amount of the settlement is a bonus payment over and above the total amount of damages awarded by the trier of fact.

Again, say the plaintiff was 40% negligent, the settling tortfeasor was 20% negligent, and each of the other tortfeasors was 10% negligent. If the settling tortfeasor's negligence was not counted, then the negligence of the plaintiff and that of the four remaining tortfeasors negligence would be equal. When the plaintiff's contributory negligence is equal to (or greater than) that of the total negligence (as it would be if the settling-tortfeasor's negligence were not counted), the plaintiff recovers nothing. In that situation, the four remaining tortfeasors would get off with paying nothing.

C. WORKERS' COMPENSATION

It seems likely that an employer released under the worker's compensation statute is included as a "released person" under Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016) and, therefore, the negligence of the employer must be taken into account in a lawsuit from which the employer was released. The Nebraska Worker's Compensation statute provides:

If any employee . . . of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risks, on account of personal injury . . . such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

Neb. Rev. Stat. § 48-148 (Reissue 2016). The Legislature used the same language of "release" when it enacted the current comparative negligence statute, which requires that the negligence of "released persons" be taken into account in the employee's actions against third parties. Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016).

A blameless employer would have no share of the negligence and, if released, no share of the liability. There would, then, be no reduction based on the release of a blameless employer. (Though someone may have to prove to the jury that the employer was blameless, someone other than the employer, of course, for such an employer is not a party in the lawsuit.) It is only the employer whose negligence contributes to the damage who must be included in the damages reduction under § 25-21,185.11. (And, again, someone participating in the lawsuit will have to prove to the jury that the employer was negligent.)

D. APPORTIONING DAMAGES AND THE TORT CLAIMS ACTS

Tort actions against the state or political subdivisions of the state are tried to the court, not to a jury. *See* NJI2d Civ. 8.72 for citations and discussion. In a multiple-defendant jury trial where the state or a political subdivision is a defendant, though the negligence of the governmental body is not determined by the jury for purposes of the judgment for or against that body, it seems that its negligence must be determined by the jury for purposes of the allocation required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016).

This is discussed at length at part III(F) of this Comment, above.

E. REGARDING "RELEASE" IN GENERAL

Regarding the definition and effect of "release" in general, *see* NJI2d Civ. 2.02D (affirmative defense of release); NJI2d Civ. 6.02 (effect of release on vicarious liability); *Millman v. County of Butler*, 244 Neb. 125, 129–30, 504 N.W.2d 820, 823–24 (1993); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 514–21, 496 N.W.2d 433, 440–44 (1993).

"Section 25-21,185.11 refers to a release entered into by the claimant with a 'person liable.'" *Downey v. Western Comm. Coll. Area*, 282 Neb. 970, 983, 808 N.W.2d 839, 850 (2012). It follows, then, that there can be no apportionment of damages with one who, in the first place, was never liable in tort for the claimant's injury. *Downey, supra* ("[A] court . . . cannot apportion tort liability to an employer who, because of workers' compensation, is immune from tort liability . . .").

VIII. [PART VIII OF THIS COMMENT HAS BEEN MOVED]

[What was part VIII of this Comment has been worked into part VII, immediately above.]

IX. JOINT AND SEVERAL LIABILITY

A. DEFENDANTS WHO ARE PART OF A COMMON ENTERPRISE OR PLAN AND ACTING IN CONCERT TO CAUSE HARM

Part of the instruction tells the jury they must answer the following question: "Did any or all of the following defendants cause harm acting in concert with one another as part of a common enterprise or plan?" Just what does this mean? And is there a way to say this that will be easier to understand?

Just what does it mean? The Committee does not know, except to quote the statute. Isn't there a way to say this that will be easier to understand? The Committee hopes so. However, the Committee does not know what this phrase means; to give it meaning under these circumstances would be to create law; the Committee does not create law—not intentionally. No doubt there is a better way to word this part of the instruction, but it will have to come from the courts, based on the pleadings and the evidence in the particular case being instructed.

For what it is worth, the Committee notes this: L.B. 88, § 4 said "In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert to cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several." L.B. 262 changes one word: where L.B. 88 said ". . . act in concert *to* cause harm, the liability of each such defendant . . .," L.B. 262 says ". . . act in concert *and* cause harm, the liability of each such defendant" Neb. Rev. Stat. § 25-21,185.10 (Reissue 2016) (emphasis added.)

When trying to interpret the short-lived L.B. 88, before it was replaced by L.B. 262, this is what this Committee had to say about "act in concert to cause harm":

This statutory language sounds a lot like a description of an intentional tort. However, L.B. 88 only applies to causes of action to which contributory negligence is a defense. . . . Therefore, L.B. 88 and the instructions using this "common enterprise or plan . . ." language do not apply to intentional torts. Liability for intentional torts remain joint and several. So, it is unlikely this part of L.B. 88 is a reference to intentional torts.

The meaning of this part of L.B. 88 also has to do with whether "act in concert to cause harm" (L.B. 88, § 4) means act-

ing in concert intending to cause harm or acting in concert with the result that harm is caused. If it means the former, then, again, it sounds like an intentional tort. If it means the latter, then perhaps it is meant to pick up cases of vicarious liability. Regarding vicarious liability, [see part IX(B)] of this Comment, immediately below. If it means the latter, then, in truth, the Committee does not know what it means: its meaning will have to await judicial interpretation.

Further regarding intentional torts, see part II(C)(2) and XI of this Comment, below.

Perhaps the change from L.B. 88 to L.B. 262 was designed to steer the statute away from strict liability and to something else, such as vicarious liability. (Another change from L.B. 88 to L.B. 262 is this: the former did not have a repealer clause; the latter does, and it repeals the former § 25-21,185, which dealt with strict liability and contributory negligence.) Regarding strict liability and the comparative negligence statute, see parts II(C) and XI of this Comment.

Regarding this part of the instruction, remember: If it is undisputed or determined as a matter of law that all of the defendants in a case “caused harm acting in concert with one another as part of a common enterprise or plan,” then this instruction is not applicable. In that situation, the defendants’ liability is joint and several as a matter of law; NJI2d Civ. 5.02, NJI2d Civ. 5.03, and NJI2d Civ. 5.04 do not apply; the appropriate instructions are either NJI2d Civ. 2.01 and NJI2d Civ. 4.01 or NJI2d Civ. 5.05.

The Committee believes that this part of the pattern instruction will not be used all that often. In most cases where this could be an issue, the Committee believes it will be resolved by the court, as a matter of law.

If there was more than one set of defendants who “caused harm acting in concert with one another as part of a common enterprise or plan,” then this instruction will have to be modified. For a pattern, see part IX(B) of this Comment, immediately below.

B. JOINT AND SEVERAL LIABILITY AND VICARIOUS LIABILITY

In a case that involves issues of joint and several liability and vicarious liability take care that the instructions separate those concepts. Joint and several liability and vicarious liability are separate and distinct, and § 25-21,185.10’s rules regarding joint and several liability and the awarding of economic and noneconomic damages do not apply to the latter.

In the case of a principal vicariously liable for damages caused by an agent, the vicariously liable principal is jointly and severally liable

with the agent, for the entire comparative share of damage assigned to the agent. *See* Rest. 3d (Apport.), § 13, Comment c. *See also* the discussion at NJI2d Civ. 6.02, Comment & Authorities.

In a case where there is joint and several liability and vicarious liability do this: Where the instruction reads, "What percent, if any, of the negligence was (here name defendant 1)'s?," change it to this:

"For the purpose of determining the percent of the total negligence that is attributable to the various (persons, parties, companies, et cetera) involved, (here identify the defendants whose liability is vicarious as a matter of law) are to be treated as though they were a single party. What percent, if any, of the negligence was attributable to (here name the defendants whose liability is vicarious as a matter of law)?"

If the vicarious liability runs to two persons or entities who have been discharged from the lawsuit as specified in § 25-21,185.11, then make an equivalent adjustment in the part of the instruction relevant to those persons or entities.

Otherwise regarding vicarious liability, *see* part IX(A) of this Comment, immediately above.

If there is a question as to whether the liability of some of the defendants is vicarious, then this will all have to be worked in with the instructions in Chapter 6 of NJI2d Civ.

Regarding joint and several liability and partners, *see* NJI2d Civ. 6.21.

C. WHAT THE JURY IS NOT TOLD

This instruction tells the jury to decide everything that is necessary to divide the damages jointly and severally or just severally, in conformance with § 25-21,185.10. But, it does not tell them why they are deciding these things; it does not tell them the effect of this part of their findings; it does not tell them about several liability versus joint and several liability; it does not tell them how this all relates to economic and noneconomic damages. Here is why: it is not necessary to do so, and not doing so keeps the instruction much shorter and simpler.

Section 25-21,185.09 states that "The jury shall be instructed on the effects of the allocation of negligence." This section refers to the allocation of negligence to the plaintiff in the form of contributory negligence. Section 25-21,185.10, the section on the joint and several liability of the defendants, says no such thing. It does say separate judgments shall be rendered against defendants where their liability is only several and not joint, but judgments are rendered by the court, sometimes based on verdicts rendered by the jury.

The jury must be told what "several liability" and "joint and several liability" mean or, at least, must be told the effect of each. In addition, there would be nothing wrong with instructing the jury on the several or joint and several allocation of the damages, and how economic versus noneconomic damages affect that allocation, but it gets quite complicated.

The instruction (and the statute on which it is based) is complex and difficult enough without these additions. The complexity of the instruction without these additions is necessary to convey the intricacies of what the jury is to do. To add an explanation of joint and several liability versus just several liability and what that means to who bears the loss if some defendants are unable to pay and what all of that has to do with economic and noneconomic damages, adds further complexity and does so unnecessarily. The instruction contemplates that the jury will give the judge all the information the judge needs to do the joint-and-several math versus only the several math.

The approach to these instructions has the jury do the sometimes quite complicated math. There is another approach that the Committee recommends if possible. It is to tell the jury everything they are to decide, have them come up with the numbers, and have the judge do the math. This is discussed further at NJI2d Civ. 5.05, Authorities.

X. WRONGFUL DEATH ACTIONS

L.B. 88, the short-lived Bill repealed by L.B. 262, and L.B. 262 are worded differently as regards their relationship to wrongful death actions. With the deletions from L.B. 88 overstruck and the additions to L.B. 262 underlined, here is the difference:

Nothing in sections 1 to 6 of this act shall be construed to limit ~~damages as set forth in wrongful death claims brought pursuant to sections 30-809 and 30-810, but such claims shall be subject to sections 1 to 6 of this act.~~ [Note that sections 1 to 6 of L.B. 262 have been codified as §§ 25-21,185.07 to 25-21,185.12 of the Nebraska Revised Statutes.]

This Comment was originally written as a Comment to L.B. 88's treatment of comparative negligence. Here is part of what the Committee had to say about L.B. 88 and wrongful death:

Section 1 of L.B. 88 states that nothing in the act "shall be construed to limit damages as set forth in §§ 30-809 and 30-810" of the Nebraska Revised Statutes, the wrongful death sections . . . L.B. 88's limits on joint and several liability do limit damages; the act is not to be construed to limit damages in wrongful death actions; on its face, this seems to mean that L.B. 88's change in the law of joint and several liability does not apply in a wrongful death action, even one to which contributory negligence could be a defense.

The legislative history of L.B. 88 [seemed to support this conclusion]. Floor Debate, L.B. 88, First Session, 92nd Legislature, at 879, 882 (Senator Ashford, Feb. 13, 1991). *But see, id.* at 882 (Senator Ashford); *id.* at 1150 (Senators Ashford and Kristensen).

L.B. 262 changes this: though L.B. 262 says it shall not “limit wrongful death claims,” Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016), as noted above, it also says its damage provisions do apply to wrongful death claims. *Id.* The Committee has not done an L.B. 262-draft of the wrongful death damage instruction, NJI2d Civ. 4.60. Therefore, in a wrongful death action alleging a kind of tort to which contributory negligence is a defense and where joint and several liability is an issue, use NJI2d Civ. 4.60, but adapt it so that it identifies and separately states economic and noneconomic damages, using NJI2d Civ. 4.00 and the Verdict Forms instructions at NJI2d Civ. 5.02 through 5.05 as models.

Regarding the difference between a wrongful death action and a survival action, *see* NJI2d Civ. 4.60, Comment.

XI. STRICT LIABILITY, INTENTIONAL TORTS, AND COMPARATIVE NEGLIGENCE

Strict liability and comparative negligence has already been mentioned in part II(C) and part IX of this Comment, both above. This discussion expands on that.

For cases that accrued before February 8, 1992, contributory negligence was a defense to a strict liability action. Neb. Rev. Stat. § 25-21,185 (Reissue 2016). The repealer clause in L.B. 262, the Legislative Bill that became Nebraska’s current comparative negligence statute repeals § 25-21,185. L.B. 262, § 12, Second Session, 92nd Legislature (1992). As noted in many places throughout this Comment, Nebraska’s current comparative negligence statute, operative on and after February 8, 1992, only applies to a type of action where the law allows contributory negligence as a defense. With the repeal of § 25-21,185 the law no longer allows either contributory or comparative negligence as a defense to an action in strict liability. *Shipler v. General Motors Corp.*, 271 Neb. 194, 209–20, 710 N.W.2d 807, 824–31 (2006) (interpreting and applying Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 2016)).

In regard to instructing the jury, this may present the greatest challenge in a case where there are both negligence and strict liability causes of action. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001), may be of some help here. This case involves intentional torts. As with strict liability, the law does not allow contributory negligence as a defense to intentional torts. *Id.* at 654–55, 624 N.W.2d at 619. *Brandon* states that if there are negligent and intentional tortfeasors in the same case, damages are not allocated to intentional tortfeasors. The allocation is only among negligent tortfea-

sors and not among negligent and intentional tortfeasors together. In other words, the negligent tortfeasors are not off the hook for an amount of damage allocated to the intentional tortfeasors because there is no allocation in so far as the latter is concerned.¹³ *Id.* at 654-56, 624 N.W.2d at 619-20. *See also Shipler*, above.

Regarding strict liability *see also* NJI2d Civ. 11.20 through 11.26, below.

XII. OWNERS OF LEASED TRUCKS AND L.B. 262

The owner of any leased truck, truck-tractor, whether with or without trailer, or trailer shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state.

Neb. Rev. Stat. § 25-21,239 (Reissue 2016).

L.B. 262, that is §§ 25-21,185.07 through 25-21,185.12, applies to all civil actions of a type to which contributory negligence is an allowable defense. *See* Part II(C) of this Comment, above. Does that mean that L.B. 262 does away with joint and several liability for noneconomic damages in the situation described in § 25-21,239?

As noted above, L.B. 262 has a repealer clause. The repealer clause

¹³*Brandon v. Cty. of Richardson* explains that

JoAnn first claims that the district court erred in its application of Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), by allocating 85 percent of the damages to the intentional torts of Lotter and Nissen, thereby reducing the judgment against the county for noneconomic damages by 85 percent. JoAnn claims the court impermissibly shifted liability from the county, a negligent tortfeasor, to Lotter and Nissen, intentional tortfeasors.

[A]llowing allocation of damages between negligent and intentional tortfeasors presents practical difficulties. Fact finders are likely to allocate most, if not all, of the damages to the intentional tortfeasor due to the higher de-

gree of social condemnation attached to intentional, as opposed to negligent, tort. Thus, allocation of a percentage of the damages to an intentional tortfeasor reduces the negligent party's incentive to comply with the applicable standard of care. Furthermore, it would be irrational to allow a party who negligently fails to discharge a duty to protect to reduce its liability because there is an intervening intentional tort when the intervening intentional tort is exactly what the negligent party had a duty to protect against.

[T]he trial court erred in allocating 85 percent of the noneconomic damages to the intentional torts of Lotter and Nissen.

Brandon v. County of Richardson, 261 Neb. 636, 655-56, 624 N.W.2d 604, 620 (2001) (citations omitted).

does not cite § 25-21,239 (Reissue 2008). Furthermore, in 1993, § 25-21,239 was moved from its prior location at § 39-6,193 of the Nebraska Revised Statutes. Section 25-21,239 seems to stand as the law of Nebraska, alongside L.B. 262.

XIII. THE AUTOMOBILE GUEST STATUTE AND L.B. 262

Nebraska's Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008), which did have some application to the situation covered by this instruction, has been repealed. 2010 Neb. Laws, L.B. 216. See NJI2d Civ. 7.50A, Special Note, for more information about the repeal of this statute

XIV. EXTRAORDINARY FORCES OF NATURE AND COMPARATIVE NEGLIGENCE

The defense of extraordinary force of nature, formerly "act of God," is discussed generally at NJI2d 2.02C. The relationship between an extraordinary force of nature and comparative negligence, and the effect of an extraordinary force of nature on defendant's liability for economic or noneconomic damages, under both the old statute and the new one, is discussed at NJI2d Civ. 3.42, Authorities.

XV. THE IMPUTATION OF PARENTS' NEGLIGENCE TO THEIR CHILDREN AND VICE VERSA—A CROSS REFERENCE

Regarding comparative negligence and the imputation (or not) of a child's negligence to his or her parents or the parents' negligence to their child, see NJI2d Civ. 3.25, 3.26A, and 3.26B.

XVI. THE APPORTIONMENT OF FAULT IN A CASE WHERE THERE IS MORE THAN ONE PLAINTIFF PRESENTING A JOINT CLAIM, FEWER THAN ALL OF THE PLAINTIFFS SHARE IN THE FAULT, AND THE ACTUAL DAMAGES EXCEED A STATUTORY CAP ON DAMAGES

This is the situation dealt with here. There is a statutory cap on damages; the actual damage suffered exceeds the damage award allowed by the cap; and the damages must be reduced because of the damaged party's contributory negligence. Must the comparative-negligence reduction be applied to the total amount of damage suffered, before reducing that amount to comply with the cap, or must it be applied after the damages are reduced to comply with the cap?

In *Connelly v. City of Omaha* the Court faced this situation. Under the Political Subdivision Tort Claims Act the daughter (Rachel) had a cause of action in negligence against Omaha. Under that same act, her father (Timothy) and mother (Kelly) sued the city for medical expenses, loss of services, and emotional distress. The daughter was not herself negligent (and her father's negligence could not be imputed to her; see

NJI2d Civ. 3.42, 3.26A, and 3.26B), so she recovered damages unreduced by the comparative negligence statute but reduced to \$1 million by the statutory cap on damages. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

Her parents also recovered damages in excess of the cap; 75% of the total fault was attributable to the city, 25% to the father, and none to the mother. This raises two questions: How are the damages to be reduced given that one of these two parties was responsible for part of the negligence and the other was not responsible for any of it? And is the comparative negligence reduction to be applied to the total amount of damage suffered by the parents or to the statutory cap's \$1 million dollar upper limit?

There remains the issue of how to apportion Timothy's comparative fault against the single damage cap applicable to the joint parental claim, given that Kelly was not found to be at fault. We agree that a statutory limitation on damages such as that of § 13-926(1) [of the Political Subdivision Tort Claims Act] "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for comparative negligence, since the latter approach would multiply the effect of the damage limitation." Here the district court determined that the parents sustained damages in the total amount of \$1,663,550.32. It reduced one half of that amount by 25 percent due to Timothy's comparative fault, thus arriving at an award for Timothy of \$623,661.02 and an award for Kelly of \$831,775.17. The total of these awards is \$1,445,436.19. [T]his award must be reduced to \$1 million pursuant to [the statutory cap], with this judgment payable jointly to Kelly and Timothy.

Connelly v. City of Omaha, 284 Neb. 131, 159, 816 N.W.2d 742, 764-65 (2012) (footnote citing 57 Am. Jur. 2d *Municipal, etc., Tort Liability* § 602 at 611 (2012) and a Texas case omitted).

XVII. A FINAL POINT REGARDING A 10 TO 2 VERDICT

What about a case where these Verdict Forms are used and, after the requisite amount of time, at least 10 jurors agree to each answer to each question, but it is not the same set of 10 jurors in agreement on each answer? Previous annual updates of this pattern jury instruction book stated that the Committee did not know what the law is in this regard but that the patterns in this chapter had been drafted as though all that is important is that there is 10 to 2 agreement to the final product, there needn't be agreement by the same set of 10 jurors to each separate answer. This is the Committee's interpretation of L.B. 262. In May of 2003, the Nebraska Supreme Court adopted this position. *Gourley*

v. Neb. Methodist Health Sys., Inc., 265 Neb. 918, 927, 663 N.W.2d 43, 58 (2003). That opinion does the following three things: recognizes that there are two approaches, the “same juror” approach and the “any majority” approach; discusses each approach, reviewing the literature and the cases from other jurisdictions; and adopts the “any majority” approach for the State of Nebraska. *Id.* at 925–30, 663 N.W.2d at 57–61.

AUTHORITIES

The following is a lengthy quotation from Neb. Rev. Stat. §§ 25-21,185 and 25-21,185.07 through 25-21,185.12 (Reissue 2016) (L.B. 262, 2d Session, 92nd Legislature (1992)).

25-21,185.07. Civil actions to which contributory negligence is a defense; sections applicable. Sections 25-21,185.07 to [sic] 25-21,185.12 shall apply to all civil actions to which contributory negligence may be, pursuant to law, a defense that accrue on or after the effective date of this act for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability Nothing in sections 1 to 6 of this act shall be construed to limit wrongful death claims brought pursuant to sections 30-809 and 30-810, but such claims shall be subject to sections 1 to 6 of this act.

25-21,185.08. Civil actions to which contributory negligence is a defense; terms, defined. For purposes of sections 25-21,185.07 to [sic] 25-21,185.12:

(1)

(2) Economic damages shall mean monetary losses, including, but not limited to, medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities; and

(3) Noneconomic damages shall mean subjective, non-monetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation, but shall not include economic damages.

25-21,185.09. Civil actions to which contributory negligence is a defense; effect on recovery. Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

25-21,185.10. Civil actions to which contributory negligence is a defense; multiple defendants; joint and several liability; when; allocation of liability. In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.

In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

25-21,185.11. Civil actions to which contributory negligence is a defense; release, covenant not to sue, or similar agreement; effect. (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but that person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

.....

Section 13 of L.B. 262 provides as follows: "Sec. 13. Since an emergency exists, this act shall be in full force and effect, from and after its passage and approval, according to law."

In the first two sections quoted above, §§ 25-21,185.07 and 25-21,185.08, the following appears: "Sections 25-21,185.07 to [sic] 25-21,185.12" The "[sic]" appears in the quotation because it is clear that the statute means "Sections 25-21,185.07 through 25-21,185.12," and not "Section 25-21,185.07 to 25-21,185.12." Section 25-21,185.12 is included in, not excluded from, the cross-reference.

See also the Comment, above, and the cross-references therein.

NJ12d Civ. 5.05

VERDICT FORM 5.05: TORT ACTION WHERE CONTRIBUTORY NEGLIGENCE IS SUBMITTED TO THE JURY AND JOINT AND SEVERAL LIABILITY IS NOT AN ISSUE AND THE JURY FINDS THAT BOTH PLAINTIFF AND DEFENDANTS HAVE MET THEIR BURDENS OF PROOF

VERDICT FORM NO. _____

We the jury find that both the plaintiff and the defendant have met their burdens of proof. We answer the questions on this Verdict Form as follows:

LIST OF PERCENTAGES:

What percent of the negligence was (here insert name of plaintiff)'s? _____%

What percent, if any, of the negligence was (here name defendant 1)'s? _____%

What percent, if any, of the negligence was (here name defendant 2)'s? _____%

[Repeat as necessary, specifying each defendant.] _____%

What percent, if any, of the negligence was (here identify entity 1, discharged as specified in 25-21,185.11)'s? _____%

What percent, if any, of the negligence was (here identify entity 2, discharged as specified in 25-21,185.11)'s? _____%

[Repeat as necessary, specifying each entity discharged as specified in 25-21,185.11.] _____%

The total negligence must add up to 100%. TOTAL = 100%

If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court.

If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, using Instruction No. ____, you must determine the total amount of damage suffered by the plaintiff, and enter that number here: Plaintiff's total damages, figured pursuant to Instruction Number ____, are \$____.

The amount of money that will actually be awarded to the plaintiff is not the total amount of damage you have listed above. The amount of money the plaintiff will receive will be figured as follows: Once you have returned your verdict, the judge will take the number you have

entered as the total amount of plaintiff's damage and reduce it by the percentage of the negligence you have attributed to the plaintiff and to (here identify the discharged) parties. That amount is the amount of money that will be awarded to the plaintiff. In other words, if the plaintiff's negligence was X% and (here identify the discharged parties)'s negligence is Y%, then the judge will reduce the plaintiff's total damages by X% + Y%, and the remainder will be awarded to the plaintiff.

Dated _____, 20____

Presiding Juror _____

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

SPECIAL NOTE

Nebraska's comparative negligence statute, Neb. Rev. Stat. §§ 25-21,185.07, *et seq.* (Reissue 2016), requires that the jury be instructed on the effects of their allocation of negligence. The Nebraska Supreme Court has held that verdict forms are not a substitute for jury instruction. Reading to the jury a verdict form that tells them the effect of their allocation of negligence does not count as instructing them on the effect of their allocation of negligence. *Sinsel v. Olsen*, 279 Neb. 38, 46-47, 777 N.W.2d 54, 59-60 (2009); *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). There must be instruction on the effects of the allocation of negligence and this verdict form does not accomplish that.

This problem cannot be waived by lack of objection. It is prejudicial error if the trial court does not properly instruct on the allocation of negligence under Nebraska's comparative negligence statute. *City of Wahoo v. NIFCO Mech, Sys.*, 306 Neb. 203, 211-14, 944 N.W.2d 757, — (2020); *Sinsel*, 279 Neb. at 46-47, 777 N.W.2d at 59-60; *Russell*, 262 Neb. at 857, 635 N.W.2d at 738; *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620.

The additional instruction that is needed can be based on the instruction the Supreme Court suggested in the *Wheeler* case and the Committee believes that it can be based on, but must be separate from, the verdict forms found at NJI2d Civ. 5.02-5.05. Regarding this whole problem in general and a discussion of the relevant parts of the *Wheeler* case in particular, see the discussion in the Comment, below.

See also NJI2d Civ 5.04 Comment generally and particularly at part III(C).

COMMENT

The Verdict Forms that are used must be read to the jury. Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). See part I(C) of the Comment to NJI2d Civ. 5.04. See also part III(B) of the Comment to NJI2d Civ. 5.04. They will be read right before NJI2d Civ. 5.01, Submission to the Jury.

For a general discussion of this instruction, see the Comment to NJI2d Civ. 5.04.

This particular instruction is written to be used in combination with NJI2d Civ. 2.02A-1. This is the verdict form referenced in paragraph 3 of NJI2d Civ. 2.02A-1, *i.e.*, the verdict form to be used in a tort action where contributory negligence is submitted to the jury and joint and several liability is not an issue. (If the jury finds both plaintiff and defendant have met their burdens and joint and several liability is an issue, then use NJI2d Civ. 2.02A-1 and NJI2d Civ. 5.04. If the jury finds that plaintiff has met his or her burden and defendants have not and joint and several liability is an issue, use NJI2d Civ. 2.02A-1 and NJI2d Civ. 5.03.)

“Verdict forms to be submitted to the jury should be treated in the same manner as jury instructions to be submitted.” *Hiway 20 Terminal, Inc. v. Tri-Cty. Agri-Supply, Inc.*, 235 Neb. 207, 213, 454 N.W.2d 671, 675 (1990). This is further discussed in the Comment to NJI2d Civ. 5.01.

The Verdict Forms that are used must be read to the jury. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016), quoted at NJI2d Civ. 5.04, Authorities. The jury must be instructed on the effect of their allocation of negligence. *Sinsel v. Olsen*, 279 Neb. 38, 46-47, 777 N.W.2d 54, 59-60 (2009); *Russell v. Stricker*, 262 Neb. 853, 857-60, 635 N.W.2d 734, 738-40 (2001); *Pleiss v. Barnes*, 260 Neb. 770, 774, 619 N.W.2d 825, 828 (2000); *Wheeler v. Bagley*, 254 Neb. 232, 241, 575 N.W.2d 616, 621 (1998). This instruction must be separate from the verdict form. That is, it is not enough that the jury is given and that they complete a verdict form that explains the effect of their allocation of negligence. They must be instructed on its effect and a verdict form may not serve as a substitute for the jury instruction required by the statute. *Russell*, 262 Neb. at 857-60, 635 N.W.2d at 738-40; *Pleiss*, 260 Neb. at 774, 619 N.W.2d at 828. The Verdict Forms will be read right before NJI2d Civ. 5.01, Submission to the Jury.

Use only those parts of this instruction as are applicable in the case under instruction.

The words “if any” appear in parts of the instruction such as, “What

percent, if any, of the negligence was (here name defendant 1)'s? — %." The words "if any" do not appear in this part of the instruction: "What percent of the negligence was (here insert name of plaintiff)'s? — %." This is because this verdict form is to be used only when the jury finds that the plaintiff and the defendants have met their burden of proof, that is, when the jury finds that the plaintiff was in fact negligent and that at least some of the defendants were in fact negligent. "[I]f any" appears where it does because the jury might find that some of the defendants were negligent and some were not and that some of the released parties were negligent and some were not. If there is only one defendant, then use the sample Verdict Form that appears just below.

The following is a sample of how pattern Verdict Form 5.05 might be adapted for use in a case where there is one plaintiff, one defendant, and there are no entities discharged as described in § 25-21,185.11. This sample is complete but for the signature lines.

VERDICT FORM NO. ____

We the jury find that both the plaintiff and the defendant have met their burdens of proof. We answer the questions on this Verdict Form as follows:

LIST OF PERCENTAGES:

What percent of the total negligence is attributable to (here insert name of plaintiff)? _____%

What percent of the total negligence is attributable to (here insert name of defendant)? _____%

The total negligence must add up to 100%. TOTAL = 100%

If the negligence of the plaintiff equals 50% or more, then you must return a verdict for the defendant: date and sign a verdict for the defendant and return it to the court.

If the negligence of the plaintiff is less than 50%, then you must return a verdict for the plaintiff and, using Instruction No. ____, you must determine the total amount of damage suffered by the plaintiff and enter that number here: Plaintiff's total damages, figured pursuant to Instruction No. ____, are \$ ____.

The amount of money that will actually be awarded to the plaintiff is not the total amount of damage you have listed above. The amount of money the plaintiff will receive will be

figured as follows: Once you have returned your verdict, the judge will take the number you have entered as the total amount of plaintiff's damage and reduce it by the percentage of the negligence you have attributed to the plaintiff. That amount is the amount of money that will be awarded to the plaintiff. In other words, if the plaintiff's negligence was X%, then the judge will reduce the plaintiff's total damages by X%, and the remainder will be awarded to the plaintiff.

DATED: _____.

AUTHORITIES

A. IN GENERAL

Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016), quoted in part and discussed in the Comment and Authorities to NJI2d Civ. 5.04. (This statutory section is sometimes cited in the Comments and Authorities of NJI2d Civ. 5.02 through 5.04 as Legislative Bill 262, Second Session, 92nd Legislature (1992) or L.B. 5.05. The difference in citation form is explained as follows: As of the date those instructions first went to press, L.B. 262 had not been codified in the Nebraska Revised Statutes.)

B. THE DIFFERENCE BETWEEN THE PATTERN ABOVE AND THE PATTERN SUGGESTED IN THE *WHEELER* CASE

Wheeler v. Bagley, 254 Neb. 232, 240–41, 575 N.W.2d 616, 621 (1998) contains a suggested verdict form. The above pattern verdict form is different in part from that suggested in *Wheeler*. The controlling statute and the *Wheeler* case each require that “The jury shall be instructed on the effects of the allocation of negligence.” Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016). There are two ways of fulfilling that statutory requirement. One is to tell the jury the effect of the allocation of negligence, but let the judge do the actual math. The other is to tell the jury the effect of the allocation of negligence and have the jurors do the math required. The pattern verdict form in *Wheeler* is the latter kind; it has the jury do the math. The pattern verdict form above is the former kind; it tells the jury what math will be done but leaves the actual math to the judge.

The reason the Committee is suggesting an approach that is different from the one suggested in *Wheeler*—i.e., suggesting an approach where the judge does the math—is that the math involved is particularly complicated and beyond the competence of many people, including many jurors. The Committee's approach leaves these complicated calculations in the hands of the judge. It makes sense to the Committee to have the jurors determine the percentages of negligence and the total amount of damage, and to tell the jurors that the total amount of plaintiff's damages will be reduced to reflect the plaintiff's percentage share of the total negligence, and then let the judge do the percentage-multiplication math. In the Committee's view, there will be fewer math errors on the form, including fewer potentially appealable math errors, and fewer

frustrated jurors if they are not required to do the percentage multiplication themselves. And it seems to the Committee that this is consistent with the requirements of the statute and the *Wheeler* case.

If the Committee's approach is incorrect—if it is not enough to tell the jury the effect of their allocation of negligence, but they must be made to do the actual math, even though the statute does not say they must do the math—then the Committee suggests deleting the final substantive paragraph of the instruction—the paragraph beginning “The amount of money that will actually be awarded to the plaintiff is not the total amount of damage you have listed above”—and substituting in its place an adapted version of one of the following:

(If there is only one defendant and no discharged entity, then insert the following paragraph at this point.)

Multiply the total damages, from above, by the percent of negligence attributable to (here insert name of defendant), also from above. The resulting number is the amount of damages that the plaintiff may recover. Enter that number below.

Amount of damages plaintiff may recover: \$_____.

(If there is one defendant and one or more discharged entities, then include the following paragraph at this point.)

Multiply the total amount of damages awarded to the (here identify the plaintiff) by the percent of the negligence that is attributable to (here identify the defendant, but not the plaintiff or the discharged entity or entities). The resulting number is the amount of damages that the plaintiff may recover. Enter that number below.

Amount of damages plaintiff may recover: \$_____.

(If there is more than one defendant and one or more discharged entities, then include the following paragraph.)

Take the percent of the negligence, if any, that is attributable to (here identify each defendant the jury has found to be negligent, but not the plaintiff or the discharged entity or entities). Add those percentages together to find the total percent of the negligence that is attributable to (here identify the negligent defendant(s)).

Take the total amount of damages awarded to (here identify the plaintiff) times the total percent of negligence attributable to (here identify the negligent defendant(s), but not the plaintiff or the discharged entity or entities). The resulting

number is the amount of damages that the plaintiff may recover from (here identify each or all of the defendants). Enter that number below.

Amount of damages plaintiff may recover: \$_____.

That number is the total amount of damages to be awarded to the plaintiff, from the defendants. When the defendants are not jointly and severably liable, then one more calculation must be made. If the judge is not allowed to make that calculation, then the jurors must be instructed that they are to do it, and how they are to do it. The total damage award must be divided up between or among the liable defendants, with each defendant paying only its percentage share.

The controlling statutes read as follows.

Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

Neb. Rev. Stat. § 25-21,185.9 (Reissue 2016).

(1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016).

The first of these two quoted statutory sections says that the amount of damages awarded to plaintiff "shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence . . ." It goes on to say that "[t]he claim of the claimant against other persons shall be reduced by the

amount of the released person's share of the obligation as determined by the trier of fact." The approach stated above accomplishes both of those things by awarding damages to the plaintiff based on the defendant(s)'s share of the negligence.

While the language of the statutory sections quoted above says that the plaintiff's negligence is to be removed from the equation, Neb. Rev. Stat. § 25-21,185.9, and that the negligence of released persons is to be removed as well, simply figuring the percent of the negligence attributable to the defendant and awarding that to the plaintiff is a much simpler way of removing the negligence of the plaintiff and the released persons. And it comes out at the same place, as calculating defendant's share of the negligence and awarding it to the plaintiff takes out both the plaintiff's share and the share of any released person. It is a much easier calculation, and it accomplishes what the statute says it is to accomplish: when there are three entities, *i.e.*, plaintiff, defendants, released persons, and their negligence equals 100%, the easiest way to remove plaintiffs' and released persons' percent of the negligence is to figure defendants'.

Note that NJI2d 5.05 and the sample instructions included in this Authorities do not apply "[in] an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm . . .," Neb. Rev. Stat. § 25-21,185.10. In that case each defendant is jointly and severally liable for the plaintiff's economic damages (but not for plaintiff's noneconomic damages). Regarding instruction when joint and several liability is an issue, see NJI2d Civ. 5.02, 5.03, and 5.04.

CHAPTER 6

SPECIAL LEGAL RELATIONSHIPS OF PARTIES—VICARIOUS RESPONSIBILITY

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

A. AGENCY AND EMPLOYMENT

- 6.01 Agency—Issues and Burden of Proof
- 6.02 Agency—Vicarious Liability, Agency and Scope of Authority in Issue—Effect of Findings
- 6.03 Definition of Agency
- 6.04 Definition of Scope of Authority
- 6.05 Agency—Principal and Agent Sued, Negligence Action, Vicarious Liability, No Issue As to Agency or Scope of Authority—Effect of Findings
- 6.06 Definition of Independent Contractor
- 6.08 Agency—Apparent Authority
- 6.10 Agency—Original Principal Bound by Acts of Loaned or Hired-Out Agent
- 6.11 Agent's Deviation from Principal's Business

B. PARTNERSHIP

- 6.20 Partnership—Issues and Burden of Proof
- 6.21 Partnership—Vicarious Liability in a Negligence Action—Effect of Findings
- 6.22 Partnership—Vicarious Liability in a Contract Action—Effect of Findings
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- 6.24 Partnership—Ordinary Course of Business—Negligence Action
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- 6.26 Partner by Estoppel—Liability of One Who Claims to Be a Partner
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C. CORPORATIONS

- 6.30 A Corporation Acts Through Its Employees or Agents

D. JOINT VENTURE

- 6.40 Joint Venture—Issues and Burden of Proof
 - 6.41 Joint Venture—Vicarious Liability in a Negligence Action—
Effect of Findings
 - 6.42 Joint Venture—Vicarious Liability in a Contract Action—Effect
of Findings
 - 6.43 Definition of Joint Venture
 - 6.44 Joint Venture—Ordinary Course of Business—Negligence
Action
 - 6.45 Joint Venture—Ordinary Course of Business—Contract Action
-

A. AGENCY AND EMPLOYMENT

NJ12d Civ. 6.01

AGENCY—ISSUES AND BURDEN OF PROOF

(As explained in the Comment & Authorities, the following is to be worked into NJ12d Civ. 2.01 or NJ12d Civ. 15.01.)

1. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (name of alleged agent, hereinafter “A”) was the agent of (name of alleged principal, hereinafter “P”); and

2. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (A) was acting within the scope of (his, her) authority as the agent of (P).

COMMENT & AUTHORITIES

- I. GENERAL USE
- II. “AGENCY” VERSUS “EMPLOYMENT”
 - A. IN GENERAL
 - B. IN ACTIONS BASED ON VICARIOUS TORT LIABILITY
 - C. IN CONTRACT ACTIONS
 - D. INDEPENDENT CONTRACTORS
- III. LIABILITY FOR AGENT’S ACTS
 - A. THE AGENT’S PERSONAL LIABILITY
 - B. THE PRINCIPAL’S LIABILITY
- IV. NEGLIGENCE HIRING, TRAINING, OR SUPERVISION
- V. RELATED TOPICS

I. GENERAL USE

The instructions in part A of Chapter 6 have to do with two special legal relationships: agency and employment. These pattern instructions use the language of agency. The instructions actually given should use either the language of agency or employment depending, of course, on which relationship is involved in the case at hand and the words actually used during the trial. In other words, when appropriate, substitute the words "employment," "employer," and "employee" for the words "agency," "principal," and "agent"; additionally, the word "employment" may be substituted for the word "authority."

This instruction—NJI2d Civ. 6.01—is to be used when a principal is sued over the acts or omissions of his or her agent. It states the issues and, because of where it will be placed in the instructions, the burden of proof as to the principal. That is, it states what the plaintiff must prove (and the jury must find) if the principal is to be held liable for the acts or omissions of the agent. In a negligence action, this instruction should be worked into NJI2d Civ. 2.01, at part I(B), which states the burden of proof on the plaintiff's claims. In a contract action, it should be worked into NJI2d Civ. 15.01, at part I(B), which states the burden of proof on the plaintiff's claims. In addition, part I(A), the "issues" part of the statement-of-the-case instruction, will have to be modified to include one or both of the claims of agency and scope of agency.

Insert into the appropriate statement-of-the-case instruction as much of this instruction as is called for by the issues in the case at hand. This instruction is written to apply where both agency and scope of authority are at issue. If only one of the two is at issue, modify this instruction by eliminating the unnecessary portion. If neither agency nor scope of authority is in issue, then *see* NJI2d Civ. 6.05.

If the principal is not the only defendant, the references to "the defendant" in the statement-of-the-case instruction (NJI2d Civ. 2.01 or 15.01) will have to be modified. Where the plaintiff does not claim that the principal is personally liable, the "Issues" part of the appropriate statement-of-the-case instruction must be drafted to reflect that fact.

If both the agent and the principal have been sued, then there are two options: (1) the statement of the case against each can be combined into one statement-of-the-case instruction or (2) two separate statement-of-the-case instructions can be given, one for the agent and one for the principal.

For the definition of agency and scope of authority, *see* NJI2d Civ. 6.03 and 6.04, respectively. As noted above, if neither agency nor scope of authority is in issue, *see* NJI2d Civ. 6.05. Where the jury must decide whether a person was either an agent or employee, on the one hand, or an independent contractor, on the other, *see* NJI2d Civ. 6.06, Comment & Authorities.

II. "AGENCY" VERSUS "EMPLOYMENT"

A. IN GENERAL

As discussed above, the instructions in part A of Chapter 6 should use either the language of agency or of employment, depending on which relationship is involved in the case at hand.

The Restatement (Second) of Agency (1958) defines the agency relationship differently than it defines the employment relationship. The difference is in the element of control: the principal has the right *to control* the agent, *id.* at § 1 (emphasis added); the employer "has the right *to control the physical conduct of* the [employee]," *id.* at § 2 (emphasis added). The latter definition is the narrower of the two.

Discussing employment in the context of the Wage Payment and Collection Act, the Court has stated that "[a]n individual is not an employee under the Act if the 'individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact.'" *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 906, 896 N.S.2d 612, 627 (2017). Regarding the Wage Payment and Collection Act, *see* NJI2d Civ. 4.52, Comment & Authorities.

For more on what constitutes an agency relationship, *see* NJI2d Civ. 6.03, Comment & Authorities.

B. IN ACTIONS BASED ON VICARIOUS TORT LIABILITY

Regarding vicarious tort liability, it does not seem to matter "whether the relationship is more technically classified as principal-agent . . . or employer-employee." NJI 6.03, Comment (1969). Under Nebraska cases on the subject of vicarious liability in tort actions, the rules of law seem to be the same. For example, the language of the employer-employee cases is the same as that of the principal-agent cases. *E.g.*, *Sutton v. Inland Constr. Co.*, 144 Neb. 721, 725, 14 N.W.2d 387, 390 (1944) ("[A] person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employers or principal's business with his knowledge and direction.").

Additionally, while an employer is vicariously liable for the negligent acts of an employee acting in the course of the former's business, the employer generally is not vicariously liable for the acts of an independent contractor. The difference is that the employer has control over the acts of an employee acting in the course of the former's business, but the employer generally has no control over the manner in which the independent contractor's work is done. *Cruz v. Lopez*, 301 Neb. 531, 542, 919 N.W.2d 479, 489–90 (2018). An agent is more like the employee in that the principal generally has control over the acts of

an agent acting on behalf of the principal. *See* Hemmerling v. Happy Cab. Co., 247 Neb. 919, 926, 530 N.W.2d 916, 921 (1995) ("We have repeatedly stated that although control or the right of control is the chief factor to be considered when identifying one acting on behalf of another as [either] an employee or an independent contractor, it is not the conclusive factor."); *and see* more such cases cited at NJI2d Civ. 6.06, Comment & Authorities, part II(B). Regarding the employer-employee and the principal-agent relationship, *see* part (3)(B) of this Comment & Authorities and NJI2d Civ. 603, Comment & Authorities; regarding the employer-independent contractor relationship, including the four exceptions to the rule that the employer is not vicariously liable for the acts of the independent contractor, *see* NJI2d Civ. 6.06, Comment & Authorities.

See also S.M.S. Trucking Co. v. Midland Vet, Inc., 186 Neb. 647, 650, 185 N.W.2d 667, 669 (1971) (where employee acts under direction of employer, latter is liable not merely under rules of respondeat superior, but also as joint participant, and employees and employer are, in fact, principals and joint participants). Prosser's discussion of an employer's vicarious liability for the acts of an employee cites often and relies heavily upon the Restatement of Agency (Second). Prosser and Keeton On the Law of Torts § 70 (W. Keeton gen. ed. 5th ed. 1984).

C. IN CONTRACT ACTIONS

These instructions are drafted to apply both in tort and contract cases. In an action on a contract, it is possible that the applicable law could be different depending on whether the relationship involved was that of principal and agent or that of employer and employee. If it is, that may have to be taken into account when drafting instructions based on these patterns. This is discussed further below in this Comment & Authorities.

D. INDEPENDENT CONTRACTORS

Regarding independent contractors and the difference between them, on the one hand, and agents or employees, on the other, *see* NJI2d Civ. 6.06. Among other things, NJI2d Civ. 6.06, Comment & Authorities discusses how to handle the situation where the jury must decide whether a person was an independent contractor or an agent or employee.

III. LIABILITY FOR AN AGENT'S ACTS

A. THE AGENT'S PERSONAL LIABILITY

1. NEGLIGENCE ACTION

Whether an agent is personally liable in a negligence action depends (as does liability in every negligence action) on the agent's duty of care. Did the agent owe a duty of care to the one injured? *Carlson v. Metz*,

248 Neb. 139, 143, 532 N.W.2d 631, 635 (1995) (citing *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983)). "Before the employee can be held liable there must be some reason why he should be called upon to act and thus use proper care to prevent injury to the third person, or some relationship between the parties calling that duty into existence." *Dieter v. Hand*, 214 Neb. 257, 262, 333 N.W.2d 772, 775 (1983) ("[A]n employee [is not] liable to a third person for a loss sustained by the latter as the result of the employee's failure to perform a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person.").

It is the agent's common-law duty of care that determines the agent's negligence liability, not the agent's contract with the principal. *Carlson*, 248 Neb. at 143, 532 N.W.2d at 635. So, an agent is not shielded from liability for his or her own negligence solely by virtue of the fact that he or she was acting as the agent of another.

"The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon the circumstances of the particular case." *Dieter*, 214 Neb. at 261-262, 333 N.W.2d at 775 (1983).

"An agent can be held liable if the agent makes some representation or performs some act on the agent's own responsibility without authorization from the principal." *Nathan v. McDermott*, 306 Neb. 216, 245, 945 N.W.2d 92, 114 (2020) *Accord*, e.g., *Edwin Bender and Sons v. Ericson Livestock Comm'n Co.*, 228 Neb. 157, 164, 421 N.W.2d 766, 771 (1988) (stating further that "this rule is intended to apply only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction." *Id.* at 165, 421 N.W.2d at 771). Narrowing the point, "An agent may be held liable for the agent's conduct, such as misrepresentation of a material fact, during a transaction on behalf of the principal." *Nathan*, 306 Neb. at 245, 945 N.W.2d at 114. *Accord*, e.g., *Edwin Bender*, 228 Neb. at 167, 421 N.W.2d at 772.

It is generally recognized that "[a]s a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he is merely acting as agent." 3 C.J.S. *Agency* § 361 (1973). . . .

However, an agent can be held liable if he makes some representation or performs some act on his own responsibility without authorization from his principal. See 3 C.J.S. *Agency* § 362 (1973). But "[t]his rule is intended to apply only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction" *Id.*

Edwin Bender, 228 Neb. at 164-65, 421 N.W.2d at 766.

"An 'agent may be subject to tort liability to the principal for failing

to perform his duties.’” *McReynolds v. RIU Resorts and Hotels, S.A.*, 293 Neb. 345, 350, 880 N.W.2d 43, 47 (2016).

The agent’s duty of care can be a delegated duty. In this situation, there are four things to consider when determining whether personal liability will be imposed on an individual employee, agent or other corporate officer: (1) The principal or employer must owe a duty of care to a third party and breach of that duty must have caused the damage sued upon. (2) That duty must have been delegated by the principal or employer to the defendant officer, agent, or employee. (3) The defendant must have personally failed to use reasonable care resulting in a breach of the duty owed to the third party. (4) “[W]ith regard to personal fault, it is not sufficient that the defendant merely had a general administrative responsibility for the work being done, nor is it sufficient that the defendant delegated that general responsibility with due care to a responsible subordinate, unless the defendant personally knows or should have known that the subordinate failed to perform or performed negligently and the defendant nevertheless did not cure the risk of harm. The defendant officer, agent, or employee must owe a personal duty to the injured third party, breach of which specifically caused the plaintiff’s damages.” *Carlson*, 248 Neb. at 143–144, 532 N.W.2d at 635 (1995) (citing *Dieter v. Hand*, *supra*).

For a complete discussion of the duty of care as it applies to a negligence action, see *NJI2d Civ. 3.02, Comment & Authorities*.

2. CONTRACT ACTION

The general rule in a contract action where the obligation under the contract is that of the principal is that “a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.” *Nathan v. McDermott*, 306 Neb. 216, 245, 945 N.W.2d 92, 114 (2020). *Accord*, e.g., *Edwin Bender and Sons v. Ericson Livestock Comm’n Co.*, 228 Neb. 157, 164, 421 N.W.2d 766, 771 (1988). *See also* the cases cited after the *Accord* signal following the second indented quotation below.

“[A]n action for breach of contract to procure insurance is inappropriate when brought against the insurer’s agent who, within the scope of his or her authority, contracted on behalf of the disclosed principal and did not bind himself or herself personally. Specifically, an insurance agent’s mere promise to procure requested coverage through his sole principal is insufficient to create the agent’s personal liability because that promise is clearly within the scope of the agent’s authority. However, we will recognize a cause of action against a broker for breach of contract to procure insurance because the broker is the insured’s agent.”

Broad ex rel. Estate of Schekall v. Randy Bauer Ins. Agency, Inc., 275 Neb. 788, 795, 749 N.W.2d 478, 484 (2008).

“However, an agent can be held liable if he makes some representation or performs some act on his own responsibility without authorization from his principal. But ‘[t]his rule is intended to apply only where the unauthorized act of the agent leaves the third party with no claim against the principal, who is not bound by the transaction. . . .’”

Edwin Bender and Sons, 228 Neb. at 164–65, 421 N.W.2d at 771 (citations omitted). *Accord Nathan*, 306 Neb. at 245, 945 N.W.2d at 114; *Broad*, 275 Neb. at 794, 749 N.W.2d at 483; *Rankin*, 275 Neb. at 795, 749 N.W.2d at 760; *Walker v. Walker Enters.*, 248 Neb. 120, 130, 532 N.W.2d 324, 331 (1995); *Hecker v. Ravenna Bank*, 237 Neb. 810, 817, 468 N.W.2d 88, 94 (1991) (same rule applies to corporation officers or directors); *Suzuki v. Gateway Realty*, 207 Neb. 562, 566, 299 N.W.2d 762, 766 (1980).

The general rule is that when a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract. Stated another way, an agent for a disclosed principal is not liable on a contract in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility. . . .

[However,] while general agency rules apply to the attorney client relationship, there is much more involved than mere agency. The attorney, not the client, is responsible for performing the details of the litigation.

Thus, . . . unless a lawyer or third person disclaims such liability at the time of contract acting, a lawyer is subject to liability to third persons on contracts entered into on behalf of a client if “the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer’s credit.”

Thomas & Thomas Court Reporters v. Switzer, 283 Neb. 19, 23–25, 810 N.W.2d 677, 682–83 (2012) (footnotes omitted). For more on the attorney-client relationship generally, see NJI2d Civ. 12.04, Comment & Authorities.

Regarding an action on a breach of contract to procure insurance, the difference between an agent and a broker can be critical, as follows.

■ The insurance agent represents the insurer (the principal). *Broad*, 275 Neb. at 794, 749 N.W.2d at 483. When the insurance agent,

within the scope of his or her agency, contracts on behalf of a disclosed principal and does not bind him- or herself personally, then an action for breach of contract to procure insurance does not lie against the agent. "Specifically, an insurance agent's mere promise to procure requested coverage through his sole principal is insufficient to create the agent's personal liability because that promise is clearly within the scope of the agent's authority." *Broad*, 275 Neb. at 795, 749 N.W.2d at 484.

■ The insurance broker represents the insured. *Countryside Coop v. Harry A. Koch Co.*, 280 Neb. 795, 802, 790 N.W.2d 873, 881 (2010) ("An insurance broker acts as an agent of the insured."); *Broad*, 275 Neb. at 794, 749 N.W.2d at 483. The insured does have a "cause of action against a broker for breach of contract to procure insurance because the broker is the insured's agent." *Broad*, 275 Neb. at 795, 749 N.W.2d at 484.

3. ACTION BY THE PRINCIPAL

An agent who fails to fulfill agency duties may be liable to the principal for the latter's losses, but not if the principal authorized, acquiesced in, or ratified the agent's acts. *Barta v. Kindschuh*, 246 Neb. 208, 212, 518 N.W.2d 98, 100 (1994).

B. THE PRINCIPAL'S LIABILITY

1. A Principal's Direct and Vicarious Liability Generally

In tort actions, a principal may be either vicariously or directly liable for the acts or omissions of an agent. If an agent commits a negligent act or omission while acting within the scope of his or her agency, then the principal may be vicariously liable. If an agent commits a negligent act or omission done under the direction of or subsequently ratified by the principal, then the principal may be directly liability as a joint tortfeasor.

As a practical matter, when a plaintiff injured by an agent sues the principal alleging vicarious liability (usually under a theory of respondeat superior), the plaintiff is attempting to reach the deeper pockets of the principal.

If plaintiff's damages were caused by negligent acts of an agent and those acts were directed or ratified by the principal, then the agent is liable because the agent committed the acts and the principal is liable because the principal directed or ratified the acts. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 219, 475 N.W.2d 105, 112 (1991). ("The law imputes to the principal . . . responsibility for the negligent acts of his or her agent . . . done in obedience to the express orders or directions of the [principal]."), *overruled on other grounds by Hynes v. Hynes*, 251 Neb. 404, 558 N.W.2d 35 (1997); *S.M.S. Trucking Co. v. Midland*

Vet, Inc., 186 Neb. 647, 650, 185 N.W.2d 667, 669 (1971) (“Where an employee acts under the direction of his employer, the employer is liable, not merely under the rules of respondeat superior, but rather as a joint participant in the acts complained of.”) (quoting *Fonda v. Northwestern Pub. Serv. Co.*, 138 Neb. 262, 276, 292 N.W. 712, 720 (1940)).

If the injuries were caused by negligent acts of an agent that were neither directed nor ratified by the principal, the agent is liable because the agent committed the act that caused the injury. The principal may be vicariously liable under the doctrine of respondeat superior. *Plock, supra*. See also, e.g., *Rodriguez v. Lasting Hope Recovery Center of Catholic Health Initiatives*, 308 Neb. 538, 544, 955 N.W.2d 707, 714 (2021) (“[T]he doctrine of respondeat superior . . . allows an employer to be held vicariously liable for the negligence of an employee which acting within the scope of employment.”); *Kocsis v. Harrison*, 249 Neb. 274, 281, 543 N.W.2d 164, 169 (1996) (Where an employer is vicariously liable for an employee’s negligent acts that were neither directed nor ratified by the employer, the “employer’s liability is derivative rather than that of a joint tort-feasor.”).

The principal will be vicariously liable for the agent’s negligent acts if the plaintiff can show two things. First, the principal is only vicariously liable if the agent is liable. The plaintiff must therefore show that the agent was liable. E.g., *Burns v. Metz*, 245 Neb. 428, 438, 513 N.W.2d 505, 511 (1994); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 969, 485 N.W.2d 748, 757 (1992); *Plock, supra* (“Unless the servant is liable, there can be no liability on the part of the master.”).

Second, the plaintiff must show that the agent was acting within the scope of his or her authority. E.g., *Kocsis*, 249 Neb. at, 280, 543 N.W.2d at 168 (“Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer’s business.”); *Grote, supra*; *Plock, supra*.

An agent acts within the scope of his or her authority when the act in question is the kind of thing the agent was hired to do, done substantially within any authorized limits on time and place and with at least the partial intention of furthering the interests of the principal. NJI2d Civ. 6.04 and the authorities cited and discussed in the Comments & Authorities thereto.

Both the principal who is vicariously liable for the negligent acts of an agent and the negligent agent him- or herself are jointly and severally liable for the resulting damage. This can be misleading given Nebraska’s unusual comparative negligence statute and what it says about joint and several liability in tort actions. The effect of Nebraska’s comparative negligence statute on a principal’s vicarious joint-and-

several liability for negligent acts or omissions of an agent is discussed at NJI2d Civ. 6.02, Comment & Authorities.

The effect on the principal's liability of a release or a judgment in favor of the agent is discussed at NJI2d Civ. 6.02, Comment & Authorities.

Regarding a principal's vicarious liability, *see also* NJI2d Civ. 6.02, Comment & Authorities, and NJI2d Civ. 6.05, Comment & Authorities.

2. A Principal's Vicarious Liability and Nebraska's Comparative Negligence Statute

Nebraska has an unusual statute regarding comparative negligence and joint and several liability in multiple-defendant negligence actions of a kind to which contributory negligence may be a defense. Neb. Rev. Stat. § 25-21,185, et seq. (Reissue 2016) (effective in causes of action that accrue on or after February 8, 1992). It is discussed at length at NJI2d Civ. 5.04, Comment.

This statute states that when defendants are part of a common enterprise or plan and act in concert to cause harm, those defendants are jointly and severally liable for both economic damages and noneconomic damages. In cases where defendants acted in concert, as part of a common enterprise or plan, to cause harm, the liability of each is joint and several. Presumably, this includes those cases (discussed above at NJI2d Civ. 6.01, Comment & Authorities) where the principal or employer is liable as a joint participant.

When multiple defendants were each negligent but did not act as part of a common enterprise or plan, in concert, to cause harm, then they are jointly and severally liable for the plaintiff's economic damages, but only severally liable for the plaintiff's noneconomic damages. In the case of a principal vicariously liable for damages caused by an agent, where the vicariously liable principal was not him-or herself negligent, such a principal is liable jointly and severally with the agent, for the entire comparative share of damage assigned to the agent. *See* Restatement (Third) of Torts: Apportionment of Liability § 13 cmt. c (2000).

For a detailed discussion of this comparative negligence statute and a discussion of how to instruct in this situation, *see* NJI2d Civ. 5.04, Comment.

IV. NEGLIGENCE HIRING, TRAINING, OR SUPERVISION

Regarding negligent hiring, *see* *Johnson v. State*, 270 Neb. 316, 321-23, 700 N.W.2d 620, 624-25 (2005) (referring throughout to *Sheridan v. United States*, 487 U.S. 392 (1988)); *Kime v. Hobbs*, 252 Neb. 407,

562 N.W.2d 705 (1997); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 561, 501 N.W.2d 281, 288 (1993). *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

Regarding negligent supervision, see *Johnson*, above; *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002); *Goodenow v. State Dept. of Corr. Servs.*, 259 Neb. 375, 610 N.W.2d 19 (2000); *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993); *Ohnstad v. Omaha Pub. Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989); *Strong v. K Inv., Inc.*, 216 Neb. 370, 343 N.W.2d 912 (1984); *Brahatcek v. Millard Sch. Dist.*, 202 Neb. 86, 273 N.W.2d 680 (1979); *Farr v. Cambridge, Co-Op. Oil Co.*, 164 Neb. 45, 81 N.W.2d 597 (1957). See also, NJI2d Civ. 3.02, Comment & Authorities.

V. RELATED TOPICS

The difference between an agent or employee and an independent contractor is discussed at NJI2d Civ. 6.06.

Statutes of limitations applicable here are discussed at NJI2d Civ. 6.02, Comment & Authorities and the cross references therein.

Subagents are discussed at NJI2d Civ. 6.03, Comment & Authorities.

Regarding a manufacturer or a distributor's vicarious liability for negligent warranty work by a dealer, see *Zwingman v. Kallhoff*, 244 Neb. 514, 516-21, 507 N.W.2d 894, 896-99 (1993).

The duty an employer owes to an employee who is injured on the job, is discussed at NJI2d Civ. 3.02, Comment & Authorities.

The agent's duty to act solely for the benefit of the principal and to adhere to the principal's instructions in all matters connected with the agency, is discussed at NJI2d Civ. 6.03, Comment & Authorities.

Dick v. Koski Professional Group addresses equitable clawback.

Our appellate courts have not otherwise addressed the concept of equitable clawback. Equitable clawback is a restitutionary remedy based on principles of unjust enrichment and the faithless servant doctrine. The doctrine establishes a mandate that an agent who engages in activities that breach the agent's fiduciary duties to the principal is not entitled to an award of any compensation for services rendered during the period of the breach.

Dick v. Koski Professional Group, P.C., 307 Neb. 599, 675, 950 N.W.2d 321, 375 (2020).

NJ12d Civ. 6.02

**AGENCY—VICARIOUS LIABILITY, AGENCY AND
SCOPE OF AUTHORITY IN ISSUE—EFFECT OF
FINDINGS**

(In a negligence action where both the principal and the agent have been sued and the only claim regarding the liability of the principal is that of vicarious liability, use the following paragraph.)

If you find that (name of alleged agent, hereinafter "A") is liable to the plaintiff, then (name of alleged principal, hereinafter "P") is also liable if (A)'s negligence occurred while (he, she) was the agent of (P) and was acting within the scope of (his, her) authority as the agent of (P).

(Where the liability of the principal is not based on negligence, and where both the principal and the alleged agent are sued, then the following paragraph will serve as a model.)

(P) is bound by the (acts, representations, omissions, et cetera) of (A) if such (acts, representations, omissions, et cetera) were done while (A) was the agent of (P) and while (A) was acting within the scope of (his, her) authority as the agent of (P).

(In an action where only the principal has been sued, and not the agent, and the only claim regarding the liability of the principal is derivative, that of vicarious liability, the effect of finding part of NJ12d Civ. 2.01 or NJ12d Civ. 15.01 will work as written.)

COMMENT & AUTHORITIES

- I. GENERAL USE
- II. VICARIOUS LIABILITY
- III. INDEMNITY AND CONTRIBUTION
- IV. RELEASE OR JUDGMENT IN FAVOR OF THE AGENT
 - A. VICARIOUS LIABILITY
 - B. JOINT AND SEVERAL LIABILITY
- V. STATUTES OF LIMITATIONS
- VI. AGENT AS OPPOSED TO INDEPENDENT CONTRACTOR

I. GENERAL USE

As discussed at NJ12d Civ. 6.01, Comment & Authorities, a principal or employer may be either vicariously or directly liable for the acts or omissions of an agent or employee. NJ12d Civ. 6.01 NJ12d Civ.

6.01 addresses these questions: Was there an agency relationship? If so, at the time of the act or omission that gives rise to the lawsuit, was the agent acting within the scope of the agency. This instruction—NJ12d Civ. 6.02—addresses the question of the principal's vicarious liability for the acts of an agent acting within the scope of his or her agency.

This instruction combines both the statement of the vicarious-liability issue and the effect of findings.

As explained in the italicized notes included within this pattern instruction, the paragraphs of this pattern are not to be used simultaneously, but rather are offered as alternatives, as follows:

(1) In a negligence action where both the principal and the agent are sued, the only claim against the principal is that of vicarious liability, and both agency and scope of authority are in issue, use the first of the above pattern instructions (the first of the non-italicized paragraphs).

(2) In a negligence action where both the principal and the agent are sued, the only claim against the principal is that of vicarious liability, and there is *no* issue as to either agency or scope of authority, see NJ12d Civ. 6.05.

(3) If both the principal and the agent are sued and the claim against the principal is not that of vicarious liability, but instead is whether the principal is in some other way bound by an act of the agent, and both agency and scope of authority are in issue, then use the second of the above pattern instructions (the second of the non-italicized paragraphs).

(4) If only the principal is sued, and not the agent, and the only claim against the principal is that of vicarious liability, then the final italicized paragraph sets forth what to do. There is no specific instruction in Chapter 6 for this scenario.

Whenever both the principal and the agent have been sued, there are two options regarding statement-of-the-case instruction: 1) the statement of the case (including effect of findings) against each can be combined into one statement of the case instruction; or 2) two separate statements of the case instructions can be given, one for the principal and one for the agent. See NJ12d Civ. 6.01, Comment & Authorities.

■ In the scenario covered by the first of the alternative instructions above—a negligence action in which both the principal and the agent are sued, the only claim against the principal is that of vicarious liability, and both agency and scope of authority are in issue—two things are required with regard to the effect-of-findings part of the instruction:

First, there must be a statement of the effect of findings with regard

to the agent. That can be taken care of by adapting the effect of findings part of NJI2d Civ. 2.01.

Second, there must be a statement of the effect of findings as they relate to the principal. The first of the alternatives in the above instruction serves as a model for an instruction regarding the findings necessary before the principal is liable.

■ In the scenario covered by the second of the alternative instructions above—an action in which both the principal and the agent are sued and the claim against the principal is not that of vicarious liability, but instead is whether the principal is in some other way bound by an act of the agent, and both agency and scope of authority are in issue—two things are required with regard to the effect-of-findings part of the instruction:

First, there must be a statement of the effect of findings with regard to the agent. That can be taken care of by adapting the effect of findings part of NJI2d Civ. 2.01, in a negligence action, or NJI2d Civ. 15.01, in a contract action.

Second, there must be a statement of the effect of findings as they relate to the principal. In a negligence action where the principal's liability is not alleged to be vicarious, but direct, an instruction will have to be written; that can be done by adapting the effect of findings part of NJI2d Civ. 2.01. In a contract action, adapt the effect of findings part of NJI2d Civ. 15.01.

See NJI2d Civ. 6.01 Comment & Authorities, NJI2d Civ. 2.01, Comment, and 15.01, Comment.

II. VICARIOUS LIABILITY

The principal's vicarious liability for negligent acts of the agent is discussed at NJI2d Civ. 6.01, Comments & Authorities. The affect that a release of or a judgment in favor of the agent has on the liability of the principal is discussed below in this Comment & Authorities.

III. INDEMNITY AND CONTRIBUTION

If an employer is found to be vicariously liable for negligent acts committed by his or her employee, the employer may seek full reimbursement from the employee for the damages paid to the third party. "One who is held to be vicariously liable for the active negligence of another has a claim for indemnity from that person who is primarily liable." *Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164, 169 (1996).

The statute of limitations on an employer's action for indemnity is taken up below, under the heading "Statutes of Limitations."

Where a principal and an agent are found jointly and severally liable as joint participants, then, as a general rule, if one of the two pays more than his or her proportionate share of the damages, that one has a right to sue the other for contribution. *Royal Indem. Co. v. Aetna Cas. and Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975). Contribution is distinguished from indemnity. This distinction, and contribution generally, are discussed at NJI2d Civ. 2.05, Comment & Authorities.

IV. A RELEASE OR JUDGMENT IN FAVOR OF THE AGENT

A. VICARIOUS LIABILITY

A general discussion of vicarious liability appears at NJI2d Civ. 6.01, Comment & Authorities, and to some extent above in this Comment & Authorities. The discussion here concerns the affect that a release or a judgment in favor of the agent has on the liability of the principal.

Where the only evidence of negligence on the part of an employer is of negligence imputed through the doctrine of respondeat superior, then, as between the same parties, a judgment on the merits in favor of the employee "renders invalid any judgment against the [employer]." *White v. Lovgren*, 222 Neb. 771, 774, 387 N.W.2d 483, 485 (1986) (citing authorities). In an action against a principal based exclusively on vicarious liability, "a judgment dismissing the [agent] but holding the [principal] liable is inconsistent." *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 220, 475 N.W.2d 105, 112 (1991). *Accord Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164, 168 (1996) (under the doctrine of respondeat superior, an employer cannot be liable if the employee is not liable; plaintiff is not, however, required to join the employee when suing the employer).

Likewise, a valid release of either the employee or the employer releases the other. *E.g.*, *Holloway v. State*, 293 Neb. 12, 27-28, 875 N.W.2d 435, 448 (2016) ("If an employee is not liable, the employer cannot be liable under the doctrine of respondeat superior"; here the plaintiff voluntarily dismissed the employee); *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 330, 527 N.W.2d 178, 183 (1995) ("[S]ettlement with an agent constitutes settlement with the principal, no matter what the parties may have intended."); *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 354, 436 N.W.2d 184, 188 (1989). *See also Anderson v. Nashua Corp.*, 246 Neb. 420, 423, 433-34, 519 N.W.2d 275, 279, 284-85 (1994) (when an independent contractor is immune from suit under the exclusivity provision of worker's compensation laws, then the contractor's employer is not vicariously liable to the contractor's employee for the contractor's negligence; this is discussed more fully at NJI2d Civ. 6.06, Comment & Authorities); *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993) (a statute barring a claim against the agent "equally protects the principal, on whose behalf the agent has acted," *id.* at 532, 497 N.W.2d at 334); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 518-21, 496 N.W.2d 433, 442-44 (1993) ("[S]ettlement with

the agent [however reached] constitutes a settlement with the principal, no matter what the parties may have intended." *Id.* at 521, 496 N.W.2d at 444).

These things are so even if the release specifically reserves all claims against the other. *Kroeger*, 247 Neb. at 330, 527 N.W.2d at 182 (as quoted above, "settlement with an agent constitutes settlement with the principal, no matter what the parties may have intended." (emphasis added)).

This is an application of the broader general rule that, "where two persons are not actively joint tort-feasors, but one person commits the tort and is primarily liable while the liability of the other person is secondary, the releasor's acceptance of satisfaction from one discharges the other as well." *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 99, 560 N.W.2d 482, 486 (1997) ("This is true because secondary liability does not indicate a degree of negligence, but, rather, a kind of wrong and a legal obligation which is imputed or constructive only, being based on some legal relation between the parties or arising from some positive rule of common or statutory law, such as under the doctrine of respondeat superior.") (citations omitted).

Regarding the application of this rule to independent contractors and the owners who hire them, see NJI2d Civ. 6.06, Comment & Authorities.

B. JOINT AND SEVERAL LIABILITY

When the employer's liability is based on the employer's joint participation as opposed to strictly vicarious liability, a judgment for the agent does not release the principal from liability. "So a verdict against the [principal] and an acquittal of the [agent] will be sufficient to sustain a judgment against the [principal] where the act resulting in the injury complained of was committed under the express command of the [principal]." *S.M.S. Trucking Co. v. Midland Vet, Inc.*, 186 Neb. 647, 650, 185 N.W.2d 667, 669 (1971).

Here, unlike the case where the principal's liability is strictly vicarious, the action against one does not depend on the right to sue the other.

Regarding joint and several liability, keep in mind Nebraska's comparative negligence statute, which is discussed somewhat specifically at NJI2d Civ. 6.01, Comment & Authorities, and more generally and in greater depth at NJI2d Civ. 5.04, Comment. Where the employer's liability in a negligence action is not vicarious, but is direct, consult those sources.

V. STATUTES OF LIMITATIONS

The statute of limitations that applies in an action where the

plaintiff is alleging an employer is vicariously liable for the acts or omissions of an employee "is that which would apply to the employee." *Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164, 168 (1996). The accrual date for the action against the employer is the same as that for the action against the employee.

In an employer's action for indemnity against the employee, the "claim for indemnity accrues not at the time of the underlying transaction, but, rather, at the time the indemnity claimant suffers loss or damage." *Kocsis*, 249 Neb. at 281, 543 N.W.2d at 169.

In 1997, the Unicameral amended the statute governing the trial of statute of limitations issues. Unless waived by all parties, a jury shall determine any factual issues concerning the bar of a statute of limitations. Neb. Rev. Stat. § 25-221 (Reissue 2016). (This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first.) This amendment is discussed in the Statute of Limitations part of NJI2d Civ. 12.04, Comment.

"Procedural amendments to statutes are ordinarily applicable to pending cases. . . . Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date." *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005). *Accord Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005) ("[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.").

Regarding statutes of limitations generally, see NJI2d Civ. 2.02D and 12.04, Comment & Authorities, and the cross-references found therein.

Regarding the statute of limitations on a contribution claim, see NJI2d Civ. 2.05, Comment & Authorities.

VI. AGENT AS OPPOSED TO INDEPENDENT CONTRACTOR

For a discussion of the definitions of and the differences between agents or employee, on the one hand, and independent contractor, on the other, see NJI2d Civ. 6.03 and NJI2d Civ. 6.06, respectively.

NJI2d Civ. 6.03

DEFINITION OF AGENCY

An agency relationship existed in this case if (name of alleged agent, hereinafter "A") and (name of alleged principal, hereinafter "P") consented to these two things:

1. That (A) would act on behalf of (P); and

2. That (P) would have the right to control (A)'s acts. It does not matter whether (P) actually exercised control over (A), so long as (he, she, (P)) had the right to do so.

[(A)'s authority to act on behalf of (P) need not be in writing; it may be shown by the words or conduct of (P). (A)'s consent may be shown by (his, her, (A)'s) words or conduct.]

[(A person, One) may be an agent of another even though there is no agreement that the agent will be paid.]

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. THE DISTINGUISHING FEATURES: CONTROL AND CONSENT
- III. THE LABELS THE PARTIES GIVE THE RELATIONSHIP IS NOT CONTROLLING
- IV. ABSENCE OF A COMPENSATION AGREEMENT IS NOT CONTROLLING
- V. EXAMPLES OF RELATIONSHIPS THE COURT HAS HELD ARE AGENCY RELATIONSHIPS
- VI. EXAMPLES OF RELATIONSHIPS THE COURT HAS HELD ARE NOT AGENCY RELATIONSHIPS
- VII. UNDISCLOSED AGENCY
- VIII. AGENT'S DUTY TO DISCLOSE FACTS TO THE PRINCIPAL
- IX. AGENTS MUST ACT FOR THE BENEFIT OF THEIR PRINCIPALS
- X. SUBAGENTS
- XI. RELATED TOPICS

I. IN GENERAL

The bracketed materials should be used as appropriate.

NJI2d Civ. 6.01 addresses these questions: Was there an agency relationship? If so, at the time of the act or omission that gives rise to the lawsuit, was the agent acting within the scope of the agency? This instruction tells the trier of fact how to answer the first of those two questions. NJI2d Civ. 6.04 tells the trier of fact how to answer the second.

The Restatement (Second) of Agency (1958) serves as a good general reference. It, or its predecessor, is quoted from, discussed, or cited in the majority of the cases cited hereafter.

II. THE DISTINGUISHING FEATURES: CONTROL AND CONSENT

The distinguishing features of an agency relationship are consent and control: the principal's and the agent's consent that the latter shall act on behalf of the former and subject to the former's control. *E.g.*, Restatement (Second) of Agency § 1 (1958); *In re Estate of Adelung*, 306 Neb. 646, 672, 947 N.W.2d 269, — (2020); *Nathan v. McDermott*, 306 Neb. 216, 242, 945 N.W.2d 92, 112 (2020); *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 337, 886 N.W.2d 240, 251 (2016); *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 179, 777 N.W.2d 259, 263 (2010); *Archbold v. Reifenrath*, 274 Neb. 894, 900, 744 N.W.2d 701 (2008); *State ex rel. Medlin v. Little*, 270 Neb. 414, 418, 703 N.W.2d 593, 596 (2005); *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 638, 676 N.W.2d 58, 64 (2004); *Crosby v. Luehrs*, 266 Neb. 827, 834, 669 N.W.2d 635, 643 (2003); *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 509, 623 N.W.2d 681, 688 (2001); *Andrews v. Schram*, 252 Neb. 298, 303, 562 N.W.2d 50, 54 (1997); *Landmark Enters. v. M.I. Harrisburg Assocs.* 250 Neb. 882, 886, 554 N.W.2d 119, 122 (1996); *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 871, 515 N.W.2d 794, 801 (1994); *Mansfield v. Andrew Murphy & Son*, 139 Neb. 793, 799–800, 298 N.W. 749, 753–54 (1941); *Schultz v. Bleckwehl*, 135 Neb. 94, 99, 280 N.W. 257, 260 (1938). *See also* NJI2d Civ. 6.06, Comment & Authorities (discussing and distinguishing agents and independent contractors). *See also* *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 906, 896 N.W.2d 612, 627 (2017) (“An individual is not an employee under the [Wage Payment and Collection] Act if the ‘individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact.’” Regarding the Wage Payment and Collection Act, *see* NJI2d Civ. 4.52 Comment & Authorities.).

The test is actual control or the right to control. *Reeves v. Associates Fin. Serv. Co., Inc.*, 197 Neb. 107, 114, 247 N.W.2d 434, 438 (1976); *Johnson v. Evers*, 195 Neb. 426, 430, 238 N.W.2d 474, 476 (1976). “The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.” *Pettit v. State*, 249 Neb. 666, 673–76, 544 N.W.2d 855, 861–62 (1996). Regarding “control,” *see also* *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 792, 496 N.W.2d 902, 909 (1993), *disapproved on other grounds*, *Gaytan v. Wal-Mart*, 289 Neb. 49, 74, 853 N.W.2d 181, 202 (2014); and NJI2d Civ. 6.06, Comment & Authorities.

The principal's agreement may be express or inferred. *Farmers Union Coop. Ass'n v. Commercial State Bank*, 187 Neb. 376, 378, 191 N.W.2d 168, 169–70 (1971). If agency is inferred, it must be inferred from the words or conduct of the principal; it may not be inferred from the words or conduct of the agent. *Abel Constr. Co. v. School Dist. of Seward*, 188 Neb. 166, 175, 195 N.W.2d 744, 749–50 (1972); *J.R. Watkins Co. v. Wiley*, 184 Neb. 144, 145–46, 165 N.W.2d 585, 586 (1969); *Berg v. Midwest Laundry Equip. Corp.*, 175 Neb. 423, 425, 122 N.W.2d

250, 252 (1963); *Rodine v. Iowa Home Mut. Cas. Co.*, 171 Neb. 263, 274-75, 106 N.W.2d 391, 397-98 (1960). *RM Campbell Indus. v. Midwest Renewable Energy*, above, states this rule somewhat differently: "An agency relationship may be *implied* from the words *and* conduct of the *parties* and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship," *Id.* at 337, 886 N.W.2d at 251-52 (emphasis added). The Committee sees no difference between "inferred" and "implied." The Committee believes that the *RM Campbell* is simply compiling a list of the things that can evidence the relationship and does not mean to indicate that it must be implied from both words *and* conduct. And, when *RM Campbell* states that the relationship may be implied from the words and conduct of the *parties*, it is completing the list and does not mean that the relationship can be inferred from the words or conduct of the "agent" alone.

Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's behalf.

Restatement (Second) of Agency § 26 (1958).

Regarding apparent authority, *see*, NJI2d Civ. 6.08, Comment & Authorities..

III. THE LABEL THE PARTIES GIVE THE RELATIONSHIP IS NOT CONTROLLING

A relationship may be an agency regardless of what the parties call it. *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 337, 886 N.W.2d 240, 251-52 (2016); *State ex rel. Medlin v. Little*, 270 Neb. 414, 418-19, 703 N.W.2d 593, 596-97 (2005) ("Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship."); *Landmark Enters. v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 886, 554 N.W.2d 119, 122 (1996); *Larson v. Hometown Commc'ns, Inc.*, 248 Neb. 942, 959, 540 N.W.2d 339, 351 (1995) (whether an agency exists depends on the facts underlying the relationship and not the words parties used to describe relationship; a written contract is evidence, "and may be of prime importance," but may not be used to conceal the true arrangement); *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 871, 515 N.W.2d 794, 801 (1994); *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 456, 507 N.W.2d 631, 636 (1993); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 827, 458 N.W.2d 443, 451 (1990); *Ginn v. Lamp*, 234 Neb. 198, 201, 450 N.W.2d 388, 390 (1990); *Valentine Oil Co. v. Powers*, 157 Neb. 87, 91, 59 N.W.2d 160, 163 (1953).

See also the discussion of apparent authority at NJI2d Civ. 6.08

and the discussion of “undisclosed agency” below, in this Comment & Authorities.

IV. ABSENCE OF A COMPENSATION AGREEMENT IS NOT CONTROLLING

The absence of any agreement that the agent is to be compensated does not negate agency. *Snyder v. Russell*, 140 Neb. 616, 619, 1 N.W.2d 125, 127 (1941). The payment of a fee on a commission is not enough to establish an agency relationship. *Donahoo v. Home of the Good Shepherd of Omaha*, 193 Neb. 586, 596, 228 N.W.2d 287, 293 (1975).

V. EXAMPLES OF RELATIONSHIPS THE COURT HAS HELD ARE AGENCY RELATIONSHIPS

Attorney and Client: “The relationship between attorney and client is one of agency.” *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 850, 530 N.W.2d 619, 623 (1995). *Accord*, e.g., *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 24, 810 N.W.2d 677, 683 (2012) (“Thus, a client may be liable for the acts of the client’s attorney when such was within the attorney’s scope of authority.” *Id.*). For more on the details of this particular agency relationship, see NJI2d Civ. 6.01, Comment. For more on the attorney-client relationship, see NJI2d Civ. 12.04, Comment & Authorities.

Power of Attorney: “A power of attorney authorizes another to act as one’s agent.” Same quotation In re Estate of Adelung, 306 Neb. 646, 672, 947 N.W.2d 269, — (2020); *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 179, 777 N.W.2d 259, 263 (2010); *Crosby v. Luehrs*, 266 Neb. 827, 834, 669 N.W.2d 635, 643 (2003); In re Conservatorship of Anderson, 262 Neb. 51, 56, 628 N.W.2d 233, 239 (2001); *State ex rel. NSBA v. Flores*, 261 Neb. 256, 272, 622 N.W.2d 632, 644 (2001); *Cheloha v. Cheloha*, 255 Neb. 32, 36, 582 N.W.2d 291, 296 (1998); *Mischke v. Mischke*, 247 Neb. 752, 759, 530 N.W.2d 235, 240 (1995); In re Estate of Lienemann, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986), *superseded by statute on other grounds by*, *Eggleston v. Vovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007). *Accord* *Litherland v. Jergens*, 291 Neb. 775, 783, 869 N.W.2d 92, 97 (2015); *Archibold v. Reifenrath*, 274 Neb. 894, 900-01, 744 N.W.2d 701, 707-08 (2008); *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 509, 623 N.W.2d 681, 688 (2001)

For lengthy discussions of the duties and liabilities of one holding a power of attorney, see *Archibold*, 274 Neb. at 900-04; the cases cited in *Archibold*; and *North Bend Senior Citizens Home*, 261 Neb. at 509, 623 N.W.2d at 688.

The Nebraska Court of Appeals has summarized state law regarding abuse and fraud by one who has a power of attorney as follows.

Nebraska law is concerned with the potential for abuse and fraud that exists when a fiduciary has broad powers to

control another person's property. Because of this concern, the Nebraska Supreme Court has held that a party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact. Whether the fiduciary acted in good faith or had actual intent to defraud is immaterial; when these circumstances are shown, the law presumes constructive fraud. Once a prima facie case of fraud is established, the burden shifts to the fiduciary to demonstrate that the gift was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of the donor. The fiduciary also bears the burden of proving that fairness of the transaction.

Stehlik v. Rakosnik, 24 Neb. App. 34, 40, 881 N.W.2d 1, 40 (2016) (citations omitted) ("A blanket power to gift is not effective to authorize self-dealing. . . . [T]hat power must be specifically authorized in the instrument." (citing Nebraska Supreme Court cases)).

Regarding power of attorney, the court has stated, "No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. The basic policy concern . . . is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated."

Closely related is a rule of strict construction. Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.

Adelung, 306 Neb.at 673, 947 N.W.2d at — (footnotes omitted).

The Nebraska Uniform Power of Attorney Act (NUPROAA), chapter 30, article 40 of the Nebraska Revised Statutes, should be consulted regarding powers of attorney. NUPROAA is particularly discussed in *Adelung*, 306 Neb.at 676–78, 947 N.W.2d at ——. In that regard, many cases cited here (including *Stehlik*, but not *Adelung*) involved actions taken prior to the effective date of new statutory requirements for gifts made via power of attorney. See Neb. Rev. Stat. §§ 30-4024 and 30-4040 (Reissue 2016), which sections concern gifts made by the holder of the power or attorney and may impact that part of the law. *Adelung* includes the statement "that '[u]nless displaced by a provision of the [NUPROAA], The principles of law and equity supplement the act.' . . . Thus, we hold that the rule of strict construction regarding authority under a power of attorney to make gifts continues under the NUPROAA." *Adelung*, id. at 678, 947 N.W.2d at —, quoting Neb. Rev. Stat. § 30-4021 (Reissue 2016).

Auctioneer and Seller: When selling the property of another at auction, an auctioneer is the agent of the seller. *Edwin Bender & Sons v. Ericson Livestock Comm'n Co.*, 228 Neb. 157, 164, 421 N.W.2d 766, 771 (1988).

Travel Agent: *McReynolds v. RIU Resorts and Hotels, S.A.*, 293 Neb. 345, 880 N.W.2d 43 (2016) discusses law from other jurisdictions holding that travel agents are the "special agent[s] of the traveler." *Id.* at 351, 880 N.W.2d at 47 (finding them to be "more than a mere 'ticket agent.'").

VI. EXAMPLES OF RELATIONSHIPS THE COURT HAS HELD ARE NOT AGENCY RELATIONSHIPS

"[T]he landlord-tenant relationship does not, in and of itself, create a principal-agent relationship, even if the tenant has permission to improve the property." *Landmark Enters. v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 886, 554 N.W.2d 119, 123 (1996) (without the authority of Landlord, Tenant cannot charge land with a lien for materials even if Tenant has Landlord's permission to improve the property).

"[O]ne who receives goods from another for resale to a third person is not thereby the other's agent unless the former's duty is to act primarily for the benefit of the one delivering the goods." *Zwingman v. Kallhoff*, 244 Neb. 514, 516, 507 N.W.2d 894, 896 (1993) (discussing manufacturer's and distributor's liability for dealer's negligent warranty work, *id.* at 516-21, 507 N.W.2d at 896-99). *Accord* *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 353, 436 N.W.2d 184, 187 (1989); *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 481, 390 N.W.2d 536, 542 (1986).

VII. UNDISCLOSED AGENCY

It is not necessary that the agency relationship be known by or disclosed to the third party. In other words, the undisclosed principal may be liable. *Department of Banking v. Davis*, 227 Neb. 172, 177, 416 N.W.2d 566, 569 (1987); *Mintken v. Neb. Sur. Co.*, 187 Neb. 215, 216, 188 N.W.2d 819, 820 (1971); *Boettcher v. Goethe*, 165 Neb. 363, 374, 85 N.W.2d 884, 890 (1957).

At the same time, if the agent fails to disclose his agency and represents himself as a principal, he may be treated as a principal for all purposes, including liability. *David A. Baxter and Sons v. Sofio*, 182 Neb. 599, 600, 156 N.W.2d 141, 142 (1968).

"[A]n agent who, on behalf of an undisclosed principal, enters into a contract in the agent's own name is entitled to maintain an action thereon in the agent's own name." *Marten v. Staab*, 249 Neb. 299, 304, 543 N.W.2d 436, 442 (1996).

VIII. AGENT'S DUTY TO DISCLOSE FACTS TO THE PRINCIPAL

An agent is "under a legal obligation to make a full, fair, and prompt

disclosure to the principal of all facts within the agent's knowledge which are or may be material to matters in connection with which the agent has been employed, which might affect the principal's rights and interests, or influence the principal's action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the agent has undertaken." *Daubman v. CBS Real Estate Co.*, 254 Neb. 904, 913-14, 580 N.W.2d 552, 559 (1998) (principals whose agents violate this duty may properly refuse to pay compensation, *id.* at 917, 580 N.W.2d at 561). *Accord City of Gering v. Patricia G. Smith Co.*, 215 Neb. 174, 179, 337 N.W.2d 747, 751 (1983); *Unland v. City of Lincoln*, 247 Neb. 837, 843-44, 530 N.W.2d 624, 629 (1995) (notice to and knowledge of attorney is notice to and knowledge of client); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 972, 485 N.W.2d 748, 759 (1992) ("A defendant corporation, as an employer and principal, is bound by the knowledge possessed by its employees."); *Professional Recruiters, Inc. v. Oliver*, 235 Neb. 508, 517, 456 N.W.2d 103, 109 (1990) (knowledge of board of directors, officers, and agents of corporation is imputed to corporation); *Robbins v. National Life & Accident Ins. Co.*, 182 Neb. 749, 751-52, 157 N.W.2d 188, 190-91 (1968); Seavey, *Handbook of the Law of Agency* §§ 97, 98 (1964); 3 C.J.S., *Agency* §§ 272, 436 (1973) (at § 436: "An agent's knowledge of matter[s] . . . outside the scope of the agency or not related to its purpose is not imputed to the principal.").

IX. AGENT'S DUTY TO DISCLOSE FACTS TO THE CUSTOMER

Agents have a duty to disclose their "capacity as an agent of a corporation if [they] are to escape personal liability for contracts made, and in the absence of such disclosure, the agent bears the burden of proof of showing that the contract was made while acting in a corporate, not an individual, capacity." *Thomas Grady Photography v. Amazing Vapor*, 301 Neb. 401, 406, 918 N.W.2d 853 (2018).

X. AGENTS MUST ACT SOLELY FOR THE BENEFIT OF THEIR PRINCIPALS

An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. An agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest. An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.

Crosby v. Luehrs, 266 Neb. 827, 834, 669 N.W.2d 635, 643-44 (2003)

(paragraph break and citations omitted). *Accord* In re Estate of Adelung, 306 Neb. 646, 672–73, 947 N.W.2d 269, — (2020); Nathan v. McDermott, 306 Neb. 216, 242, 945 N.W.2d 92, 112 (2020); Deutsche Bank Nat. Trust Co. v. Siegel, 279 Neb. 174, 179, 777 N.W.2d 259, 263 (2010); Archbold v. Reifenrath, 274 Neb. 894, 900, 744 N.W.2d 701 (2008); State ex rel. Medlin v. Little, 270 Neb. 414, 418, 703 N.W.2d 593, 596 (2005); First Colony Life Ins. Co. v. Gerdes, 267 Neb. 632, 638–39, 676 N.W.2d 58, 64 (2004); In re Conservatorship of Anderson, 262 Neb. 51, 56, 628 N.W.2d 233, 239 (2001); State ex rel. NSBA v. Flores, 261 Neb. 256, 273, 622 N.W.2d 632, 644 (2001); ProData Computer Servs., Inc. v. Ponec, 256 Neb. 228, 237, 590 N.W.2d 176, 183 (1999) (an agent who deals with the subject matter of the agency so as to make a personal profit will be held accountable in equity as trustee for all profits and advantages thereby acquired); Cheloha v. Cheloha, 255 Neb. 32, 36, 582 N.W.2d 291, 296 (1998).

XI. SUBAGENTS

“A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for a principal, but for whose conduct the agent agrees with the principal to be primarily responsible. A subagent stands in a fiduciary relation to a principal and is subject to all the liabilities of an agent to a principal, except liability dependent upon the existence of a contractual relation between them.” *Andrews v. Schram*, 252 Neb. 298, 303, 562 N.W.2d 50, 54–55 (1997) (citations omitted).

“The authorized employment of a subservant or other subagent does not thereby subject the principal to contractual liability to the subagent” *Shipley v. Baillie*, 250 Neb. 88, 92, 547 N.W.2d 711, 714 (1996) (quoting Restatement (Second) of Agency § 458, at 378 (1958)). “If an agent employs a subagent, the agent is the employing person, and the principal is not a party to the contract of employment, except where, by express promise or otherwise, [the principal] becomes a surety.” *Id.* (quoting Comment *a* to § 458 of the Restatement (Second) of Agency). (*Shipley* goes on to discuss and define “surety.”) To the extent that *Equitable Life Assurance Co. v. Brobst*, 18 Neb. 526, 26 N.W. 204 (1886) is to the contrary, it is overruled.

See also NJI2d Civ. 2.01, Comment; NJI2d Civ. 15.01, Comment.

XII. RELATED TOPICS

Regarding actual versus apparent authority and ratification of the acts of an agent, *see* NJI2d Civ. 6.08.

Regarding implied authority, *see* NJI2d Civ. 6.04.

An agent’s deviation from the principal’s business is the subject of NJI2d Civ. 6.11.

The “loaned employee” rule is the subject of NJI2d Civ. 6.10.

"In Nebraska, one acting on behalf of another may do so as an agent or an independent contractor." *Fitzpatrick v. US West, Inc.*, 246 Neb. 225, 230, 518 N.W.2d 107, 112 (1994). For a full discussion of the difference between an agent and an independent contractor, see NJI2d Civ. 6.06 Comment & Authorities.

Regarding whether an insurance intermediary is an agent of the insured or the insurer, see *Broad ex rel. Estate of Schekall v. Randy Bauer Ins. Agency, Inc.*, 275 Neb. 788, 794, 749 N.W.2d 478 (2008); *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992).

NJI2d Civ. 6.04

DEFINITION OF SCOPE OF AUTHORITY

The conduct of an agent is within the scope of (his, her) authority:

1. When it is the kind of thing (he, she) was (employed, engaged, hired) to do;
2. When it is done substantially within any authorized limits on time and place; and
3. When it is done with at least the partial intention of furthering the interests of (his, her) principal.

[The agent has the authority to do such acts and employ such means as are usual, appropriate, reasonably necessary, or proper to accomplish the purposes and objects of the agency, unless the principal has limited the agent's authority.]

[If an agent intentionally uses force against another, that use of force is within the scope of (his, her) authority if, in addition to satisfying the conditions set out in paragraphs numbered 1, 2, and 3 of this instruction, that use of force was foreseeable by the principal.]

COMMENT & AUTHORITIES

I. GENERAL USE

NJI2d Civ. 6.01 addresses these questions: Was there an agency relationship? If so, at the time of the act or omission that gives rise to the lawsuit, was the agent acting within the scope of the agency? This instruction tells the trier of fact how to answer the second of those two questions. NJI2d Civ. 6.03 tells the trier of fact how to answer the first.

This is the general instruction on scope of authority. This instruction does not cover all of the possible agent-conduct situations that may need to be the subject of instruction. This instruction may have to be

modified or other instructions may have to be drafted to fit specific situations. For example, this instruction does not cover the issue of the agent who engaged in forbidden or criminal acts. *See* Restatement (Second) of Agency §§ 230, 231, and 228–237 generally (1958).

The bracketed paragraphs should not be given routinely. The first is further instruction on implied authority. The non-bracketed part of the instruction should be sufficient in most cases involving scope of authority, implied or otherwise. This bracketed paragraph may be given when further instruction on the subject is needed.

Regarding the first bracketed paragraph and its reference to the principal limiting the agent's authority, it is true that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency § 230 (1958). It is also true that even though an agent presents a contract that contains a clause declaring the company will not be bound by the agent's representations, if the agent "is known to be an agent sent out for the express purpose of making representations as an inducement to the sale[,] . . . the provision in the contract . . . is not considered as limiting the scope of [the agent's] ostensible authority [and] the company is responsible" *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 366, 518 N.W.2d 910, 919 (1994) (citation omitted). Care must be taken not to use this part of the instruction in situations to which it does not apply.

The second bracketed paragraph applies where the pleadings and the evidence support the contention that the agent intentionally used force against another. *See* Restatement (Second) of Agency §§ 228 and 245 (1958). (This is discussed further in the Authorities, below.)

See also NJI2d Civ. 6.01, Comment & Authorities; NJI2d Civ. 6.03, Comment & Authorities.

II. SCOPE OF AUTHORITY

Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents. A subcategory of actual authority is implied authority, which courts typically use to denote actual authority either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably believes the principal wishes the agent to act, in light of the principal's objectives and manifestations. When a principal delegates authority to an agent to accomplish a task without specific directions, the grant of authority includes the agent's ability to exercise his or her discretion and make reasonable determinations concerning the details of how the agent will exercise that authority.

Apparent authority is authority conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.

RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC, 294 Neb. 326, 337-38, 886 N.W.2d 240, 338 (footnotes omitted). For more on apparent authority, including an extension of the above quotation from *RM Campbell Industrial*, see NJI2d Civ. 6.08, Comment & Authorities.

"The scope of an agent's authority is a question of fact." *RM Campbell Indus.*, 294 Neb. at 332, 886 N.W.2d at — (2016); *Accord Koricic v. Beverly Enters.*—Neb., 278 Neb. 713, 716, 773 N.W.2d 145, 149 (2009); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 6, 443 N.W.2d 596, 601 (1989). Regarding the burden of proof on the issue of scope of authority, see *Western Fertilizer and Cordage Co., Inc. v. BRG, Inc.*, 228 Neb. 776, 783, 424 N.W.2d 588, 593 (1988).

"An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. [W]ork connected activity goes beyond the direct services performed for the employer and includes at least some ministration to the personal comfort and human wants of the employee." *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 396, 631 N.W.2d 510, 521 (2001) (interpreting the Nebraska Workers' Compensation Act; internal quotation marks and citations omitted). Drawing the line is particularly difficult when "the employee helps a coemployee and simultaneously advances the employer's work, but does so *not* primarily to help the employer, but to accommodate the coemployee." *Id.* (discussing how this line is drawn and citing cases).

As a general rule, acts of corporate officers pertaining to ordinary corporate business transactions are within the officers' authority. When, however, corporate officers act outside the scope of ordinary business, the general rule does not apply and the other party to the transaction is required to make an inquiry into the officer's authority. *Western Fertilizer and Cordage Co., Inc. v. BRG, Inc.*, 228 Neb. 776, 783, 424 N.W.2d 588, 593 (1988). *Accord Continental Mortgage v. Johnson*, 250 Neb. 484, 488, 549 N.W.2d 640, 643 (1996) (presumption acts of corporate officer pertaining to ordinary corporate business transactions, authorized by corporation; when officer acts outside scope of ordinary business, no such presumption arises and other party required to inquire into officer's authority).

An agent's intentional use of force against another is within the scope of the agent's authority if said force is used with the intention of furthering the interests of the principal and if said use of force is not

unexpected by the principal. *Klause v. Neb. State Bd. of Agric.*, 150 Neb. 466, 35 N.W.2d 104 (1948); *Rich v. Dugan, supra*; *Crounse v. Booth Fisheries, Co.*, 111 Neb. 6, 195 N.W. 462 (1923); *Zaitz v. Drake-Williams Mount Co.*, 107 Neb. 262, 185 N.W. 424 (1921); *Sternad v. Omaha & C.B. St. Ry. Co.*, 104 Neb. 460, 177 N.W. 738 (1920); *Allertz v. Hankins*, 102 Neb. 202, 166 N.W. 608 (1918). *See also* Restatement (Second) of Agency §§ 228, 245 (1958). *But see* *Zybach v. State, Depart. of Soc. Serv.*, 226 Neb. 396, 403, 411 N.W.2d 627, 631-32 (1987) (“[An] attorney in fact or agent has no implied or apparent authority to do that which the principal himself would not be authorized to do.”). Regarding apparent authority, *see* NJI2d Civ. 6.08.

Deceit or fraud on the part of the agent may be within the scope of the agent's authority despite the fact that the principal did not authorize, concur in, or even know of the deceit or fraud. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 653-54, 392 N.W.2d 759, 766 (1986). *But see* *Zybach v. State, Depart. of Soc. Serv.*, 226 Neb. 396, 403, 411 N.W.2d 627, 631-32 (1987), as quoted in the preceding paragraph.

Authority only to report to a principal or a fellow agent is not authority to bind the principal. *Kliment v. National Farms, Inc.*, 245 Neb. 596, 600, 514 N.W.2d 315, 318 (1994).

Agents who deviate from the business of their principal is the subject of NJI2d Civ. 6.11. *See* that instruction and the Comment & Authorities thereto.

On the subject of whether an agent was acting within the scope of his or her authority, and in addition to the cases above, *see* the following Nebraska cases, among others: *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001); *Strong v. K & K Invs., Inc.*, 216 Neb. 370, 374-75, 343 N.W.2d 912, 915-16 (1984); *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 427, 264 N.W.2d 178, 182 (1978); *Johnson v. Evers*, 195 Neb. 426, 430-31, 238 N.W.2d 474, 476-77 (1976) (quoting the Restatement); *S.M.S. Trucking Co. v. Midland Vet, Inc.*, 186 Neb. 647, 652, 185 N.W.2d 667, 670 (1971); *Dembowski v. Central Constr. Co.*, 186 Neb. 624, 627, 185 N.W.2d 461, 463-64 (1971); *Rogers v. Navajo Freight Lines, Inc.*, 186 Neb. 502, 505, 184 N.W.2d 623, 625 (1971); *Rankin v. Western Union Tel. Co.*, 147 Neb. 411, 413-14, 23 N.W.2d 676, 677-78 (1946) (use of an instrumentality of a substantially different kind from that authorized); *Sutton v. Inland Constr. Co.*, 144 Neb. 721, 725, 14 N.W.2d 387, 390 (1944) (when an employee deviates from the business of the employer, fulfills the purpose of the deviation, and resumes the prosecution of the employer's business, the employer may be liable for the employee's acts).

For a more detailed discussion of the kinds of things that evidence scope of authority, *see* Restatement (Second) of Agency §§ 229 (conduct), 233 (time), and 234 (area) (1958). *See generally id.* at §§ 228-37.

III. RELATED TOPICS

As noted above, the first bracketed paragraph of the instruction is

instruction on implied authority. Regarding that part of the instruction, which, as also noted above, is not to be given routinely, *see* *Koricic v. Beverly Enters.*—Neb., 278 Neb. 713, 716-19, 773 N.W.2d 145, 149-51 (2009); *Shriver v. Sims*, 127 Neb. 374, 380, 255 N.W. 60, 63 (1934); Restatement (Second) of Agency § 35 (1958).

Apparent authority is the subject of NJI2d Civ. 6.08.

The loaned or hired-out agent is the subject of NJI2d Civ. 6.10.

Agents who deviate from the business of their principal is the subject of NJI2d Civ. 6.11.

NJI2d Civ. 6.05

AGENCY—PRINCIPAL AND AGENT SUED, NEGLIGENCE ACTION, VICARIOUS LIABILITY, NO ISSUE AS TO AGENCY OR SCOPE OF AUTHORITY—EFFECT OF FINDINGS

At the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (name of agent, hereinafter "A") was acting within the scope of (his, her) authority as the agent of (name of principal, hereinafter "P"). That means that if you find that (A) is liable to the plaintiff, then you must also find that (P) is liable to the plaintiff. On the other hand, if you find that (A) is not liable to the plaintiff, then you must also find that (P) is not liable to the plaintiff.

COMMENT & AUTHORITIES

See NJI2d Civ. 6.01, Comment & Authorities; NJI2d Civ. 6.02, Comment & Authorities. NJI2d Civ. 6.02, Comment & Authorities, explains how this instruction is to be worked into the effect of finding part of the statement of the case instruction.

This instruction applies only in negligence actions where both the principal and the agent are sued, where the sole issue regarding the principal's liability is that of vicarious liability, and where there is no issue as to either agency or scope of authority. If only the principal or the agent is sued, and the sole issue regarding the principal's liability is that of vicarious liability, and there is no issue as to either agency or scope of authority, then this extra effect of finding paragraph is not needed and NJI2d Civ. 2.01 will adequately cover the issue. Where there is an issue as to agency or scope of authority or both, *see* NJI2d Civ. 6.01 and 6.02. (As a general rule, an agent is not liable for the acts, debts, or contractual obligations of his or her principal so long as the agent is only acting as agent. *See* NJI2d Civ. 6.01, Comment & Authorities.)

The final sentence of this instruction should be true in the great majority of cases where the only issue regarding the principal's liability is that of vicarious liability. It is possible, however, that evidence tending to show the agent's wrongful acts could be admitted against the principal but not against the agent. This was the case in *Sears v. Mid-City Motors, Inc.*, 179 Neb. 100, 105, 136 N.W.2d 428, 431 (1965). In that situation, the final sentence of this instruction may not be proper as written, and may need to be redrafted.

If there is evidence tending to show wrongful acts on the part of the principal—evidence of personal negligence on the part of the principal, in addition to imputed negligence—then the final sentence of the instruction will not be appropriate. In *Fonda v. Northwestern Pub. Serv. Co.*, 138 Neb. 262, 277, 292 N.W. 712, 719–20 (1940), for example, the court stated: “A jury may properly return a verdict in favor of a servant and against a master where the evidence supports a finding of other negligence chargeable to the master than that of the servant exonerated by the verdict.” In this situation, the final sentence of the instruction should be rewritten to read as follows:

“On the other hand, if you find that (A) is not liable to the plaintiff, then you must also find that (P) is not liable to the plaintiff for any acts committed by (A).”

Regarding a manufacturer or a distributor's vicarious liability for negligent warranty work by a dealer, see *Zwingman v. Kallhoff*, 244 Neb. 514, 516–21, 507 N.W.2d 894, 896–99 (1993). Accord *Eastlick v. Lueder Const. Co.*, 274 Neb. 467, 473, 741 N.W.2d 628 (2007).

NJI2d Civ. 6.06

DEFINITION OF INDEPENDENT CONTRACTOR

An independent contractor is one who agrees to perform a service for another but whose conduct in the performance of the service is not subject to the right of control by the other.

COMMENT & AUTHORITIES

I. THE SIGNIFICANCE OF THE DISTINCTION BETWEEN AN AGENT AND AN INDEPENDENT CONTRACTOR

“In Nebraska, one acting on behalf of another may do so as an agent or an independent contractor.” *Fitzpatrick v. US West, Inc.*, 246 Neb. 225, 230, 518 N.W.2d 107, 112 (1994). Regarding the former, see NJI2d Civ. 6.03.

Under the doctrine of “*respondeat superior* . . . the negligence of an agent is imputable to the principal.” *McCurry v. School Dist. of*

Valley, 242 Neb. 504, 512, 496 N.W.2d 433, 439, 81 Ed. Law Rep. 288 (1993). *Accord*, e.g., Parrish v. Omaha Pub. Power Dist., 242 Neb. 783, 792, 496 N.W.2d 902, 909 (1993), *disapproved on other grounds* Gaytan v. Wal-Mart, 289 Neb. 49, 74, 853 N.W.2d 181, 202 (2014).

As a general rule, the negligence of an independent contractor or its employees is not imputable to the person engaging the contractor. *E.g.*, Sparks v. M&D Trucking, L.L.C., 301 Neb. 977, 993, 921 N.W.2d 110, 124 (2018); Rodriguez v. Surgical Assoc., 298 Neb. 573, 583, 905 N.W.2d 247, 257 (2018); Gaytan, 289 Neb. at 57, 853 N.W.2d at 192 (same quotation as *Rodriguez*); Eastlick v. Lueder Const. Co., 274 Neb. 467, 473, 741 N.W.2d 628, 635 (2007); Zwingman v. Kallhoff, 244 Neb. 514, 516, 507 N.W.2d 894, 896 (1993) (same quotation as *Rodriguez*); Parrish, 242 Neb. at 792, 496 N.W.2d at 909, *disapproved on other grounds* Gaytan, Neb. at 57, 853 N.W.2d at 202); McCurry, 242 Neb. at 512, 496 N.W.2d at 439.

Negligence is imputable in the former case (of an agent) and not the latter (of an independent contractor) because the principal has control over the agent while the one who hires an independent contractor does not have control over the acts of the contractor. *E.g.*, Gaytan, 289 Neb. at 57, 853 N.W.2d at 192; McCurry v. School Dist. of Valley, 242 Neb. 504, 512, 496 N.W.2d 433, 439, 81 Ed. Law Rep. 288 (1993). Since “an employer of an independent contractor generally has no control over the manner in which the work is to be done by the contractor, . . . the contractor, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk and bearing the distributing it.” *Rodriguez*, 298 Neb. at 583, 905 N.W.2d at 257. *Accord* Gaytan, 289 Neb. at 57, 853 N.W.2d at 192. *See also* part II(B) of this Comment & Authorities, below.

A. FOUR EXCEPTIONS TO THIS GENERAL RULE OF NON-IMPUTABLE NEGLIGENCE

There are four exceptions to the general rule that the negligence of the independent contractor is not imputable to the contractor’s employer.

[A]n employer of an independent contractor can be liable for physical harm caused to another if (1) the employer retains control over the contractor’s work, (2) the employer is in possession and control of premises, (3) a statute or rule imposes a specific duty on the employer, or (4) the contractor’s work involves special risks or dangers.

Gaytan v. Wal-Mart, 289 Neb. 49, 57, 853 N.W.2d 181, 192–93 (2014) (citing cases). Note that the conjunction in the preceding quotation is “or”; the plaintiff must prove one of the four. *Accord* Sparks v. M&D Trucking, L.L.C., 301 Neb. 977, 993–94, 921 N.W.2d 110, 124–25 (2018); Cruz v. Lopez, 301 Neb. 531, 545, 919 N.W.2d 479, 491 (2018).

The Court often classifies exceptions (2), (3), and (4) as “nondelegable duties.” *Sparks*, 301 Neb. at 994, 921 N.W.2d at 125; *Cruz*, 301 Neb. at 548 *et seq.*, 919 N.W.2d at 493; *Gaytan*, 289 Neb. at 57, 853 N.W.2d at 193. *Accord* *Rodriguez v. Surgical Assocs., P.C.*, 298 Neb. 573, 584, 905 N.W.2d 247, 257 (2018). When one who employs an independent contractor assigns to the independent contractor work consequent to the former’s nondelegable duty, then the employer “is not relieved from liability arising from the delegated duties negligently performed. *Sparks*, 301 Neb. at 994, 921 N.W.2d at 125. *Accord, e.g., Rodriguez*, 298 Neb. at 584, 905 N.W.2d at 257. “Thus, the person owing a nondelegable duty is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.” *Rodriguez*, 298 Neb. at 584, 905 N.W.2d at 257.

Whether a duty is nondelegable is a question of law. There is no set formula for determining when a duty is nondelegable. Indeed, whether a particular duty is properly categorized as nondelegable necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations. In a given case, the policy question facing a court is whether, on the facts presented, the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks inherent in the performance of the task. Courts have often deemed a duty to be nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.

Rodriguez, 298 Neb. at 584–85, 905 N.W.2d at 257–58 (footnotes and multiple internal quotation marks omitted).

Regarding nondelegable duties in the context of physicians, *see* NJI2d Civ. 12.01, Comment & Authorities.

1. Retained Control

To fall within the first of the four exceptions above, *i.e.*, the “retained control” exception,

the contracting party’s involvement in overseeing the work must be substantial. Furthermore, that control must directly relate to the work that caused the injury. In other words, the key element of control must exist with respect to the very thing from which the injury arose. To impose liability, the contracting party must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger that ultimately caused the injury, and (3) the opportunity to prevent the injury.”

Sparks, 301 Neb. at 993–94, 921 N.W.2d at 125. *Accord Cruz*, 301 Neb. at 546, 919 N.W.2d at 492; *Gaytan v. Wal-Mart*, 289 Neb. 49, 57, 853

N.W.2d 181, 193 (2014); *Kime v. Hobbs*, 252 Neb. 407, 416, 562 N.W.2d 705, 712 (1997). Note that the conjunction in the preceding quotation is “and”; the plaintiff must prove all three. “Having the right to control and supervise the work in this context implies having the ability to oversee and direct the manner in which the work which caused the injury is carried out.” Same quotation: *Sparks*, 301 Neb. at 995, 921 N.W.2d at 125; *Kime*, 252 Neb. at 416, 562 N.W.2d at 712.

Prior cases had said that control in the case of the general contractor required proof of these three elements, but control in the case of one who employed the contractor meant that “the owner’s involvement in overseeing the construction process must be substantial.” *Gaytan*, 289 Neb. at 58, 853 N.W.2d at 193 (citing cases). *Gaytan* does away with this split, clarifying the definition of “control” in the case of the owner. The rule is now the same whether the plaintiff is trying to impute the independent contractor’s negligence to the owner of the property or to the general contractor. If the plaintiff proves these three things, the plaintiff will necessarily have proved that the owner’s control was substantial, but these three elements require that the owner’s “control must directly relate to the work that caused the injury.” *Gaytan*, 289 Neb. at 59, 853 N.W.2d at 193. *Accord Sparks*, 301 Neb. at 994, 921 N.W.2d at 125; *Cruz*, 301 Neb. at 546, 919 N.W.2d at 492.

“Further, control over the work by the general contractor or the owner must manifest in an ability to dictate the way the work is performed, and not merely include powers such as a general right to start and stop work, inspect progress, or make suggestions which need not be followed.” *Gaytan*, 289 Neb. at 59, 853 N.W.2d at 193–94 (evidence of this kind of control can be found in the language of the contract and the actual practice of the parties, *id.* at 194). *Accord Cruz*, 301 Neb. at 546, 919 N.W.2d at 492; *Kime*, 252 Neb. at 416, 562 N.W.2d at 712.

If this kind of control is retained, then the relationship may be that of principal and agent or employer and employee, rather than that of employer and independent contractor.

2. Employer in Possession and Control of the Premises

The first of these four exceptions, the one just discussed above, has to do with the employer’s control of the work being done. This, the second of the four exceptions, *i.e.*, the “employer in possession and control of premises” exception, has to do with the premises on or in which the work is done. “[T]he fact that the owner does not retain sufficient control of the work so as to become liable for injuries to employees of an independent contractor does not mean that the owner is relieved of its nondelegable duty to provide a safe place to work for employees of independent contractors.” *Gaytan*, 289 Neb. at 66, 853 N.W.2d at 197. Regarding the safe place to work exception, see NJI2d Civ. 8.26, Comment & Authorities.

3. Statute or Rule Imposing a Specific Duty on the Employer

Regarding the third of the four exceptions, *i.e.*, the “statute or rule imposing a specific duty on the employer” exception, “[t]he duty arises only if the statute or regulation specifically imposes the obligation on only the employer and at least implicitly prohibits delegation. It is the nature of the regulation itself that determines whether the duties it creates are nondelegable.” *Gaytan*, 289 Neb. at 66, 853 N.W.2d at 199 (footnote omitted). See *Cruz v. Lopez*, 301 Neb. 531, 551–59, 919 N.W.2d 479, 495–99 (2018) (discussing motor carrier statutes and regulations).

4. Special Risks or Dangers

The fourth of the exceptions, *i.e.*, the “special risks or dangers” exception, is discussed at *Cruz*, 301 Neb. at 550–51, 919 N.W.2d at 494–95; *Gaytan*, 289 Neb. at 69–74, 853 N.W.2d at 199–202 (citing cases); *Semler v. Sears, Roebuck and Co.*, 268 Neb. 857, 862–63, 689 N.W.2d 327, 332–33 (2004); *Ray v. Argos Corp.*, 259 Neb. 799, 803–07, 612 N.W.2d 246, 249–51 (2000); *Whalen v. US West Commc’ns, Inc.*, 253 Neb. 334, 341–48, 570 N.W.2d 531, 541 (1997) (defining and giving examples of peculiar risk); *Kime v. Hobbs*, 252 Neb. 407, 415–17, 562 N.W.2d 705, 712–713 (1997) (operating loaded tractor-livestock trailer unit not inherently dangerous activity so as to impose liability on owner-of-cattle employer for negligence of independent-contractor driver; loading of certain kinds of goods may be inherently dangerous, but driving loaded truck is not); *Anderson v. Nashua Corp.*, 246 Neb. 420, 431–33, 519 N.W.2d 275, 283–84 (1994). This exception “does not apply to personal injury claims by employees of subcontractors against general contractors or owners.” *Gaytan*, 289 Neb. at 66, 853 N.W.2d at 202.

B. SOME CASES STATE ONLY TWO EXCEPTIONS TO THIS GENERAL RULE OF NON-IMPUTABLE NEGLIGENCE

Some cases say that there are two exceptions, not four: (1) where the duty is nondelegable and (2) when the one engaging the contractor fails to exercise due care when selecting the contractor. As for what these cases list as the first exception—nondelegable duty—they do not break out the latter three of the four exceptions from the *Gaytan* quotation above because, on their facts, they do not have to. *E.g.*, *Prochaska v. Douglas Cty.*, 260 Neb. 642, 646–47, 619 N.W.2d 437, 441 (2000); *Parrish*, 242 Neb. at 794–800, 496 N.W.2d at 909, 910–914; *McCurry*, 242 Neb. at 512, 496 N.W.2d at 439.

As for what these cases list as the second exception—failure to exercise due care when selecting the contractor—that is less an exception to non-imputability of negligence, and more a separate act of negligence. Negligence is, after all, a failure to exercise reasonable care. See *NJI2d Civ.* 3.02.

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An independent contractor who has only contracted to follow plans,

specifications, or instructions owes no duty to third persons to judge the plans, specifications, or instructions, unless they are so obviously dangerous that no competent contractor would follow them. *Lindsay Mfg. Co. v. Universal Sur. Co.*, 246 Neb. 495, 511–12, 519 N.W.2d 530, 542 (1994) (adopting this rule for first time in Nebraska).

The employer of an independent contractor cannot be held vicariously liable for negligence of the independent contractor, which results in injury to an employee of the independent contractor, when, pursuant to the exclusivity provision of worker's compensation laws, the independent contractor itself is immune from suit. *Anderson v. Nashua Corp.*, 246 Neb. 420, 423, 433–34, 519 N.W.2d 275, 279, 284–85 (1994). This is true even in the case of a "nondelegable duty," where the work is inherently dangerous and the employer of the contractor has a nondelegable duty to protect the third-party injured employee from harm caused by the contractor. *Id.* at 433–34, 519 N.W.2d at 284–85.

"[W]hen an independent contractor is primarily liable and any liability of an owner is derived solely from the actions of its independent contractor," the acceptance of satisfaction from and the release of the independent contractor also releases the employee. *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 99, 560 N.W.2d 482, 486 (1997). This is discussed further at NJI2d Civ. 6.02, Comment & Authorities.

There is also a difference in the duty to disclose. In *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006), National American Ins. Co. (NAICO) sued Constructors Bonding Co. (CBI) alleging that the latter had failed to inform the former of certain facts that would have affected the issuance of a surety bond that the former issued to a third party. Concluding "that CBI was an independent contractor," the Court stated that it "must determine whether CBI had any duty to disclose to NAICO the information about [the third party]." *Id.* at 176, 297 N.W.2d at 303. The Court stated that there is no "duty to disclose unless there is a fiduciary relationship between the parties." *Id.* "Absent a fiduciary relationship, the duty to disclose . . . would have to arise under the terms of the contract." *Id.* at 177, 719 N.W.2d at 303. Absent a fiduciary relationship or a contract provision establishing such a duty, "[i]n the absence of fraud or deception to induce the contract, the courts can afford no relief." *Id.* at 176, 297 N.W.2d at 303 (quoting *Jones v. Stewart*, 62 Neb. 207, 210, 87 N.W. 12, 13 (1901)). Since CBI was an independent contractor and not an employee, there was no fiduciary relationship inherent in the relationship. *Id.* at 176, 297 N.W.2d at 303.

II. AGENT, EMPLOYEE, AND INDEPENDENT CONTRACTOR DEFINED

A. DEFINITION OF AGENT AND EMPLOYEE

For the definition of agent and employee, see NJI2d Civ. 6.03.

B. DEFINING INDEPENDENT CONTRACTOR BY CONTRASTING IT WITH AGENT AND EMPLOYEE

As a general rule, the person who hires an independent contractor is not liable for the negligence of the contractor. This general rule and its exceptions are discussed above in the part I of this Comment & Authorities.

“Ordinarily, a party’s status as an employee or an independent contractor is a question of fact.” Same quotation: *Sparks v. M&D Trucking, L.L.C.*, 301 Neb. 977, 988, 921 N.W.2d 110, 121 (2018); *Cruz v. Lopez*, 301 Neb. 531, 543, 919 N.W.2d 479, 490 (2018); *Mays v. Midnite Dreams*, 300 Neb. 485, 492, 496, 915 N.W.2d 71, 81, 84 (2018); *Williams v. Allstate Indem. Co.*, 266 Neb. 794, 801, 669 N.W.2d 455, 461 (2003); *Keller v. Tavarone*, 262 Neb. 2, 8, 628 N.W.2d 222, 228 (2001); *Kime v. Hobbs*, 252 Neb. 407, 413, 562 N.W.2d 705, 711 (1997). *Accord* *Reeder v. State*, 254 Neb. 707, 712, 578 N.W.2d 435, 440 (1998); *Pettit v. State*, 249 Neb. 666, 669, 544 N.W.2d 855, 859 (1996); *Larson v. Hometown Commc’ns, Inc.*, 248 Neb. 942, 952, 540 N.W.2d 339, 347 (1995).

The matter is a question of law, however, where “there can be no dispute as to facts pertaining to the contract and the relationship of the parties involved and . . . only one reasonable inference can be drawn therefrom.” *Williams*, 266 Neb. at 801, 669 N.W.2d at 461. *Accord* *Sparks*, 301 Neb. at 988, 921 N.W.2d at 121 (“By stating ‘where the inference is clear,’ this court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.”); *Mays, supra*; *Keller v. Tavarone, supra*; *Reeder v. State, supra*; *Kime v. Hobbs, supra*; *Pettit v. State, supra*.

There is no single test for whether one is an independent contractor, on the one hand, or an agent or employee, on the other. The determination must be made from all of the facts in the case. *Aboytes-Mosqueda v. LFA INC.*, 306 Neb. 277, 285, 944 N.W.2d 765, — (2020); *Sparks*, 301 Neb. at 988, 921 N.W.2d at 121; *Kime*, 252 Neb. at 413–14, 562 N.W.2d at 711.

The parties’ own description of the relationship is not determinative. *Sparks*, 301 Neb. at 988, 921 N.W.2d at 121; *Kime*, 252 Neb. at 413–14, 562 N.W.2d at 711. However, the kind of relationship the parties believed they were forming “is an important guideline in determining the legal nature of the relationship.” *Keller v. Tavarone*, 262 Neb. 2, 9–10, 628 N.W.2d 222, 229 (2001).

“While no one factor is determinative, control is the most important factor to be considered in determining whether someone is an employee or independent contractor.” *Sparks*, 301 Neb. at 989, 921 N.W.2d at 122; *Williams*, 266 Neb. at 801, 669 N.W.2d at 462. *Accord* *Mays*, 300

Neb. at 497, 915 N.W.2d at 495; *Keller*, 262 Neb. at 8, 628 N.W.2d at 228; *Omaha World-Herald v. Dernier*, 253 Neb. 215, 223, 570 N.W.2d 508, 514 (1997) ("the most important factor"); *Kime*, 252 Neb. at 414, 562 N.W.2d at 711; *Pettit v. State*, 249 Neb. 666, 673, 544 N.W.2d 855, 861 (1996); *Zwingman v. Kallhoff*, 244 Neb. 514, 516, 507 N.W.2d 894, 896 (1993) (stating that the chief criterion is control or right thereof; discussing manufacturer's and distributor's liability for dealer's negligent warranty work, *id.* at 516-21, 507 N.W.2d at 896-99). See also *Mansfield v. Andrew Murphy & Son, Inc.*, 139 Neb. 793, 799-800, 298 N.W. 749, 753-54 (1941).

In examining the extent of the employer's control over the worker in this context, it is important to distinguish control over the means and methods of the assignment from control over the end product of the work to be performed. An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done *only as to the result of the work and not as to the methods or means used*. Even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms.

Kime v. Hobbs, 252 Neb. 407, 414, 562 N.W.2d 705, 711 (1997) (italics in original). *Accord Sparks*, 301 Neb. at 988, 921 N.W.2d at 122. Same quotation as first sentence: *Cruz v. Lopez*, 301 Neb. at 546, 919 N.W.2d at 492.

"We have repeatedly stated that although control or the right of control is the chief factor to be considered when identifying one acting on behalf of another as an employee or an independent contractor, it is not the conclusive factor." *Hemmerling v. Happy Cab. Co.*, 247 Neb. 919, 926, 530 N.W.2d 916, 921 (1995). *Accord Sparks*, 301 Neb. at 989, 921 N.W.2d at 122; *Williams*, 266 Neb. at 801, 669 N.W.2d at 462 (no one factor, including control, is determinative); *Reeder v. State*, 254 Neb. 707, 712, 578 N.W.2d 435, 440 (1998) (same quotation); *Larson v. Hometown Commc'ns, Inc.*, 248 Neb. 942, 954, 540 N.W.2d 339, 348 (1995) (control or right of control generally chief criterion in determining whether one is independent contractor; however, even employer of independent contractor may exercise such control as necessary to assure performance of contract in accordance with its terms).

The following is a simplified definition of "independent contractor": "An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used." *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 925, 530 N.W.2d 916, 920 (1995) (internal quotation marks and citation omitted) (court finds employer-employee relationship as matter of law). *Accord Omaha World-Herald v. Dernier*, 253 Neb. 215, 222, 570 N.W.2d 508, 514 (1997).

The *Erspamer Advertising* case says this about the test for deciding whether a person is an independent contractor:

[T]he common-law test for independent contractor includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive.

.....

The Restatement (Second) of Agency § 220 (1958) lists the following ten factors to be considered in determining whether a person is an employee or an independent contractor: "(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work . . . ;

"(b) whether or not the one employed is engaged in a distinct occupation or business . . . ;

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the work[er] supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer . . . ;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

"(j) whether the principal is or is not in business."

Erspamer Adver. Co. v. Department of Labor, 214 Neb. 68, 71-72, 333 N.W.2d 646, 648-49 (1983). *Accord*, e.g., *Aboytes-Mosqueda*, 306 Neb. at 285, 944 N.W.2d at — (involving workers compensation; discussing factors applied to the facts presented); *Sparks*, 301 Neb. at 988-89, 992, 921 N.W.2d at 124 (finding that the driver was not an employee of defendant company in part because driver was in a distinct business from defendant was not exclusively bound to defendant and could take

other work, and did not use defendant's equipment, *id.* at 993, 921 N.W.2d at 124); *Mays v. Midnite Dreams*, 300 Neb. 485, 495–96, 915 N.W.2d 71, 83 (2018); *Williams v. Allstate Indem. Co.*, 266 Neb. 794, 801, 669 N.W.2d 455, 461–62 (2003); *Keller v. Tavarone*, 262 Neb. 2, 8, 628 N.W.2d 222, 228 (2001); *Omaha World-Herald v. Dernier*, 253 Neb. at 222–23, 570 N.W.2d at 514; *Kime v. Hobbs*, 252 Neb., 407, 414, 562 N.W.2d 705, 711 (1997) (regarding the driver of a cattle truck); *Pettit v. State*, 249 Neb. 666, 673–76, 544 N.W.2d 855, 861–62 (1996) (listing ten factors; right of control is chief factor; discussing each factor in context of plaintiff's relationship with Nebraska Department of Social Services); *Larson v. Hometown Commc'ns, Inc.*, 248 Neb. 942, 952–64, 540 N.W.2d 339, 347–53 (1995) (listing ten factors, *id.* at 953–54, 540 N.W.2d at 348; though right of control is chief factor, no one factor is conclusive, *id.* at 953, 540 N.W.2d at 348; discussing each factor in context of the particular relationship between a newspaper and an injured newspaper-carrier and finding sufficient evidence to affirm the trial court's finding that this carrier was employee of this newspaper, *id.* at 954–64, 540 N.W.2d at 348–53); *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 456, 507 N.W.2d 631, 636 (1993) (citing cases).

Regarding subparagraph (g) from the above quotation: On the question of whether one is or is not performing services for wages, see *Omaha World-Herald v. Dernier*, 253 Neb. 215, 219–20, 570 N.W.2d 508, 512–513 (1997). On the subject of whether one is performing services under a contract of hire, see *Omaha World-Herald*, 253 Neb. at 221, 570 N.W.2d at 513. Regarding subparagraph (g):

“Normally an employee is compensated while he works. An independent contractor's compensation, on the other hand, usually depends upon whether he makes a profit from the contract.” If such “profitability depends upon the worker's own capital investment, management, and the difference between income and expense, that is an indication of independent contractor status.” Also, “[t]he deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication.”

Omaha World-Herald, 253 Neb. at 227, 570 N.W.2d at 516 (citations omitted).

Regarding subparagraph (i) from the above quotation:

We have recognized that whether the parties believed that they were creating a master-servant relationship is an “important guideline” in determining the legal nature of the relationship. When there is a written contract between the parties which denominates and describes the relationship as that of independent contractor, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is not deemed to be

an employee as a matter of law. The existence of such contractual provision “‘must . . . be considered and may be of prime importance,’ ” but “ ‘a writing which merely denominates the relationship may not be used to conceal the true arrangement.’ ”

Omaha World-Herald, 253 Neb. at 229, 570 N.W.2d at 517 (citations omitted).

“[A] subcontractor is one who independently contracts with the contractor to do part of the work which the contractor has previously agreed to perform.” *McKinstry v. County of Cass*, 228 Neb. 733, 746, 424 N.W.2d 322, 330 (1988).

Regarding the definition of independent contractor, *see generally* Restatement (Second) of Agency §§ 2, 219–20, 227 (1958). Since the independent contractor is partly defined by distinguishing it from agent and employee, *see also* NJI2d Civ. 6.03, Comment & Authorities, defining agent and employee.

III. AGENT OR INDEPENDENT-CONTRACTOR STATUS: A QUESTION OF FACT

“Ordinarily, a party’s status as an employee or an independent contractor is a question of fact.” *See the cases cited in part II(B) of this Comment & Authorities, above.*

However, the matter is a question of law where “there can be no dispute as to facts pertaining to the contract and the relationship of the parties involved and . . . only one reasonable inference can be drawn therefrom.” *See the cases cited in part II(B) of this Comment & Authorities, above.*

IV. DRAFTING ADDITIONAL INSTRUCTIONS

Where there is a question of fact as to whether an alleged agent was an agent or an independent contractor, that issue will have to be stated in the “Issues” part of NJI2d Civ. 2.01 or 15.01, and worked into the “Burden of Proof” part of that same instruction. (*See* NJI2d Civ. 6.01, Comment & Authorities.) Regarding the “Effect of Findings” part of the instruction, the changes found in NJI2d Civ. 6.02 and the Comment & Authorities thereto will be necessary. In addition, in those situations where the following changes are appropriate, they are optional: The following might be added onto the end of the alternative suggested first in NJI2d Civ. 6.02.

“[(P) is not liable for any negligence of (A) if it occurred while (A) was an independent contractor [or an (employee, agent) of an independent contractor].]”

And the following might be added onto the end of the alternative suggested second:

"[(P) is not bound by the acts of (A) done while (A) was an independent contractor [or an (employee, agent) of an independent contractor].]"

V. CROSS REFERENCES

Regarding the liability of an owner or possessor of land for injuries suffered by an independent contractor due to conditions on the premises, see NJI2d Civ. 8.25.

NJI2d Civ. 6.08

AGENCY—APPARENT AUTHORITY

If you find

1. that (name of principal, hereinafter "P") led (here insert appropriate name) to believe that (name of agent, hereinafter "A") was authorized to (here insert specific description of the act or acts involved) on behalf of (P), and
2. that (here insert appropriate name)'s belief that (A) had this authority was reasonable,

then, as between (P) and (third person), and regarding (here insert specific description of the act or acts involved), (P) is (responsible for, bound by) the acts of (A).

COMMENT & AUTHORITIES

I. GENERAL USE

This instruction states the two elements of apparent authority: (1) that (P) led the third person to believe in (A)'s authority; and (2) that the third person's belief was reasonable. The third person's reliance on that belief is not an element of apparent authority. It is, however, an element of recovery. As such, it will be taken care of in the statement-of-the-case instruction, the parts thereof stating "Issues" and "Burden of Proof".

Because of the element of reliance, this instruction will be appropriate most often in a contract situation, less often in a tort action. One does not step in front of a car in reliance on the driver's apparent authority. This is not to say that there cannot be tort actions based on apparent authority. It is possible, for example, that a patient could believe that a particular hospital has an outstanding reputation, that the hospital could lead the patient reasonably to believe that a particular surgeon is an employee or agent of the hospital, and that the patient

could select that particular surgeon in reliance on the belief that the surgeon is an employee of the hospital (or, in the language of the applicable law, in reliance on the belief that the hospital had authorized the surgeon to act on its behalf).

If there is only one “third person” in the lawsuit, then the following words can be omitted from near the end of the instruction: “as between (P) and (here insert appropriate name), and.”

II. APPARENT AUTHORITY

Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent’s apparent authority. Apparent authority gives an agent the power to affect the principal’s legal relationships with third parties. The power arises from and is limited to the principal’s manifestations to those third parties about the relationships. Stated another way, apparent authority for which a principal may be liable exists only when the third party’s belief is traceable to the principal’s manifestation and cannot be established by the agent’s acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor’s authority that reach the third party and the third party can trace to the principal.

For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.

RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC, 294 Neb. 326, 338, 886 N.W.2d 240, 252 (2016) (footnotes omitted). Same quotation, but with paragraph break omitted: *Koricic v. Beverly Enters.*—Neb., 278 Neb. 713, 719-20, 773 N.W.2d 145, 151-52 (2009). *Accord* *Kohout v. Bennett Construction*, 296 Neb. 608, 616, 894 N.W.2d 821, 828 (2017); *Storevisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 246-47, 795 N.W.2d 271, 279 (2011).

It may be helpful to consider the difference between actual authority and apparent authority in this way: to create actual authority, the principal “communicates” directly with the agent; to create apparent authority the principal “communicates” directly with a third person. Creating apparent authority does not create an agency relationship; rather it allows the third party to rely upon the authority. *See* *RM Campbell Indus.*, 294 Neb. at 337, 886 N.W.2d at 252 (“Actual authority

is authority that the principal expressly grants to the agent or authority to which the principal consents.”)

“A party who has knowingly permitted others to treat one as his or her agent is estopped to deny the agency.” Same quotation: *Landmark Enters. v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 887, 554 N.W.2d 119, 123 (1996); *Ryder Truck Rental, Inc. v. Transportation Equip. Co.*, 215 Neb. 458, 461, 339 N.W.2d 283, 286 (1983). *Accord* *Department of Banking v. Davis*, 227 Neb. 172, 177, 416 N.W.2d 566, 569 (1987).

Apparent authority must be traceable to the principal, that is, the appearance must have been caused by the principal. It cannot be created by the acts, declarations, or conduct of the agent. *E.g.*, *Kohout*, 296 Neb. at 616, 296 N.W.2d at 828; *Koricic*, quoted *supra*; *State ex rel. Medlin v. Little*, 270 Neb. 414, 419-20, 703 N.W.2d 593, 597-98 (2005); *Landmark*, 250 Neb. at 887, 554 N.W.2d at 123; *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 720, 515 N.W.2d 416, 422 (1994); *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 871, 515 N.W.2d 794, 801 (1994); *Corman v. Musselman*, 232 Neb. 159, 167, 439 N.W.2d 781, 787 (1989); *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 353, 436 N.W.2d 184, 187 (1989).

The agent’s belief that he or she has authority is not enough to bind the principal. *Western Fertilizer v. BRG, Inc.*, 228 Neb. at 785, 424 N.W.2d at 594.

“Apparent authority arises from conduct by the principal to cause good faith belief that the agent was acting within the scope of his authority.” *Twin City Plaza, Inc. v. Central Sur. & Ins. Corp.*, 409 F.2d 1195, 1199 (8th Cir.1969). *See also* *State ex rel. Medlin*, 270 Neb. at 419, 703 N.W.2d at 597.

The acts of the principal which establish the apparent agency may be either intentional acts or negligent acts. *Koricic*, quoted *supra*; *State ex rel. Medlin*, 270 Neb. at 419, 703 N.W.2d at 597; *Draemel*, 223 Neb. at 651, 392 N.W.2d at 763; *Wolfson Car Leasing Co. v. Weberg*, 200 Neb. 420, 426-27, 264 N.W.2d 178, 182 (1978).

“[A]pparent authority may exist beyond termination of the principal-agency relationship when notice of termination has not been given.” *Moore v. Puget Sound Plywood, Inc.*, 214 Neb. 14, 19-20, 332 N.W.2d 212, 215-16 (1983). *Accord* *Draemel*, 223 Neb. at 653, 392 N.W.2d at 763-65.

The third person’s belief in the existence of the agency relationship must be reasonable. *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 341, 886 N.W.2d 240, 254 (2016) (“ . . . NJI2d Civ. 6.08 does not require that the jury find that the party relying on the apparent authority not be negligent and use ordinary prudence. Rather, a jury must only find that the party must be acting reasonably.”); *Rodine*, 171 Neb. at 274, 106 N.W.2d at 397-98.

Apparent authority does not exist where the third person has a reason to question the validity of the apparent authority and has reasonable means of checking. In that case, the court will charge the third person with knowledge of the facts that the inquiry would have revealed. "One who is placed on inquiry as to an agent's or employee's authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which the inquiry would have developed." *Franksen*, 245 Neb. at 871-72, 515 N.W.2d at 801-02.

An act can be done with apparent authority even if it is "directly contrary to the instructions of the principal." *Draemel*, 223 Neb. at 654, 392 N.W.2d at 765. (internal quotation marks omitted).

See generally Restatement (Second) of Agency §§ 8, 27 (1958).

Regarding inferred or implied agency, *see*, NJI2d Civ. 6.03, Comment & Authorities.

See also NJI2d Civ. 6.01, Comment & Authorities.

III. RATIFICATION

"Ratification is the acceptance of a previously unauthorized contract." *Christiansen v. County of Douglas*, 288 Neb. 564, 582-83, 849 N.W.2d 493, 507 (2014) (ratification by a county board).

(1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.

(2) A person ratifies an act by

(a) manifesting assent that the act shall affect the person's legal relations, or

(b) conduct that justifies a reasonable assumption that the person so consents.

Cisneros v. Graham, 294 Neb. 83, 100, 881 N.W.2d 878, 889 (2016) (quoting 1 Restatement (Third) of Agency § 4.01 at 304 (2006)). "Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents." *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 337, 886 N.W.2d 240, 252 (2016).

"[W]hether there has been a ratification is ultimately and ordinarily a question of fact." *Cisneros*, 294 Neb. at 100, 881 N.W.2d at 890. And "[b]ecause ratification is an affirmative defense, the burden of proving ratification rests on the party asserting it." *Id.*

As a general rule, “ratification of an agent’s unauthorized acts may be made by overt action or inferred from silence or inaction. However, . . . “[i]f formalities are required for the authorization of an act, the same formalities are required for ratification. In particular, if written authorization would be necessary to bind the principal to a transaction, a writing is necessary to bind the principal to a ratification.” *Cisneros*, 294 Neb. at 100-101, 881 N.W.2d at 889 (citation omitted), quoting 1 Restatement (Third) of Agency § 4.01, comment *e*, at 308 (2006). Accord *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 907-09, 896 N.W.2d 612, 628 (2017) (discussing ratification of the unauthorized acts of a corporate officer).

Cisneros arose in the context of an agency relationship created by a power of attorney; by law, the power of attorney must be granted in writing; therefore, ratification must be in writing; and in this case it was not. *Cisneros*, *passim*.

We find instructive, though we do not expressly adopt, the Restatement (Third) of Agency. According to the Restatement, ratification is the “affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority” A person ratifies an act by (a) manifesting assent that the act shall affect the person’s legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents.

“A person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge.” Notice in this context means actual notice, and not notice as otherwise set forth in the Restatement.

Harts v. County of Knox, 308 Neb. 1, 9, 952 N.W.2d 199, 206 (2020) (footnotes omitted) (quoting respectively 1 Restatement (Third) of Agency, §§ 4.01 (1) and (2) at 304 (2006), *id.* at § 4.06 at 336, and *id.* § 1.04(4) at 70).

Regarding the principal’s ratification of the acts of its agent—here in the context of partners as agents of the partnership, see the extensive discussion at *Elting v. Elting*, 288 Neb. 404, 415, 418–21, 849 N.W.2d 444, 452–457 (2014). See also, *Christiansen*, 288 Neb. at 583, 849 N.W.2d at 507 (“Ratification of an agent’s unauthorized acts may be made by overt action or inferred from silence and inaction.”); *Brook Valley Ltd. P’ship v. Mutual of Omaha Bank*, 285 Neb. 157, 188, 825 N.W.2d 779, 789 (2013) (same as *Christiansen*).

Specifically regarding corporate ratification of unauthorized acts of a corporate officer, see *Strohmyer*, 296 Neb. at 907-09, 896 N.W.2d at 627–29 (2017); *Western Fertilizer and Cordage Co., Inc. v. BRG, Inc.*, 228 Neb. 776, 786–87, 424 N.W.2d 588, 595 (1988).

NJI2d Civ. 6.10**AGENCY—ORIGINAL PRINCIPAL BOUND BY ACTS
OF LOANED OR HIRED-OUT AGENT**

When a principal loans or hires out (his, her, its) agent to another, that principal remains bound by the acts of the agent unless, with respect to the transaction in question, (he, she, it, the principal) has relinquished full control over the acts of the agent.

COMMENT & AUTHORITIES**I. GENERAL USE**

Even when the issue of the “loaned employee” is present, this instruction may not be necessary. The situation may be taken care of by NJI2d Civ. 6.03’s general instruction on the definition of agency, coupled with closing argument over which of the alleged principals was in fact the principal at the time of the incident that is the subject of the litigation. If that is not sufficient, then this pattern may be used. When used, it may be inserted at the end of NJI2d Civ. 6.03.

If it aids clarity, substitute something more specific in place of the word “transaction.” For example, it may be better to say “. . . the work in question.” Regarding other possible substitutions, *see* NJI2d Civ. 6.01, Comment & Authorities.

II. PRINCIPAL’S LIABILITY FOR ACTS OF LOANED AGENT

A part of the issue of agency is the issue of the “loaned employee,” the situation arising when one principal loans or hires out an agent to another. The question addressed in this instruction is under what circumstances the original principal escapes liability for the acts of the agent. The answer is that to escape liability the original principal must have relinquished full control over the agent, with regard to the transaction in question. *Vontress v. Ready Mixed Concrete Co.*, 170 Neb. 789, 793, 104 N.W.2d 331, 335–36 (1960). *See also* *Schwartz v. Riekes and Sons*, 195 Neb. 737, 740, 240 N.W.2d 581, 583 (1976); *Mid-America Pipeline Co. v. Warren*, 187 Neb. 710, 713, 193 N.W.2d 749, 751–52 (1972); *Barton v. Hobbs*, 181 Neb. 763, 767, 151 N.W.2d 331, 336 (1967); *Kessler v. Bates & Rogers Constr. Co.*, 155 Neb. 40, 45, 50 N.W.2d 553, 556 (1951); *Mansfield v. Andrew Murphy & Son*, 139 Neb. 793, 800–02, 298 N.W. 749, 753–54 (1941); *Hitte v. Republican Valley R. Co.*, 19 Neb. 620, 623–24, 28 N.W. 284, 285–86 (1886).

NJI2d Civ. 6.11**AGENT’S DEVIATION FROM PRINCIPAL’S
BUSINESS**

If, while generally acting within the scope of (his, her) authority,

an agent incidentally attends to a personal matter, the agent is still acting within the scope of (his, her) authority. On the other hand, if an agent substantially departs or deviates from the business or service of (his, her) principal, (he, she) is not acting within the scope of (his, her) authority.

COMMENT & AUTHORITIES

This instruction is not necessarily required every time there is an issue as to deviation from authority. The definition of scope of authority in NJI2d Civ. 6.04 may serve as a sufficient basis for closing argument that the agent deviated so far from the service of the principal as to be outside the scope of his or her authority.

This instruction is written for the situation where the agent deviates from the business of the principal to attend to a personal matter. The same rule applies where the deviation is to serve a purpose of a third person. Restatement (Second) of Agency § 236 (1958).

Regarding employees or agents who are engaged in activity that is connected to their work, but goes beyond the direct services they perform for the employer, *see* NJI2d Civ. 6.04, Authorities.

See NJI2d Civ. 6.01, Comment & Authorities; Restatement (Second) of Agency § 236 (1958).

B. PARTNERSHIP

NJI2d Civ. 6.20

PARTNERSHIP—ISSUES AND BURDEN OF PROOF

(As explained in the Comment & Authorities, one of the following alternative sets of paragraphs is to be worked into NJI2d Civ. 2.01 or NJI2d Civ. 15.01. The first set applies where the partnership has no name; the second set applies where the partnership does have a name.)

First Set

1. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (name of alleged partner whose acts are the subject of the litigation, hereinafter "P1"), was the partner of (names of other alleged partners, hereinafter "P2"); and

2. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (P1) was acting within the ordinary course of the business of the partnership.

Second Set

1. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (name of entity alleged to be a partnership) was a partnership;
2. That at the time of the (occurrence, accident, collision, et cetera), (name of alleged partner whose acts are the subject of the litigation, hereinafter "P1"), was a partner in (name of entity); and
3. That at the time of the (occurrence, accident, collision, et cetera), (P1) was acting within the ordinary course of the business of the partnership.

COMMENT & AUTHORITIES**I. GENERAL USE**

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

This instruction—NJI2d Civ. 6.20—is to be used when a partnership is sued over the acts or omissions of one of the partners. It states the issue and, by reason of where it will be placed, the burden of proof. It should be worked into the "Burden of Proof" part, Part I, B of the appropriate statement-of-the-case instruction: for a negligence case, NJI2d Civ. 2.01, and for a contract case, NJI2d Civ. 15.01. *See also* NJI2d Civ. 6.01, Comment & Authorities.

The bracketed sets of paragraphs are alternatives. The first set applies where either the partnership has no name or the name was not used at the trial and the second set applies when it does have a name that was used at trial.

Use only those parts of the instruction as are in issue. For example, if the partnership has a name and the existence of the partnership is not a jury question, but there is a jury question as to whether "P1" was a partner and, if so, was acting within the ordinary course of the business of the partnership, then use the second of the above alternative sets but omit the first paragraph and renumber the other two.

If there is a submissible issue of fact as to whether the alleged partner was, for example, a partner or an employee, then weave together this instruction and NJI2d Civ. 6.01. NJI2d Civ. 6.06, Comment & Authorities, contains a model that provides a basis for weaving these two together. Among other things, take care that the "Effects of Findings" part of the statement-of-the-case instruction, *see* NJI2d Civ. 6.02, and NJI2d Civ. 6.21 or 6.22, reflects the fact that the liability of the

partner or employer for the acts of his or her partner or employee is neither exclusively dependent upon the latter being found to be an agent nor exclusively dependent upon the latter being found to be a partner.

If neither the existence of the partnership, nor the participation of "P1" as a partner, nor whether "P1" was acting within the ordinary course of the partnership business is in issue, then regarding the liability of the partnership or the copartners for the acts of one of the partners, a modified version of NJI2d Civ. 6.04 or 6.05 may be used.

II. QUESTION OF FACT VERSUS QUESTIONS OF LAW

"The existence of a partnership is a question of fact under the evidence." In re Estate of Wells, 221 Neb. 741, 743, 380 N.W.2d 615, 617 (1986).

"The interpretation of a partnership agreement presents a question of law." Same quotation: Fredericks Peebles & Morgan v. Assam, 300 Neb. 670, 683, 915 N.W.2d 770, 780 (2018) ("An appellate court independently reviews a lower court's rulings on questions of law"); Shoemaker v. Shoemaker, 275 Neb. 112, 122, 745 N.W.2d 299, 308 (2008).

"[T]he scope of an agent's authority is a question of fact." Elting v. Elting, 288 Neb. 404, 418, 849 N.W.2d 444, 452 (2014).

III. BURDEN OF PROOF

"The burden of establishing the existence of a partnership is upon the party asserting that such a relationship exists." In re Estate of Wells, 221 Neb. 741, 743, 380 N.W.2d 615, 617 (1986). *Accord* In re KeyTronics, 274 Neb. 936, 953, 744 N.W.2d 425 (2008).

The burden of proof required for establishing a partnership is the normal burden in civil cases, the burden of proving the necessary elements by a preponderance (the greater weight) of the evidence. *KeyTronics*, 274 Neb. at 953-54, 744 N.W.2d at 438. It is worth noting this single burden because prior the *KeyTronics* case there were two burdens of proof applicable to suits attempting to prove the existence of a partnership. (The former general rule was that a more difficult burden applied when the dispute was among alleged partners and a lower burden applied when the dispute was between a third party and the alleged partners. *KeyTronics*, 274 Neb. at 952-55, 744 N.W.2d at 438-39. *KeyTronics* discusses the two burdens and the lack of "any reasoning to support" two standards, overrules the two-burden cases *sub silentio*, and states that only one burden applies to proof of the existence of a partnership.

In an action for an accounting the burden of proof to sustain the accounting is on the plaintiff; but if someone else is in charge of the books

and managed the business, then that person is in the position of a trustee and has this burden. *Trieweiler v. Sears*, 268 Neb. 952, 969, 689 N.W.2d 807, 829 (2004).

A party need not prove “a ‘specific agreement’ in order to [prove] a partnership.” *KeyTronics*, 274 Neb. at 955, 744 N.W.2d at 439. This is discussed further at NJI2d 6.23.

IV. RELATED TOPICS

“[E]ach partner is an agent of the partnership for the purpose of its business.” *Elting v. Elting*, 288 Neb. 404, 415, 418, 849 N.W.2d 444, 452, 454 (2014) (quoting the Uniform Partnership Act § 67-413(1) (1998); discussing the issue).

“Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all.” *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 910, 896 N.W.2d 612, 629 (2017).

Regarding the definition of partnership, *see* NJI2d Civ. 6.22 and the Comment & Authorities thereto.

Regarding the ordinary course of the business of the partnership, *see* NJI2d Civ. 6.24 and 6.25.

Regarding whether property is partnership property, *see* *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

Regarding the similarities and differences between a partnership and a joint venture, *see* NJI2d Civ. 6.40, Comment & Authorities.

“An action for a partnership dissolution and accounting between partners is one in equity and is reviewed *de novo* on the record.” Same quotation: *Fredericks Peebles & Morgan v. Assam*, 300 Neb. 670, 682, 915 N.W.2d 770, 779 (2018); *Robertson v. Jacobs Cattle Co.*, 292 Neb. 195, 202, 874 N.W.2d 1, 6 (2015) (and review is *de novo* on the record); *Robertson v. Jacobs Cattle Co.*, 288 Neb. 846, 851, 852 N.W.2d 325, 329 (2014); *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 867, 830 N.W.2d 191, 199-00 (2013) (lengthy discussion of various related issues); *Shoemaker v. Shoemaker*, 275 Neb. 112, 122, 745 N.W.2d 299, 307 (2008). Since there will be no jury, there are no jury instructions.

NJI2d Civ. 6.21

PARTNERSHIP—VICARIOUS LIABILITY IN A NEGLIGENCE ACTION—EFFECT OF FINDINGS

If you find that (name of alleged partner whose acts are the

subject of the litigation, hereinafter “P1”) is liable to the plaintiff, then (name of entity alleged to be partnership) is also liable if (P1)’s negligence occurred:

1. While (name of entity) was a partnership, with (P1) as one of its partners; and
2. While (P1) was acting in the ordinary course of the business of the partnership.

COMMENT & AUTHORITIES

I. GENERAL USE

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

This instruction (NJI2d Civ. 6.21), its variations discussed in this Comment & Authorities, and NJI2d Civ. 6.22, should meet most of the situations that will arise. Should a situation arise that they do not cover, it will be necessary to draft an instruction using them as models.

II. PARTNERS’ VICARIOUS LIABILITY REGARDING TORTS

“A partnership or every member of the partnership is vicariously liable for torts committed by one of the partners acting within the scope of partnership business.” *McVane v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 458, 466 N.W.2d 499, 505 (1991).

A. BOTH PARTNER AND ALLEGED PARTNERSHIP SUED

This instruction is appropriate in a negligence action where: (1) both “P1” and the alleged partnership have been sued; (2) the existence of the partnership and “P1”’s status as a partner are in issue; and (3) the only issue regarding the liability of the partnership is that of vicarious liability. If only some of those issues are present, the instruction will have to be adapted accordingly. Where the alleged liability of the partnership or the copartners is based on contract, *see* NJI2d Civ. 6.22.

Regarding how this instruction is to be worked into the rest of the instructions, *see* NJI2d Civ. 6.02, Comment & Authorities.

B. ONLY THE ALLEGED PARTNERSHIP IS SUED

In a negligence action where only the alleged partnership is sued and the only claim regarding its liability is that of vicarious liability, the effect of finding part of NJI2d Civ. 2.01 will work as written.

C. ONLY THE PARTNERS SUED, AND NOT THE PARTNERSHIP

It is not clear whether the partners, as opposed to the partnership,

can ever be sued in a law action in negligence where the only claim regarding the partners' liability is that of vicarious liability. This point is discussed below. If such a suit is had, then when "P1" and "P2" are sued, but not the partnership, the following paragraph may be used to instruct the jury:

"If you find that (P1) is liable to the plaintiff, then (names of other alleged partners, hereinafter 'P2') are also liable if (P1)'s negligence occurred:

1. While (P1) and (P2) were partners; and
2. While (P1) was acting in the ordinary course of the business of the partnership."

In a negligence action where there are no partnership assets and only "P2" has been sued and the only claim regarding the liability of "P2" is that of vicarious liability (if it is possible to bring such an action at law in Nebraska; see the discussion below), the effect of finding part of NJ12d Civ. 2.01 will work as written.

III. SATISFACTION OF PARTNERSHIP JUDGMENTS

The question of whether there are sufficient partnership assets to satisfy the judgment is not a jury question; therefore, it is not a part of these instructions. It does, however, play an important role in litigation.

A. THE EXHAUSTION RULE

A partner's individual property may not be used to satisfy a partnership debt unless partnership property is insufficient to do so. *E.g.*, Horn's Crane Serv. v. Prior, 182 Neb. 94, 96, 152 N.W.2d 421, 423 (1967). Therefore, in order to get at the property of an individual partner, certain steps must be taken. Those steps used to, and perhaps still do, differ depending upon the nature of the partners' liability.

At least prior to the termination date of the Uniform Partnership Act Neb. Rev. Stat. § 67-301, *et seq.* (Reissue 2003) (termination date Jan. 1, 2001) and the effective date of the Uniform Partnership act of 1998, Neb. Rev. Stat. § 67-401, *et seq.* (Reissue 2009), the nature of the liability of partners differed depending upon whether the liability arose out of tort or contract. As discussed below, this may still be the rule: this difference may have survived the termination of the older Act and the effective date of the new Act.

■ In a case of tort liability, "[p]artners are jointly and severally liable for torts committed by a partner within the scope of the business. They may be sued jointly or severally." J. Crane and A. Bromberg, Crane and Bromberg on Partnership § 64 (1968). *Accord* Neb. Rev. Stat. § 67-315 (Reissue 2003) (termination date Jan. 1, 2001); Martinez v.

Koelling, 228 Neb. 1, 4, 421 N.W.2d 1, 3 (1988); *Morse v. Mayberry*, 183 Neb. 89, 91, 157 N.W.2d 881, 883 (1968). This remains the case under the Uniform Partnership Act of 1998. Neb. Rev. Stat. § 67-418 (Reissue 2009).

■ In a case of contractual liability, “the liability is joint only” *J. Crane and A. Bromberg*, *Crane and Bromberg on Partnership* § 64 (1968). *Accord* Neb. Rev. Stat. § 67-315 (Reissue 2003) (termination date Jan. 1, 2001). The newer version of the Uniform Partnership Act does not state that liability based on contract is joint only. Neb. Rev. Stat. § 67-418 (Reissue 2009). This apparent change is, however, less of a change than it may seem, for, in the end, the older rule was more procedural than substantive: it had more to do with how the money would be collected from the partners, than with how much money could be collected from any particular partner.

The difference between the older rules regarding tort liability versus contract liability is not the degree of personal liability of each partner, but the steps that must be taken to pursue the partners. Here is an explanation of the difference between tort-based liability and contract-based liability under the original version of the Uniform Partnership Act. It may still be the rule under the 1998 version of the Act.

1. The Exhaustion Rule in a Negligence Action

If there is a judgment against a partnership and the plaintiff seeks to recover the judgment against the individual property of the partners, “it shall be lawful for the plaintiff to file a bill in equity against the several members thereof, setting forth [the] judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm.” Neb. Rev. Stat. § 25-316 (Reissue 2016). This statutory section does not say that this shall be the exclusive remedy, but only that it is allowed.

Dissenting in *Horn’s Crane Serv. v. Prior*, 182 Neb. 94, 152 N.W.2d 421 (1967), a suit on a partnership’s contractual obligation, brought against individual partners, one Justice said this: “Writ of execution on a judgment against the firm itself is issued against partnership property. If the judgment is not satisfied, the creditor may file a bill in equity against the partners. The prescribed allegations of the bill are the judgment and the insufficiency of partnership property.” *Id.* at 94, 99, 152 N.W.2d at 424 (Smith, J. dissenting).

The majority opinion in that same case states that “[i]n an action seeking a personal judgment against the individual members of a partnership or a joint adventure the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the [partnership’s] debts[.]” *Id.* at 95, 152

N.W.2d at 422. Recall that this was a suit to collect money allegedly owed under a contract, and that, at the time, and perhaps still today, a partnership's liability under a contract was joint only, and not joint and several. By the facts of the case, then, the rule applies in a contract action but not necessarily a tort action.

2. The Exhaustion Rule in an Action on a Contract

In a contract case, the law is that judgment must be had against the partnership "as a condition precedent to the bringing of an action against individual partners." *Security State Bank v. McCoy*, 219 Neb. 132, 133, 361 N.W.2d 514, 515 (1985). The court based that conclusion on the statute now published as Neb. Rev. Stat. § 25-316 (Reissue 2016). *Accord* *Martinez v. Koelling*, 228 Neb. 1, 3, 421 N.W.2d 1, 2 (1988).

The *Martinez* case states that "[t]he Uniform Partnership Act, Neb. Rev. Stat. § 67-301 to 67-343 (Reissue 2003) [(termination date Jan. 1, 2001)] also lends credence to the rule," *Martinez v. Koelling*, 228 Neb. 1, 4, 421 N.W.2d 1, 3 (1988), because it provides that the liability of a partnership under a contract is joint only, and not joint and several, while in the case of tort liability partners are jointly and severally liable for a partner's torts committed in the scope of the partnership business. *Id* (referencing the Uniform Partnership Act, Neb. Rev. Stat. § 67-315(b) (Reissue 2003) (termination date Jan. 1, 2001)). Joint liability in contract cases was the rule of the Uniform Act terminated January 1, 2001. It is not the rule under the Uniform Partnership Act of 1998. Neb. Rev. Stat. § 67-418(1) (Reissue 2009).

The rule from *Security State Bank* is a minority rule. At common law, in fact, a partnership is not a legal entity and, therefore, cannot sue or be sued in the partnership name; suits have to be brought by or against the partners; this rule is abrogated in many jurisdictions by so-called "common name statutes." H. Reuschlein and W. Gregory, *Handbook on the Law of Agency and Partnership* § 207 (1979); J. Crane and A. Bromberg, *Crane and Bromberg on Partnership* § 60 (1968). Nebraska's common name statute, quoted in part in the Comment & Authorities to *NJI2d Civ. 6.20*, is Neb. Rev. Stat. § 25-313 (Reissue 2016).

The majority rule is that the plaintiff can sue a partnership and the partners in the same proceeding, and the question of whether there are sufficient partnership assets to satisfy the judgment is an execution of judgment problem. H. Reuschlein and W. Gregory, *Handbook on the Law of Agency and Partnership* § 207, at 314 (1979); J. Crane and A. Bromberg, *Crane and Bromberg on Partnership* § 58, at 342, and § 60, at 348 (1968).

While the Committee takes no position on Nebraska's law in this regard, it seems that if the liability is contractual in nature the plaintiff must sue the partnership and then, if the plaintiff wins and if partner-

ship assets are insufficient to satisfy the judgment, file a bill in equity against the partners.

3. Conclusion

It seems, on the one hand, that if the liability is contractual in nature the plaintiff must sue the partnership and then, if the plaintiff wins and if partnership assets are insufficient to satisfy the judgment, file a bill in equity against the partners. On the other hand, if the liability is in tort, it seems that where liability is joint and several the claimant could sue both the partnership and the partners, leaving the question of whether there are sufficient partnership assets to satisfy the judgment as an execution of judgment problem. In a negligence case, it particularly seems true that the plaintiff should be able to sue both the partnership and the allegedly negligent partner in the same action. Treating this kind of tort case differently than Nebraska treats a similar contract case may find additional support in general theories of tort law; one pays for one's own negligence, while one does not necessarily "pay for" a contract entered into on behalf of another.

In some cases, then, it may boil down to this: pleading and service so that all of the partners and the partnership are parties, with any judgment executed according to the rule that partnership property must be looked to first, before looking to the property of the individual partners. (In that regard, note the following: "An action against 'A. & B., copartners doing business as A. & B. Co.'" is not a suit against the partnership as a separate entity." *Morse v. Mayberry*, 183 Neb. 89, 91, 157 N.W.2d 881, 883 (1968) (quoting the syllabus to *Independent Elevators v. Davis*, 116 Neb. 397, 217 N.W. 577 (1928))). As the first printing of the second edition of the *NJI2d Civ.* went to press the Supreme Court handed down its decision in *Martinez v. Koelling*, 228 Neb. 1, 421 N.W.2d 1 (1988) which adopts the position taken herein.

In addition to the above, the Committee offers the following opinion of one writer in this field:

[I]f the cause of action rests upon a joint and several liability, [as does a partner's liability in a tort action in Nebraska, and is brought in one of the] jurisdictions where the entity concept of partnership is accorded full recognition, [as it is in Nebraska, see *NJI2d Civ.* 6.22, *Comment & Authorities*] one of the consequences of such recognition is that the member's liability for the partnership debts is derivative only. The result is that in those jurisdictions, no recovery may be had against the individual member without at the same time taking judgment against the partnership as such. . . .

. . . .

Once the jurisdictional requisites are established, the road

is open for the partnership creditor to seize and sell any nonexempt property of any of the parties thus subjected to his judgment. Despite all the comforting language in all the cases spelling out the rights of partners to have firm property interposed between the judgment creditor and the members' individually owned property, if the creditor of the firm has taken the precaution of taking personal judgment against the member upon a partnership debt, if such partnership is a going concern and not in the process of winding-up and distribution of its assets, the partnership creditor [described in the preceding paragraph] may levy where he will.

Z. Cavitch, 2 Business Organizations with Tax Planning § 26.01[2], at 237-39 (1984).

IV. VICARIOUS LIABILITY AND NEBRASKA'S COMPARATIVE NEGLIGENCE STATUTE

Nebraska has an unusual statute regarding comparative negligence and joint and several liability in multiple defendant negligence actions of a kind to which contributory negligence may be a defense. Neb. Rev. Stat. § 25-21,185 *et seq.* (Reissue 2016) (effective in causes of action that accrue on or after February 8, 1992). It is discussed at length at NJI2d Civ. 5.04, Comment.

This statute states that when defendants are part of a common enterprise or plan and act in concert to cause harm, those defendants are jointly and severally liable for both economic damages and noneconomic damages. In cases where defendants acted in concert, as part of a common enterprise or plan, to cause harm, the liability of each is joint and several. Presumably, this includes those cases where a partner is liable as a joint participant.

When multiple defendants were each negligent but did not act as part of a common enterprise or plan, in concert, to cause harm, then they are jointly and severally liable for the plaintiff's economic damages, but only severally liable for the plaintiff's noneconomic damages. In the case of a partner vicariously liable for damages caused by another partner, where the vicariously liable partner was not him- or herself negligent, such a partner is liable jointly and severally with the negligent partner, for the entire comparative share of damage assigned to the negligent partner. *See* Rest. 3d (Apport.), § 13, Comment c.

For a detailed discussion of this comparative negligence statute and a discussion of how to instruct in this situation, *see* NJI2d. Civ. 5.04, Comment.

V. RELATED TOPICS

Regarding the effect of findings in a negligence action, *see* the

Uniform Partnership Act, Neb. Rev. Stat. § 67-313 (Reissue 2003) (termination date Jan. 1, 2001) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-417 (Reissue 2009). Regarding effects of findings in suits against partnerships generally, *see* the Uniform Partnership Act, Neb. Rev. Stat. § 67-309, *et seq.* (Reissue 2003) (termination date Jan. 1, 2001) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-413 (Reissue 2009).

Regarding the ordinary course of the business of the partnership, in a negligence action, *see* NJI2d Civ. 6.24 (and in a contract action, *see* NJI2d Civ. 6.25).

See also NJI2d Civ. 6.02, Comment & Authorities, regarding the similar topic of a principal or employer's vicarious liability for the negligent acts of an agent or employee.

NJI2d Civ. 6.22

PARTNERSHIP—VICARIOUS LIABILITY IN A CONTRACT ACTION—EFFECT OF FINDINGS

(Name of entity) is bound by the (acts, representations, omissions, et cetera) of (name of alleged partner whose acts are the subject of the litigation, hereinafter "P1") if, and only if, such (acts, representations, omissions, et cetera) (occurred, were done):

1. While (name of entity) was a partnership, with (P1) as one of its partners; and
2. While (P1) was acting within the ordinary course of the business of the partnership.

COMMENT & AUTHORITIES

For a complete discussion of the problems that must be confronted in this area, *see* NJI2d Civ. 6.21, Comment & Authorities. The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

This instruction, NJI2d Civ. 6.22, is appropriate in a contract action where: (1) both "P1" and the alleged partnership have been sued; (2) the existence of the partnership and "P1" 's status as a partner are in issue; (3) and the only issue regarding the liability of the partnership is that of vicarious liability. If only some of those issues are present, the instruction will have to be adapted accordingly. Where the alleged liability of the partnership or the copartners is based on negligence, *see* NJI2d Civ. 6.21.

Regarding how this instruction is to be worked into the rest of the instructions, *see* NJI2d Civ. 6.02, Comment & Authorities.

In a contract action where only the alleged partnership is sued and the only claim regarding its liability is that of vicarious liability, the effect of finding part of NJI2d Civ. 15.01 will work as written.

In a contract action, it does not seem that partners, as opposed to the partnership, can ever be sued in an action at law where the only claim regarding the partners' liability is that of vicarious liability. This point is discussed at NJI2d Civ. 6.21, Comment & Authorities. Were such an action possible, and were "P1" and "P2" sued, but not the partnership, the following paragraph could be used to instruct the jury:

"(Names of other alleged partners, hereinafter "P2") are bound by the (acts, representations, omissions, et cetera) of (P1) if, and only if, such (acts, representations, omissions, et cetera) (occurred, were done, were made) while they were partners and while (P1) was acting in the ordinary course of the business of the partnership."

And were such a suit possible, the effect of finding part of NJI2d Civ. 15.01 would work as written.

These alternatives, plus NJI2d Civ. 6.21, should meet most of the situations that will arise. Should a situation arise that is not covered, it will be necessary to draft a special version using the alternatives as models.

Regarding the ordinary course of the business of the partnership, in a contract action, *see* NJI2d Civ. 6.25 (and in a negligence action, *see* NJI2d Civ. 6.24).

See generally NJI2d Civ. 6.21, Comment & Authorities.

NJI2d Civ. 6.23

DEFINITION OF PARTNERSHIP

A partnership is created when two or more persons, each contributing property or money or services, join together with the intention of doing two things:

1. Carrying on a business for profit; and
2. Sharing in any profits of the business.

COMMENT & AUTHORITIES

I. GENERAL USE

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reis-

sue 2009). That Act must be consulted in any case involving these partnership instructions.

II. A PARTNER THAT IS NOT A NATURAL PERSON

The definition of partnership in this pattern instruction only applies when the alleged partners are all persons. “[C]orporations and trusts may be members of partnerships” *Altsuler v. Peters*, 190 Neb. 113, 119–20, 206 N.W.2d 570, 575 (1973). When dealing with allegations of a partnership including a non-natural person as a partner, this instruction will have to be adapted accordingly.

III. PARTNERSHIPS MAY SUE AND BE SUED IN THEIR OWN NAMES

In Nebraska, a partnership is a separate entity, apart from its partners. A partnership “may sue and be sued” in its own name, and it is “not . . . necessary . . . to set forth in the process or pleadings or to prove at the trial the names of the [partners].” Neb. Rev. Stat. § 25-313 (Reissue 2016). *Accord*, e.g., *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 547, 391 N.W.2d 557, 561–62 (1986); *State v. Siers*, 197 Neb. 51, 58, 248 N.W.2d 1, 6 (1976) (citing cases and statutory sections); *Horn’s Crane Serv. v. Prior*, 182 Neb. 94, 96, 152 N.W.2d 421, 423 (1967). Regarding this point, see NJI2d Civ. 6.21, Comment & Authorities.

IV. DEFINITION OF PARTNERSHIP

The definition of partnership in the above instruction has two elements: (1) carrying on a business for profit; (2) and sharing in any profits. The Uniform Partnership Act says only this: “A partnership is an association of persons organized as a separate entity to carry on a business for profit.” The Uniform Partnership Act, Neb. Rev. Stat. § 67-306(1) (Reissue 2003) (termination date Jan. 1, 2001). The Uniform Partnership Act of 1998 says only this: “[T]he association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership.” The Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-410 (Reissue 2009). That is the first of the elements set out in the instruction. The cases add the second element: “[T]he receipt of a share of the profits of a business is prima facie evidence of a partnership.” *In re Estate of Wells*, 221 Neb. 741, 745, 380 N.W.2d 615, 618 (1986). “The absence of a mutual interest in the profits or benefits of the undertaking is conclusive that a partnership or joint adventure does not exist.” *Frisch v. Svoboda*, 182 Neb. 825, 828, 157 N.W.2d 774, 776 (1968). *See also* *South Sioux City Star v. Edwards*, 218 Neb. 487, 490, 357 N.W.2d 178, 180 (1984). “The evidence is that the plaintiff had no right to share in any profits that might result The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist.” *Gardner v. Kothe*, 172 Neb. 364, 368, 109 N.W.2d 405, 408 (1961).

“The Uniform Partnership Act defines a partnership as ‘an associa-

tion of two or more persons to carry on as co-owners a business for profit.' * * * [T]here must . . . be a community of interest in the profits of the business, and an agreement or right to share profits." 59A Am.Jur.2d *Partnership* §§ 2, 165 (1987) (as quoted above, the Uniform Partnership Act of 1998 states essentially the same thing as the predecessor Act). Reading the Am.Jur. sections just cited, it seems that even though the Uniform Partnership Act does not state "sharing in the profits" as a necessary element of a partnership, in a majority of the jurisdictions, the cases read into the act the requirement of a community of interests between or among the partners and, as a part of the necessary community of interests, the cases require a sharing in the profits. *See also id.* at § 157.

"It is co-ownership that distinguishes partnerships from other commercial relationships such as creditor and debtor, employer and employee, franchisor and franchisee, and landlord and tenant." In re *KeyTronics*, 274 Neb. 936, 958, 744 N.W.2d 425 (2008). Regarding proof of co-ownership, *see KeyTronics*, 274 Neb. at 958-61, 744 N.W.2d at 441-43.

Though it pre-dates the adoption of the Uniform Partnership Act, one of the key elements to the existence of a partnership even after the Act's passage is well stated in *Tyson v. Bryan*, 84 Neb. 202, 205, 120 N.W. 940, 942 (1909): "While there may be a sharing of profits and yet no partnership, there can be no partnership without a sharing of profits." *See also Dunn v. Hemberger*, 230 Neb. 171, 183, 430 N.W.2d 516, 523 (1988). *State v. Siers*, 197 Neb. 51, 58, 248 N.W.2d 1, 6 (1976); *Havelock Meats, Inc. v. Roberts*, 186 Neb. 73, 77-78, 180 N.W.2d 875, 878 (1970); *Morse v. Mayberry*, 183 Neb. 89, 91, 157 N.W.2d 881, 883 (1968); *Byram v. Thompson*, 154 Neb. 756, 757, 49 N.W.2d 628, 629 (1951).

There is no requirement that the parties have a "a 'specific agreement' in order to [prove] a partnership." In re *KeyTronics*, 274 Neb. 936, 955, 744 N.W.2d 425, 439 (2008).

"The intent of the parties is of prime concern in determining whether a partnership exists." In re *Estate of Wells*, 221 Neb. 741, 743, 380 N.W.2d 615, 617 (1986). However, "if the parties voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then 'they may inadvertently create a partnership despite their expressed subjective intention not to do so.' Intent, in such cases, is still of prime concern, but it will be ascertained objectively rather than subjectively, from all the evidence and circumstances." In re *KeyTronics*, 274 Neb. 936, 955-56, 744 N.W.2d 425, 439-40 (2008) (footnotes omitted) (court found partnership where the party intended to form a corporation to avoid a partnership relationship).

Partnerships result from contracts, and the partners' rights and liabilities among themselves are subject to their contractual agreements. *Darr v. D.R.S. Invs.*, 232 Neb. 507, 512, 441 N.W.2d 197, 201 (1989).

However, note that this is true only among themselves. Such a contractual agreement is relevant only among themselves has no bearing on a third party's claim against any particular partner. In this instance, a partner who pays more than his or her contractual share may be entitled to indemnity from the partnership. Daniel S. Kleinberger, *Agency and Partnership: Examples and Explanations* §§ 7.3.1, 8.4 (1995).

Regarding the definition of partnership, *see generally* Neb. Rev. Stat. §§ 67-306 through 67-308 (Reissue 2003) (termination date Jan. 1, 2001) and § 67-409, *et seq.* (Reissue 2009). In addition to the cases cited above, *see e.g.*, *Department of Banking and Fin. v. Wilken*, 217 Neb. 796, 801-02, 352 N.W.2d 145, 149 (1984); *Hays v. Johnson*, 187 Neb. 307, 310 189 N.W.2d 475, 478-79 (1971); *Frisch v. Svoboda*, 182 Neb. 825, 828, 157 N.W.2d 774, 776 (1968); *Horn's Crane Serv. v. Prior*, 182 Neb. 94, 97, 152 N.W.2d 421, 423-24 (1967); *Norcross v. Gingery*, 181 Neb. 783, 786, 150 N.W.2d 919, 921 (1967); *Lewis v. Gallemore*, 173 Neb. 211, 218, 113 N.W.2d 54, 58 (1962); *Gardner v. Kothe*, 172 Neb. 364, 368, 109 N.W.2d 405, 408 (1961); *Frey v. Hauke*, 171 Neb. 852, 863, 108 N.W.2d 228, 234-35 (1961); *Bard v. Hanson*, 159 Neb. 563, 566-68, 68 N.W.2d 134, 136-38 (1955); *Peterson v. Massey*, 155 Neb. 829, 834, 53 N.W.2d 912, 916 (1952); *Baum v. McBride*, 143 Neb. 629, 630, 10 N.W.2d 477, 478 (1943); *Adams v. United States*, 328 F.Supp. 228, 230-32 (D.Neb.1971).

V. EXISTENCE OF PARTNERSHIP IS A QUESTION OF FACT FOR THE JURY

"Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury." *South Sioux City Star v. Edwards*, 218 Neb. 487, 489, 357 N.W.2d 178, 179 (1984). *Accord* *In re Estate of Wells*, 221 Neb. 741, 743, 380 N.W.2d 615, 617 (1986).

VI. LIMITED LIABILITY COMPANIES

"[A] limited liability company is a hybrid of the partnership and corporate forms." *Midwest Renewable Energy, LLC v. American Engineering Testing, Inc.*, 296 Neb. 73, 80, 894 N.W.2d 221, 230 (2017) (multiple quotation marks omitted). For that reason, "[i]n cases concerning limited liability companies, we have looked to the principles of corporate law when addressing areas of similar functions." *Id.*

VII. RELATED TOPICS

Regarding partnership by estoppel, *see* NJI2d Civ. 6.26 through 6.28.

Regarding joint ventures, *see* NJI2d Civ. 6.40, *et seq.*

NJI2d Civ. 6.24**PARTNERSHIP—ORDINARY COURSE OF
BUSINESS—NEGLIGENCE ACTION**

A partner is acting within the ordinary course of the business of the partnership:

1. When (he, she) acts with the authority of (his, her) copartners;
or

2. When (he, she) does the kind of thing the partnership is in business to do; does it substantially within any authorized limits on time and place; and does it with at least the partial intention of furthering the interests of the partnership.

COMMENT & AUTHORITIES

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

This instruction defines “ordinary course of partnership business” as that phrase is used in a vicarious-liability negligence action. NJI2d Civ. 6.25 defines that phrase as it is used in a vicarious-liability contract action.

The Uniform Partnership Act, Neb. Rev. Stat. § 67-413 (Reissue 2009) defines “ordinary course of the partnership business” as that phrase is used in a contract action. The Uniform Partnership Act of 1998 does the same thing. Neb. Rev. Stat. § 67-413 (Reissue 2003). Those statutory sections are the basis for NJI2d Civ. 6.25. Neither the predecessor Act nor the 1998 Act defines the phrase as it is used in a negligence action. See Neb. Rev. Stat. § 67-313 (Reissue 2003) (termination date Jan. 1, 2001) and § 67-417 (Reissue 2009), respectively. The basis for this instruction, then, is that the liability of the partnership for a partner’s wrongful acts is generally found to be predicated upon the theory of agency. H. Reuschlein & W. Gregory, *Handbook on the Law of Agency and Partnership* § 203, at 304 (1979). That being the case, then the definition of ordinary course of business should be similar in each area, *i.e.*, agency and partnership. And, in fact, that is the result cases addressing this specific point in other Uniform Partnership Act jurisdictions. *Dowd v. Webb*, 337 F.2d 93, 96 (3d Cir.1964) (partnership rules same as master and servant rules); *Wright v. E-Z Fin. Co.*, 267 S.W.2d 602, 606 (Tex.Civ.App.1954); *Iron v. Sauve*, 27 Wn.2d 562, 179 P.2d 327 (1947); *Schloss v. Silverman*, 172 Md. 632, 192 A. 343 (1937); 68 C.J.S., *Partnership* § 168 (1998). Consequently, the above instruction is based upon NJI2d Civ. 6.04, the definition of an agent’s scope of authority. See also Alan R. Bromberg and Larry E. Ribstein,

Bromberg & Ribstein on Partnership, § 4.07, at 4:77, *et seq.* (1994 & Supp. 1999).

NJI2d Civ. 6.04 is the instruction on the “Definition of Scope of Authority.” It contains two bracketed paragraphs that deal with issues that might arise in the context of the above instruction, but are not dealt with in the above instruction. Those issues are (1) limits imposed by the principal on the agent’s authority and (2) the agent’s intentional use of force. If those two issues are present in a case where this instruction, NJI2d Civ. 6.24, is being used, then adapt the appropriate parts of NJI2d Civ. 6.04 and include them with NJI2d Civ. 6.24.

NJI2d Civ. 6.25

PARTNERSHIP—ORDINARY COURSE OF BUSINESS—CONTRACT ACTION

The partner is acting within the ordinary course of the business of the partnership:

1. When (he, she, it) acts with the authority of (his, her, its) copartners; or
2. When (he, she, it) is apparently carrying on the business of the partnership in the usual way, unless in fact (he, she, it) is not authorized to so act and the person with whom (he, she, it) is dealing knows that (he, she, it) has no such authority.

COMMENT & AUTHORITIES

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

In this regard, *see* the Uniform Partnership Act, Neb. Rev. Stat. § 67-309(1) and (2) (Reissue 2003) (termination date Jan. 1, 2001) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-413 (Reissue 2009); *Waite v. Salestrom*, 206 Neb. 578, 581–82, 294 N.W.2d 338, 340 (1980); *Ogallala Fertilizer Co. v. Salsbery*, 186 Neb. 537, 540, 184 N.W.2d 729, 731 (1971); *Lewis v. Gallemore*, 173 Neb. 211, 218–19, 113 N.W.2d 54, 58 (1962); *Hauke v. Frey*, 167 Neb. 398, 402, 93 N.W.2d 183, 185 (1958); *Bard v. Hanson*, 159 Neb. 563, 566–67, 68 N.W.2d 134, 136–38 (1955).

See also NJI2d Civ. 6.24, Comment & Authorities.

NJI2d Civ. 6.26

PARTNER BY ESTOPPEL—LIABILITY OF ONE WHO CLAIMS TO BE A PARTNER

If you find

1. that (name of alleged partner whose acts are the subject of the litigation, hereinafter “P1”) either represented to others that (he, she) was a partner ([in name of partnership], [with names of other alleged partners, hereinafter “P2”]) or consented to someone else’s representing that (he, she, (P1)) was a partner ([in name of partnership], [with (P2)]), and
2. that, in reliance upon this representation, (here insert appropriate name) gave credit to ([name of partnership], [P2]),

then, (P1) is liable to (here insert appropriate name).

[The representation may be made by words or by conduct.]

COMMENT & AUTHORITIES

Different aspects of estoppel are discussed at six different places herein: *See* NJI2d Civ. 1.45, (judicial estoppel: False Testimony (*Falsus in Uno*, *Falsus in Omnibus*)); NJI2d Civ. 6.26-6.28 (“Partner by Estoppel”); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation; citing equitable estoppel cases); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract).

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

The “P1” and “P2” appellations are used throughout the instructions in this part of Chapter 6. This instruction is the one used to bind “P1.” NJI2d Civ. 6.27 is the instruction used to bind “P2.” NJI2d Civ. 6.28 is the instruction used to bind the partnership itself.

In the situation described in this pattern instruction, where a partnership liability exists, “P1” is liable for credit given to the partnership. “P1” is liable as though he or she were a member of the partnership. Where no partnership liability exists, the defendant is jointly liable with any others who so consented to the representations as to have incurred liability separately. The Uniform Partnership Act,

Neb. Rev. Stat. § 67-316(1) (Reissue 2003) (termination date Jan. 1, 2001) (most of which is quoted below) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420 (Reissue 2009).

This pattern instruction covers the partner by estoppel situation described in the instruction and in the statutory section just cited. It is drafted to cover both the situation where "P1" represents him or herself as a partner, and the situation where "P1" consents to someone else representing him or her as a partner. If the pleadings and the evidence raise a jury question regarding one, but not both of these situations, then subparagraph number 1 of this instruction will have to be modified accordingly.

These representations may be made to others individually, or they may be made to the public at large. The Uniform Partnership Act, Neb. Rev. Stat. § 67-316(1) (Reissue 2003) (termination date Jan. 1, 2001) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420 (Reissue 2009).

The instruction says that the jury must find that the detrimental reliance was in the form of giving credit to the partnership or to the alleged copartners. That language is in the instruction because it is in the statute that was applicable when this instruction was first written, which states:

The pre-2001 version of the Uniform Partnership Act provided as follows:

When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has on the faith of such representation, *given credit* to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so *giving credit* by or with the knowledge of the apparent partner making the representation or consenting to its being made.

The Uniform Partnership Act, Neb. Rev. Stat. § 67-316(1) (Reissue 2003) (termination date Jan. 1, 2001) (emphasis added). This does not appear in the post 2000 version of the Act, the Uniform Partnership Act of 1998.

Subparagraph (2) of § 67-316 of the pre-2001 version of the Act provided for a liability beyond the giving credit situation. It stated:

When a person has been thus represented to be a partner

in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

The post-2000 version of subparagraph (2) leaves out the words “given credit.” The Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-417 (Reissue 2009). It speaks simply of a person who enters into a transaction with the actual or purported partnership. In this situation, *see* NJI2d Civ. 6.25.

It seems that “gave credit to” does not need to be in the pattern instruction and should only be in the instruction given if that particular act is the one involved in the case under instruction.

The differences in this instruction, NJI2d Civ. 6.27, and NJI2d Civ. 6.28 are designed to cover all of the possibilities. It may be, however, that some situations will fall between the cracks. If that is the case, then the instruction may have to be tailored to fit the facts of the particular case.

This pattern instruction was based on the pre-2001 version of the Act, The Uniform Partnership Act, Neb. Rev. Stat. § 67-316(1) (Reissue 2003) (termination date Jan. 1, 2001), which is quoted above. *See also* the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420 (Reissue 2009). It is also based on *Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd.*, 244 Neb. 346, 354, 506 N.W.2d 706, 711 (1993); *South Sioux City Star v. Edwards*, 218 Neb. 487, 491–92, 357 N.W.2d 178, 179 (1984); *Havelock Meats, Inc. v. Roberts*, 186 Neb. 73, 78, 180 N.W.2d 875, 878 (1970). *See also* NJI2d Civ. 6.23, Definition of Partnership, Comment & Authorities.

NJI2d Civ. 6.27

PARTNER BY ESTOPPEL—LIABILITY OF ONE WHO HAS BEEN REPRESENTED TO BE A PARTNER

If you find

1. that (name of alleged partner whose acts are the subject of the litigation, hereinafter “P1”) either represented to others that (he, she) was a partner ([in name of partnership], [with names of other alleged partners, hereinafter “P2”]) or

consented to someone else representing that (he, she, (P1)) was a partner ([in name of partnership], [with P2]), and

2. that (P2) consented to that representation, and
3. that (here insert appropriate name) relied upon these representations,

then, (P2) is bound by the acts of (P1).

[The representation may be made by words or by conduct.]

COMMENT & AUTHORITIES

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

As written, this instruction applies where one partner, *i.e.*, “P2”, consents, and thereby is allegedly bound by the acts of “P1”. If more than one partner consents, the instruction will have to be adapted accordingly. If all of the partners consent, then it may be that the partnership itself is bound. In that case, *see* NJI2d Civ. 6.28. Regarding the situation where “P1” is alleged to be liable for credit given to the partnership or the copartners, *see* NJI2d Civ. 6.26. This instruction and NJI2d Civ. 6.28 are based upon the Uniform Partnership Act, Neb. Rev. Stat. § 67-316(2) (Reissue 2003) (termination date Jan. 1, 2001) and the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420(2) (Reissue 2009). NJI2d Civ. 6.26 is based upon the Uniform Partnership Act, Neb. Rev. Stat. § 67-316(1) (Reissue 2003) (termination date Jan. 1, 2001). *See also* the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420(1) (Reissue 2009). Some of these subsections of these statutes are quoted in the Comment & Authorities to NJI2d Civ. 6.26.

Note: When this instruction is used and there are partnership defenses to the cause of action against “P2”, then language will have to be added to reflect “P2”’s ability to take advantage of those defenses. Where the instruction says “then, (P2) is bound by the acts of (P1),” some version of the following should be added.

“ . . . as though (he, she) actually were a partner ([in name of partnership], [with P2]).”

See also NJI2d Civ. 6.26, Comment & Authorities.

NJI2d Civ. 6.28**PARTNERSHIP BY ESTOPPEL—LIABILITY OF THE PARTNERSHIP**

If you find

1. that (name of alleged partner whose acts are the subject of the litigation, hereinafter “P1”) either represented to others that (he, she) was a partner in (name of partnership) or consented to someone else representing that (he, she, (P1)) was a partner in (name of partnership), and
2. that all of the partners in (name of partnership) consented to that representation, and
3. that (here insert appropriate name) relied upon these representations,

then, (name of partnership) is bound by the acts of (P1).

[The representation may be made by words or by conduct.]

COMMENT & AUTHORITIES

The law regarding partnerships is set out in detail in the Uniform Partnership Act of 1998, Neb. Rev. Stat. §§ 67-401 through 67-467 (Reissue 2009). That Act must be consulted in any case involving these partnership instructions.

This instruction applies “where all members of the existing partnership consent to the representation.” The Uniform Partnership Act, Neb. Rev. Stat. § 67-316(2) (Reissue 2003) (termination date Jan. 1, 2001). The Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-420(2) (Reissue 2009) is worded differently, but carries the same meaning. In this situation, “a partnership act or obligation results.” *Id.* This instruction assumes that the existence of the partnership is not in question; the only question is whether the acts of “P1” will be treated as though they were the acts of a partner.

NJI2d Civ. 6.27 applies where it is alleged that either (1) one or more (but not all) partners consented to “P1”’s representations of partnership; or (2) persons not actually partners consented to “P1”’s representations of partnership, and, in either case, were thereby bound by the acts of “P1”. Where “P1” is alleged to be liable for credit given to the partnership or the copartners, *see* NJI2d Civ. 6.26.

Note: In the partnership by estoppel situation, what happens to the element of “acting within the ordinary course of the business of the partnership”? Is it possible to have a partnership by estoppel as defined

in this instruction and still have as a defense for the partnership that the partner by estoppel was acting outside of the ordinary course of the partnership business? Often, if not always, this problem is taken care of by the third subparagraph of the instruction: the reliance paragraph. The case of a deviation from the ordinary course of the partnership business will be a tort case. Where the action is in tort, it is not likely that plaintiff's reliance upon representations of partnership will have been involved. If the reliance subparagraph is not sufficient, then the instruction will have to be adapted to handle the problem.

See also NJI2d Civ. 6.26, Comment & Authorities.

C. CORPORATIONS

NJI2d Civ. 6.30

A CORPORATION ACTS THROUGH ITS EMPLOYEES OR AGENTS

A corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by such acts or omissions of its employees as are within the scope of their employment and by such acts or omissions of its agents as are within the scope of their authority as agents.

COMMENT & AUTHORITIES

- I. GENERAL USE
- II. GENERAL AUTHORITY FOR THIS INSTRUCTION
- III. APPLICATION TO LIMITED LIABILITY COMPANIES
- IV. LIABILITY OF CORPORATE OFFICERS
- V. LIABILITY OF CORPORATE DIRECTORS
- VI. DUTY TO DISCLOSE
- VII. PIERCING THE CORPORATE VEIL
- VIII. DE FACTO CORPORATION
- IX. SHAREHOLDER STANDING TO SUE A CORPORATION
- X. THE FIDUCIARY DUTY OF OFFICERS AND DIRECTORS
- XI. A CORPORATION'S RATIFICATION OF UNAUTHORIZED ACTS OF ITS OFFICERS
- XII. SHAREHOLDER AGREEMENTS
- XIII. VALUATION OF A SHAREHOLDER'S STOCK
- XIV. CONFLICTS OF LAWS INVOLVING CORPORATIONS

- XV. CORPORATIONS ENTITLED TO SAME TREATMENT
AS INDIVIDUAL PARTIES
- XVI. MISCELLANEA

I. GENERAL USE

This instruction can be tailored to fit a particular case, if doing so aids clarity. For example, if the case involves an employee of a corporation, and not an agent, then the references to agents and their acts or omissions can be omitted. If the fact that a corporation is bound by the knowledge possessed by its employees or agents is not of concern in a particular lawsuit, then that sentence of the instruction may be omitted.

When scope of authority is in issue, it might be advisable to give this instruction near the scope of authority instruction. The scope of authority instruction here would be NJI2d Civ. 6.04, given either as is or as adapted to the employment situation.

In a case where one of the issues is either whether the agent's knowledge was acquired within the scope of the agency or whether the agent's knowledge concerns the subject matter of the agency, then the second sentence of this instruction will have to be rewritten. The following is suggested as a pattern:

"A corporation is bound by the knowledge possessed by its employees if that knowledge was acquired in the course of (his, her) employment and relates to the purpose of (his, her) employment."

NJI (1969) had two instructions on corporations: (1) NJI 6.30 (1969), Corporation—Liability For Conduct of Agents—Scope of Authority; and (2) NJI 6.31 (1969), Corporation Sued But Not Agent—Scope of Authority In Issue—Effect. Those instructions are included in this volume as part of NJI2d Civ. 6.01 through 6.11. Regarding NJI 6.30 (1969), *see particularly* NJI2d Civ. 6.01, 6.03, 6.04 and 6.11. Regarding NJI 6.31 (1969), *see particularly* NJI2d Civ. 6.02 and the Comment & Authorities thereto.

II. GENERAL AUTHORITY FOR THIS INSTRUCTION

Val-U Constr. Co. v. Contractors, Inc., 213 Neb. 291, 293–94, 328 N.W.2d 774, 776 (1983); Koeplin v. Pfister Hybrid Co., 179 Neb. 423, 426, 138 N.W.2d 637, 639 (1965); Geyer v. Walling Co., 175 Neb. 456, 464, 122 N.W.2d 230, 235–36 (1963); Electronic Dev. Co. v. Robson, 148 Neb. 526, 535, 28 N.W.2d 130, 136–37 (1947); Drainage Dist. No. 1 v. Suburban Irrig. Dist., 139 Neb. 333, 340, 297 N.W. 645, 650 (1941).

III. APPLICATION TO LIMITED LIABILITY COMPANIES

"[A] limited liability company is a hybrid of the partnership and

corporate forms.” *Midwest Renewable Energy, LLC v. American Engineering Testing, Inc.*, 296 Neb. 73, 80, 894 N.W.2d 221, 230 (2017) (multiple quotation marks omitted). For that reason, “[i]n cases concerning limited liability companies, we have looked to the principles of corporate law when addressing areas of similar functions.” *Id.*

See the Nebraska Limited Liability Company Act, Neb. Rev. Stat. § 21-101, et seq. (Reissue 2012 & Cum. Supp. 2016).

Regarding shareholders suits to recover damages in their own name for wrongs done to the LLC, *Strech, Inc. v. Ryan Family*, 297 Neb. 773, 785, 901 N.W.2d 284, 293 (2017) recognizes that the Court has “generally treated actions by a member of an LLC in the same manner as actions by a shareholder of a corporation.” The general rule that shareholders may not sue in their own name to recover damages for wrongs done to the corporation, is discussed below, in part IX of this Comment & Authorities.

IV. LIABILITY OF CORPORATE OFFICERS

“A corporation’s officers and directors are in the same position as agents of private individuals and are not personally liable on a corporation’s contract unless the corporate officers and directors purport to bind themselves, or have bound themselves, to performance of the contract.” *Walker v. Walker Enters.*, 248 Neb. 120, 130, 532 N.W.2d 324, 331 (1995) (generally, not liable for corporate acts or debts). *Accord* *Christian v. Smith*, 276 Neb. 867, 883, 759 N.W.2d 447, 462 (2008); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 689, 605 N.W.2d 136, 145 (2000).

V. LIABILITY OF CORPORATE DIRECTORS

According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. The business judgment rule applies to all discretionary decisions by a board of directors, including the decision not to pursue a cause of action. However, such a decision is entitled to the protection of the business judgment rule only if made by a majority of disinterested directors.

McGill v. Lion Place Condo. Ass’n, 291 Neb. 70, 84, 864 N.W.2d 642, 654 (2015) (footnote omitted).

Nebraska statutes provide that “[a] corporate director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses. . . .” Nebraska Model Business Corporation Act, Neb. Rev. Stat. § 21-2,114 (Reissue 2017). See *Gerber v. P & L Finance Co.*, 301 Neb. 463, 468, 919 N.W.2d 116, 120

(2018). *See also*, NJI2d Civ 2.04. Indemnification can include attorney fees, including those incurred on appeal. *Gerber*, 301 Neb. at 470, 919 N.W.2d at 121 (defining “proceeding”).

VI. DUTY TO DISCLOSE

The following situation is not addressed in this instruction: “It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment.” *City of Gering v. Patricia G. Smith Co.*, 215 Neb. 174, 179, 337 N.W.2d 747, 751 (1983) (emphasis added). For more on the duty to disclose, *see* NJI2d Civ. 6.03, Comment & Authorities.

VII. PIERCING THE CORPORATE VEIL

Regarding piercing the corporate veil, *see, e.g.*, *Thomas Grady Photography v. Amazing Vapor*, 301 Neb. 401, 404, 407, 918 N.W.2d 853, 856, 858 (2018) (piercing the corporate veil is an equitable action, *id.* at 404, 407, 918 N.W.2d at 856, 858; the county court does not have equity jurisdiction, *id.* at 407, 918 N.W.2d at 858); *Thomas & Thomas Court Reporters, L.L.C. v. Switzer*, 283 Neb. 19, 27, 810 N.W.2d 677, 685 (2012); *Howsden v. Roper’s Real Estate Co.*, 282 Neb. 666, 671–73, 805 N.W.2d 640, 645–47 (2011) (“A court exercises its equitable power when it disregards the corporate form.” It is not likely that the court will pierce the corporate veil on behalf of the party who created the corporation); *Christian v. Smith*, 276 Neb. 867, 883–85, 759 N.W.2d 447, 463–64 (2008) (“A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff’s rights.” *Id.* at 883, 759 N.W.2d at 462. Discussing “[s]ome of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud.” *Id.* at 883–86, 759 N.W.2d at 462–63); *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 395, 618 N.W.2d 145, 153 (2000); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 689, 605 N.W.2d 136, 145 (2000); *Global Credit Servs., Inc. v. AMISUB*, 244 Neb. 681, 686–90, 508 N.W.2d 836, 842–44 (1993); *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 97, 435 N.W.2d 179, 181 (1989); *Southern Lumber & Coal v. M.P. Olson Real Estate and Constr. Co.*, 229 Neb. 249, 426 N.W.2d 504 (1988).

VIII. DE FACTO CORPORATIONS

“[A] de facto corporation exists when there has been a good faith attempt to organize the corporation, statutory requirements have been colorably complied with, and the corporation has exercised the functions or conducted the business that it was organized to perform. In re Estate of Grebe, 288 Neb. 362, 372–73, 848 N.W.2d 611, 620 (2014) (discussing the evidence proving that the entity in question was a de facto corporation; reaffirming that the de facto corporation doctrine survives the

Unicameral's enactment of the Business Corporation Act, Neb. Rev. Stat. § 21-2001 et seq. (Reissue 2012)).

IX. SHAREHOLDER STANDING TO SUE A CORPORATION

"As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation" Same quotation: *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 785, 901 N.W.2d 284, 293 (2017) (footnotes omitted); *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 832, 792 N.W.2d 134, 140 (2010), *modified*, 280 Neb. 982, 794 N.W.2d 142. *Accord Lindsay v. Fitl*, 293 Neb. 677, 683–84, 879 N.W.2d 385, 391 (2016); *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 287, 770 N.W.2d 608, 613 (2009); *Trieweiler v. Sears*, 268 Neb. 952, 968, 688 N.W.2d 807, 827 (2004) (discussing rule and exception to rule); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 762, 448, N.W.2d 129, 133–34 (1989).

This is so "[e]ven though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation." *Lindsay*, 293 Neb. at 684, 879 N.W.2d at 391, *quoting Freedom Fin. Group*, 280 Neb. at 833, 792 N.W.2d at 141 (brackets added in *Freedom Fin. Group*), *in turn quoting Meyerson*, 233 Neb. at 765, 448, N.W.2d at 135.

However, "[w]here the corporation can not, or will not, protect the interests of the stockholders, the [stockholders] may intervene for their own protection." [This is] a very limited exception [to the general rule above]. *Streck*, 297 Neb. at 785, 901 N.W.2d at 293 (brackets in *Streck*).

If the harm to the corporation also damaged the shareholder in the shareholder's individual capacity, either because of a separate and distinct injury or a special duty the party owed to the shareholder, then the individual can pursue a separate claim "Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders." *Freedom Fin. Group*, 280 Neb. at 832, 792 N.W.2d at 140. *Accord Lindsay*, 293 Neb. at 684, 879 N.W.2d at 391 (same quotation as the final sentence); *Meyerson*, 233 Neb. at 763, 448, N.W.2d at, 133–34.

[A] private party may collaterally attack the legal stature of a corporate entity if it has been dissolved and retains neither a de jure nor a de facto existence. Because Nanette was not a shareholder, director, or creditor of G&G, as a private party, she could challenge the status and activities of G&G only if it

retained neither a de jure nor a de facto existence after its dissolution.

In re Estate of Grebe, 288 Neb. 362, 372, 848 N.W.2d 611, 620 (2014).

X. THE FIDUCIARY DUTY OF OFFICERS AND DIRECTORS

"The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide." Same quotation: *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 654, 950 N.W.2d 321, 363 (2020); *Strohmyer v. Papillion Family Medicine, P.C.*, 296 Neb. 884, 897, 896 N.W.2d 612, 622 (2017).

"A corporation's articles of incorporation and bylaws, together with State corporation law, regulate the manner in which a company's officials and directors must conduct the company's business." *Skyline Manor, Inc. by and through Link v. Rynard*, 288 Neb. 602, 606, 852 N.W.2d 303, 307 (2014).

"An officer or a director of a corporation occupies a fiduciary relation toward the corporation, and must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders. A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach." *Strohmyer*, 296 Neb. at 907, 896 N.W.2d at 627–28 (footnotes omitted). ("An officer or a director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties." *Id.* at 910, 896 N.W.2d at 910.). *Accord Dick*, 307 Neb. at 655, 950 N.W.2d at — ("The traditional rule has been that corporate shareholders do not owe one another a fiduciary duty; rather corporate officers and directors owe shareholders such a duty." Exceptions have been found for majority shareholders of closely held corporations. (footnote omitted)). *See also Jardine v. McVey*, 276 Neb. 1023, 1028, 759 N.W.2d 690, 694 (2009). Regarding the fiduciary duty a director owes to the corporation, *see also*, e.g., *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 143–44, 738 N.W.2d 434, 446 (2007); *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Regarding the fiduciary duty an officer owes to the corporation, *see also*, e.g., *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 275 Neb. 642, 660–62, 748 N.W.2d 626, 462–44 (2008).

The plaintiff in an action for breach of fiduciary duty has the burden to prove that (1) the defendant owed the plaintiff a fiduciary duty (2) the defendant breached that duty, (3) the defendant's breach was the cause of the injury to the plaintiff, and (4) the plaintiff was damaged.

Dick, 307 Neb. at 656, 950 N.W.2d at 364.

XI. A CORPORATION'S RATIFICATION OF UNAUTHORIZED ACTS OF ITS OFFICERS

Regarding a corporation's ratification of unauthorized acts of one of its officers, *see* NJI2d Civ. 6.08, Comment & Authorities.

XII. SHAREHOLDER AGREEMENTS

"Shareholder agreements are construed according to the principles of the law of contracts." *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 640, 950 N.W.2d 321, 354 (2020) ("The meaning of an unambiguous shareholder agreement, like any contract, is a question of law."). "Shareholder agreements may be freestanding of corporate bylaws." *Dick*, 307 Neb. at 652, 950 N.W.2d at 362.

XIII. VALUATION OF A SHAREHOLDER'S STOCK

The valuation of a shareholder's stock is discussed at length in *Wayne L. Ryan Revocable Trust v. Ryan*, 308 Neb. 851, 877–90, 957 N.W.2d 481, 500–508 (2021).

[I]n determining the fair value of a petitioning shareholder's stock, the "real objective is to ascertain the actual worth of that which the [shareholder] loses." Such a determination is to be based on all material factors and elements that affect value, given to each the weight indicated by the circumstances. Under this analysis, the court may consider the nature of the business and its operations, its assets and liabilities, its earning capacity, the investment value of its stock, the market value of the stock, the price of stocks of like character, the size of the surplus, the amount and regularity of dividends, future prospects of the industry and of the company, and good will, if any,

. . . The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.

Id. at 877, 957 N.W.2d at 500 (footnotes omitted; second brackets in original). *See also* *Anderson v. A & R Ag Spraying and Trucking, Inc.*, 306 Neb. 484, 493–94, 946 N.W.2d 435, 442–44 (2020) (interpreting the Nebraska Model Business Corporation Act, Neb. Rev Stat. §§ 21-201 through 21-2,232 (Cum. Supp. 2016); stating, among other things, that valuation of the petitioning shareholder's stock is equitable in nature, *Anderson*, at 490, 493, 946 N.W.2d at ——).

Regarding a corporation or one or more of its shareholders purchasing all shares of a shareholder that is petitioning for dissolution of the corporation, *see* *Anderson v. A & R Ag Spraying and Trucking, Inc.*, 306 Neb. 484, 946 N.W.2d 435 (2020) (interpreting the Nebraska Model Business Corporation Act, Neb. Rev Stat. §§ 21-201 through 21-2,232

(Cum. Supp. 2016); stating, among other things, that valuation of the petitioning shareholder's stock is equitable in nature, *Anderson*, at 490, 493, 946 N.W.2d at ____).

XIV. CONFLICTS OF LAWS INVOLVING CORPORATIONS

For the resolution of conflict of laws involving contracts, this court has adopted the Restatement (Second) of Conflict of Laws § 188.28 Under the Restatement, in the absence of an effective choice of law by the parties, a court is to consider several contacts in determining the law applicable to an issue. These contacts include (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

In re Estate of Greb, 288 Neb. 362, 376, 848 N.W.2d 611, 622 (2014) (footnotes omitted).

XV. CORPORATIONS ENTITLED TO SAME TREATMENT AS INDIVIDUAL PARTIES

Regarding the fact that corporations and other non-natural parties are entitled to the same fair and impartial treatment as must be given to individual parties, see NJ12d Civ. 2.23.

XVI. MISCELLANEA

Regarding the capacity of a dissolved corporation to sue or be sued, see *Midwest Renewable Energy, LLC v. American Engineering Testing, Inc.*, 296 Neb. 73, 80-82, 894 N.W.2d 221, 230-31 (2017).

"[A] layperson cannot represent a corporation or other distinct business entity existing legally separate from its owner—including an LLC. The rule that such entities may litigate only through a duly licensed attorney is 'venerable and widespread.' This rule prohibits even presidents, major stockholders, and sole owners from appearing pro se in relation to causes of action involving the entity's status as a business." *Zapata v. McHugh*, 296 Neb. 216, 221, 893 N.W.2d 720, 724-25 (2017) (footnotes omitted).

Regarding deceptive trade practices involving trade name confusion, see *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

D. JOINT VENTURE

NJI2d Civ. 6.40

JOINT VENTURE—ISSUES AND BURDEN OF PROOF

(As explained in the Comment & Authorities, the following is to be worked into NJI2d Civ. 2.01 or NJI2d Civ. 15.01.)

1. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (name of alleged joint venturer whose acts are the subject of the litigation, hereinafter "JV1") was engaged in a joint venture with (names of other alleged joint venturers); and

2. That at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), (JV1) was acting within the ordinary course of the (business, activity, undertaking) of the joint venture.

COMMENT & AUTHORITIES

I. GENERAL USE

This instruction is to be used when joint venturers are sued over the acts or omissions of other members of the same joint venture. It states the issue and, by reason of where it will be placed in the instruction, the burden of proof. It should be worked into Part I, B of the appropriate statement of the case instruction, the part that states the burden of proof on plaintiff's claims. For a negligence case, this instruction should be worked into NJI2d Civ. 2.01, and for a contract case, into NJI2d Civ. 15.01. *See also* NJI2d Civ. 6.01, Comment & Authorities.

II. JOINT VENTURES

Soulek v. City of Omaha, 140 Neb. 151, 299 N.W. 368 (1941) is the premier Nebraska case on joint ventures. It includes this:

"A joint adventure as a legal concept is . . . purely the creature of our American courts." It is in the nature of a limited partnership. It "can exist only by the voluntary agreement of the parties to it; . . . it [cannot] arise by mere operation of law." [*Lackman v. Rousselle*, 257 Neb. 87, 98, 596 N.W.2d 15, 23 (1999); *Rossbach v. Bilby*, 155 Neb. 575, 577, 52 N.W.2d 747, 749 (1952).] The contract need not be express, but may be implied in whole or in part from the apparent purposes, the acts and conduct of the parties. It is said to exist where persons embark on an undertaking without entering on the prosecution

of a business as partners strictly, but engage in a common enterprise for their mutual benefit. [*Accord* *Evertson v. Cannon*, 226 Neb. 370, 390, 411 N.W.2d 612, 624 (1987); *Anderson v. Evans*, 164 Neb. 599, 604, 83 N.W.2d 59, 63 (1957).] The mere pooling of property, money, assets, skill or knowledge does not create the relationship. And the absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. [*Frisch v. Svoboda*, 182 Neb. 825, 828, 157 N.W.2d 774, 776 (1968); *Gardner v. Kothe*, 172 Neb. 364, 366–68, 109 N.W.2d 405, 408 (1961); *Carey v. Humphries*, 171 Neb. 578, 595–96, 107 N.W.2d 20, 31 (1961).] The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. [*Horn's Crane Serv. v. Prior*, 182 Neb. 94, 97, 152 N.W.2d 421, 424 (1967); *Bard v. Hanson*, 159 Neb. 563, 567, 68 N.W.2d 134, 136 (1955); *Rossbach v. Bilby*, *supra*.] “The fact that the contract provides for a sharing of the profits, while an important factor in determining the character of the contract, does not of itself make it one of joint adventure. There must be something more, some active participation in the enterprise; some control of the subject-matter thereof or property engaged therein[,]” and of the means employed to carry out the common purpose; some community of interest in the business[,] each to have a voice in its control and management.

The law of partnership applies to the questions arising between the parties and among the parties in relation to third parties. [*Horn's Crane Serv. v. Prior*, *supra*; *Rossbach v. Bilby*, *supra*.] Each member of the joint adventure has a dual status—that of principal for himself, and as an agent for the others. [Quoted in *Fangmeyer v. Reinwald*, 200 Neb. 120, 131–32, 263 N.W.2d 428, 434 (1978), and *Fangmeyer* is in turn quoted in *Evertson*, 226 Neb. at 390, 411 N.W.2d at 624. *Accord* *W. Sell, Agency* § 22, at 18–19 (1975).] And the negligence of one will be imputed to both

The essentials of the relationship have been frequently stated[:] . . . there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other. [Quoted in *Dunn v. Hemberger*, 230 Neb. 171, 183, 430 N.W.2d 516, 523 (1988); *Fangmeyer v. Reinwald*, *supra*. *Accord* *Evertson*, 226 Neb. at 390, 411 N.W.2d at 624.] . . .

[T]he relationship depends largely upon the legal intent as manifest from the facts and circumstances involved in each particular case [*Lackman v. Rousselle*, 257 Neb. 87, 98, 596 N.W.2d 15, 23 (1999).] [I]n order to establish a joint adventure the parties must enter into a contract, express or

implied, as joint owners or principals. It must be an arrangement for their mutual benefit in the pursuit of which each has equal voice, control and authority, although performance may be entrusted to one. [*Kremlacek v. Sedlacek*, 190 Neb. 460, 463-64, 209 N.W.2d 149, 153 (1973); *Carey v. Humphries*, *supra*; *Kleinknecht v. McNulty*, 169 Neb. 470, 479-80, 100 N.W.2d 77, 83 (1959); *Anderson v. Evans*, *supra*; *Kelley Inv. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 386 F.2d 595, 598 (8th Cir.1967).] There must be a community of interest in the objects and purposes of the enterprise, without which there can be no joint adventure.

Soulek, 140 Neb. at 154-57, 299 N.W. at 371-72 (omitting its citations, and inserting some subsequent authorities). *See generally* *Kohout v. Bennett Construction*, 296 Neb. 608, 618-21, 894 N.W.2d 821, 829-31 (2017).

More recently, the law of joint venture is reviewed in *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987) and, to a lesser extent, in *Global Credit Servs., Inc. v. AMISUB*, 244 Neb. 681, 690-93, 508 N.W.2d 836, 844-45 (1993). *Evertson* and *Global Credit Servs.* reaffirm much of what was said in the above quotation from *Soulek*. *See also* *Bahrs v. RMBR Wheels, Inc.*, 6 Neb.App. 354, 574 N.W.2d 524 (1998).

"The primary criterion of a joint venture is that 'the parties enter into an agreement, express or implied, as owners or principals in the endeavor.'" *Neb. Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 753, 626 N.W.2d 472, 499 (2001).

"The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint venture does not exist." *Dunn v. Hemberger*, 230 Neb. 171, 183, 430 N.W.2d 516, 523 (1988).

"The existence or nonexistence of a joint adventure is a question of fact for the jury's determination, although what constitutes a joint adventure is a question of law." *Kelley Inv. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 386 F.2d 595, 598 (8th Cir.1967). *Accord Evertson*, 226 Neb. at 391, 411 N.W.2d at 624.

"Where the enterprise is for some commercial or business purpose, . . . it usually is called a joint venture. It is then governed, as to tort liability, by the law applicable to partnerships." *Prosser and Keeton on the Law of Torts* § 72, at 517 (W. Keeton gen. ed. 5th ed. 1984).

III. THE BURDEN OF PROOF

Joint ventures and partnerships are governed by the same law. *See* this Comment & Authorities, above, and *NJI2d Civ. 6.43*, below. When the plaintiff alleges a partnership, the burden of proving the partnership is by the greater weight of the evidence, a.k.a., the preponderance of the evidence. This is so whether the plaintiff is an alleged partner or

a third party. The contrary rule, which applied a greater burden of proof when the litigation was between alleged partners *inter sese*, has been abolished. In re Keytronics, 274 Neb. 936, 953, 744 N.W.2d 425, 438 (2008) (footnotes omitted).

NJI2d Civ. 6.41

JOINT VENTURE—VICARIOUS LIABILITY IN A NEGLIGENCE ACTION—EFFECT OF FINDINGS

If you find that (name of alleged joint venturer whose acts are the subject of the litigation, hereinafter “JV1”) is liable to the plaintiff, then (name of appropriate other joint venturer, hereinafter “JV2”) is also liable if (JV1)’s negligence occurred:

1. While (JV1) and (JV2) were engaged in a joint venture; and
2. While (JV1) was acting within the ordinary course of the business activity of the joint venture.

COMMENT & AUTHORITIES

This instruction is appropriate in a negligence action where: one joint venturer committed an act; and that joint venturer and others are sued; the existence of the joint venture and “JV1”’s status as a member of the joint venture are in issue; and the only claim regarding the liability of “JV2” is that of vicarious liability. If only some of those issues are present, the instruction will have to be adapted accordingly. Where the alleged liability of “JV2” is based on contract, *see* NJI2d Civ. 6.42.

In a negligence action where only “JV2” is sued and the only claim regarding the liability of “JV2” is that of vicarious liability, the effect of finding part of NJI2d Civ. 2.01 will work as written.

Regarding how this instruction is to be worked into the rest of the instructions, *see* NJI2d Civ. 6.02, Comment & Authorities.

Authority for this instruction is found at NJI2d Civ. 6.40, Comment & Authorities. *See also* NJI2d Civ. 6.21, Comments & Authorities; NJI2d Civ. 2.01, Comment.

NJI2d Civ. 6.42

JOINT VENTURE—VICARIOUS LIABILITY IN A CONTRACT ACTION—EFFECT OF FINDINGS

(Name of alleged joint venturer sued, but whose acts are not the subject of the litigation, hereinafter “JV2”) Is bound by the (acts,

representations, omissions, et cetera) of (name of alleged joint venturer whose acts are the subject of the litigation, hereinafter "JV1") if, and only if, such (acts, representations, omissions, et cetera) (occurred, were done):

1. While (JV1) and (JV2) were engaged in a joint venture; and
2. While (JV1) was acting within the ordinary course of the business activity of the joint venture.

COMMENT & AUTHORITIES

For a complete discussion of the problems that must be confronted in this area, *see* NJI2d Civ. 6.21, Comment & Authorities.

This instruction is appropriate in a contract action where: both "JV1" and "JV2" have been sued; the existence of or "JV1" 's status as a member of the joint venture is in issue; and the only issue regarding the liability of "JV2" is that of vicarious liability. If only some of those issues are present, the instruction will have to be adapted accordingly. Where the alleged liability of "JV2" is based on negligence, *see* NJI2d Civ. 6.41.

Regarding how this instruction is to be worked into the rest of the instructions, *see* NJI2d Civ. 6.02, Comment & Authorities.

In a contract action where only "JV2" is sued and the only claim regarding "JV2" 's liability is that of vicarious liability, the effect of finding part of NJI2d Civ. 15.01 will work as written.

NJI2d Civ. 6.41 and 6.42, or variations thereof, should meet most of the situations that will arise. Should a situation arise that is not covered, it will be necessary to draft an instruction using them as models.

Regarding the ordinary course of the business of a joint venture in a contract action, *see* NJI2d Civ. 6.45 (and in a negligence action, *see* NJI2d Civ. 6.44).

This instruction defines when "JV2" is liable for the acts of "JV1" in a case where the claimed liability is not based on negligence.

There are no Nebraska cases on this specific point. The instruction is modeled after NJI2d Civ. 6.22 because there are Nebraska cases saying that the law regarding joint ventures is the same as the law regarding partnerships. For further comment, *see* NJI2d Civ. 6.41, Comment & Authorities.

Authority for this instruction is found at NJI2d Civ. 6.40, Comment & Authorities. *See also* NJI2d Civ. 6.22, Comments & Authorities; NJI2d Civ. 2.01, Comment.

NJI2d Civ. 6.43

DEFINITION OF JOINT VENTURE

A joint venture exists when two or more persons have:

1. An expressed or implied agreement to engage in a business activity;
2. A mutual interest in the profits or benefits of the business activity; and
3. Equal authority to control the performance of the business activity[, even if some of them give up or never exercise that authority].

COMMENT & AUTHORITIES

I. GENERAL USE

See generally NJI2d Civ. 6.40, Comment & Authorities.

There are, roughly divided, two applications of joint venture or joint enterprise law: (1) applications to more formal business arrangements (vicarious liability in a contract action); and (2) applications to less formal enterprises in which the participants have a common pecuniary interest and where the doctrine is used as an affirmative defense to a negligence action brought against a third party and by one of the alleged members of the joint enterprise, where the third party defends with the negligence of another member of the alleged joint enterprise (a sort of vicarious contributory negligence in a tort action). *See* NJI2d Civ. 6.40, Comment & Authorities.

This instruction deals with the former and is to be used with NJI2d Civ. 6.41. As regards the latter, and the instruction to be used with NJI2d Civ. 6.40, *see* part III of the Comment to NJI2d Civ. 6.40. As explained there, in Nebraska, all but one of "nonbusiness" applications of the defense of joint enterprise have involved vehicular collisions where a passenger in one vehicle sues the driver of the other vehicle, and the defendant asserts the joint enterprise defense to impute the plaintiff's driver's negligence to the plaintiff. Again, in that situation, *see* NJI2d Civ. 6.40, Comment & Authorities.

In *Fangmeyer v. Reinwald*, 200 Neb. 120, 131–32, 263 N.W.2d 428, 434–35 (1978), the court suggested that further issues may be raised and that this instruction may have to be made more specific. If the parties can establish through relevant case law that in the case at hand, given the particular nature of the joint venture alleged, the definition of their joint venture has elements in addition to those stated in the instruction, then those elements will have to be added.

II. JOINT VENTURE

The three main cases that stand as authority for this instruction are *Evertson v. Cannon*, 226 Neb. 370, 390, 411 N.W.2d 612, 624 (1987); *Fangmeyer v. Reinwald*, 200 Neb. 120, 131-32, 263 N.W.2d 428, 434 (1978); *Soulek v. City of Omaha*, 140 Neb. 151, 299 N.W. 368 (1941). *Accord Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 354, 436 N.W.2d 184, 187-88 (1989). The Comment & Authorities to N.J.I.2d Civ. 6.40 quotes extensively from the *Soulek* case and discusses the other two.

Also see generally N.J.I.2d Civ. 6.40, Comment & Authorities.

III. JOINT VENTURES VERSUS PARTNERSHIPS

The most significant difference between a joint venture and a partnership "lies in the single or ad hoc nature of a joint venture, since a partnership is usually [but not necessarily] formed to conduct some form of general, continuing business." 12 Am.Jur. POF2d, *Existence of Joint Venture* § 3, at 309 (1977). *Rossbach v. Bilby*, 155 Neb. 575, 577-78, 52 N.W.2d 747, 749 (1952).

"Although it has been held that a joint venture and a partnership are separate legal relationships, it has also been held that they are governed by the same rules of law." 48A C.J.S., *Joint Ventures* § 5, at 397 (1981). *See also* *Horn's Crane Serv. v. Prior*, 182 Neb. 94, 97, 152 N.W.2d 421, 424 (1967); *Rossbach v. Bilby*, *supra*; *Alexander v. Turner*, 139 Neb. 364, 367, 297 N.W. 589, 591 (1941); *J. Crane and A. Bromberg*, *Crane and Bromberg on Partnership* § 35 (1968) ("In all important respects, the joint venture is treated as a partnership.").

"[A] joint venture[, however,] is not a legal entity separate from its participants in the venture as a partnership is." 48A C.J.S., *Joint Venture* § 5, at 401 (1981).

If there is a submissible issue of fact as to whether the relationship of those involved is in the nature of a partnership or a joint venture, then, to the extent the law is the same, it should not matter which name is given the relationship. If it does matter, or if the submissible issue is whether the relationship is that of a partnership or a joint venture, on the one hand, or an employment relationship, on the other hand, *see* the Comment & Authorities to N.J.I.2d Civ. 6.20 for a discussion of how to weave together the appropriate instructions.

IV. JOINT VENTURES VERSUS JOINT ENTERPRISES

All but one of the Nebraska cases using the term "joint enterprise" involve vehicular collisions, and use the term in connection with the issue of imputed negligence. And most of them use "joint enterprise" to describe the relationship between the driver and a passenger, where the issue is the imputation of contributory negligence. *See, e.g., Luther v.*

Pawling, 195 Neb. 679, 682, 240 N.W.2d 42, 44-45 (1976); Kremlacek v. Sedlacek, 190 Neb. 460, 463, 209 N.W.2d 149, 153 (1973); Sandrock v. Taylor, 185 Neb. 106, 115, 174 N.W.2d 186, 193 (1970). Regarding these cases, see NJI2d Civ. 3.25, 3.26A and 3.26B. In a bit of a twist, in *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989), a passenger alleged a joint enterprise between her driver and another passenger, arguing that the negligence of the driver be imputed to the other passenger and each be held equally liable for her injuries. Further regarding *Strother*, see NJI2d Civ. 7.61. For a discussion of imputed negligence, see NJI2d Civ. 7.61, Comment & Authorities.

Fangmeyer v. Reinwald, 200 Neb. 120, 132, 263 N.W.2d 428, 434-35 (1978), involved a vehicular collision and the issue of imputed negligence, but not the relationship between a passenger and a driver. It defines joint enterprise as follows: "an association of persons for social or other nonbusiness purposes." *Id.* While this definition extends beyond imputed negligence in a vehicular collision case, the facts of the case in which it is contained do not.

The only Nebraska case that uses the term "joint enterprise" in a context other than imputed negligence and a vehicular collision, is a divorce case. *Falcone v. Falcone*, 204 Neb. 800, 805, 285 N.W.2d 694, 698 (1979) (joint enterprise between husband and wife who jointly owned stock of family business). *Falcone* seems to be an aberration, a case that uses the words "joint enterprise" more in a Webster's Dictionary sense than in a Black's Law Dictionary sense. In any event, with the single exception of the *Falcone* case, an exception of undetermined value, the Nebraska Supreme Court has only used "joint enterprise" in the context of imputed negligence, and even then, most often in the context of describing the relationship between the driver and a passenger and the imputation of contributory negligence.

The Committee believes that "joint enterprise" is effectively limited to cases involving the imputation of negligence in connection with vehicular accidents; and even then, perhaps the use of the concept should be limited to the question of whether the contributory negligence of the driver is imputed to the passenger, thereby affecting the latter's recovery from the other driver. This treatment is supported by Prosser, who reports that in American courts generally, nonbusiness applications of joint venture go by the name joint enterprise and, "[e]xcept in comparatively rare instances, [this] non-business application has been in the field of automobile law, where it has meant that the negligence of the driver of the vehicle is to be imputed to a passenger riding in it." Prosser and Keeton on the Law of Torts § 72, at 517 (W. Keeton gen. ed. 5th ed. 1984).

Winslow v. Hammer, 247 Neb. 418, 527 N.W.2d 631 (1995) involved a collision between a car and a minivan. The passenger in the minivan, who was the husband of the driver of the minivan, sued the driver of the car (and, under the family purpose doctrine, the driver's father).

Defendants offered as one of their defenses that the occupants of the minivan were engaged in a joint enterprise and, therefore, any negligence on the part of the driver-spouse was imputed to the plaintiff-passenger-spouse. The court held "that the joint enterprise defense in negligence cases [is] limited to the situation where the parties share a pecuniary interest." *Id.* at 425, 527 N.W.2d at 636 (recognizing that the court had not specifically so held in the past). *Accord, id.* at 426, 527 N.W.2d at 636.

This rule is taken from the Restatement (Second) of Torts § 491 (1965). This Chapter of the Restatement deals with the contributory negligence of a plaintiff as a defense to an action brought by that plaintiff. Restatement (Second) of Torts ch. 17, scope note at 505 (1965). This section of the Restatement deals with the negligence of a third person imputed to the plaintiff so as to bar plaintiff's recovery to the extent it would have barred plaintiff's recovery had the negligence been plaintiff's own. Restatement (Second) of Torts § 491, comment *a* at 547 (1965). "The question whether the plaintiff is engaged in a joint enterprise with a negligent third person is usually important when two or more persons are taking a ride or trip in an automobile or other vehicle and an accident happens through the negligence of both the defendant and the driver of the vehicle [in which the plaintiff was a passenger]." *Id.* comment *d* at 548.

There are, roughly divided, two applications of joint venture or joint enterprise law: (1) applications to more formal business arrangements (vicarious liability in a contract action); and (2) applications to less formal enterprises in which the participants have a common pecuniary interest and where the doctrine is used as an affirmative defense to a negligence action brought against a third party and by one of the alleged members of the joint enterprise, where the third party defends with the negligence of another member of the alleged joint enterprise (a sort of vicarious contributory negligence in a tort action). Regarding the former, see NJ12d Civ. Civ. 6.43. Both this discussion and the pattern for an instruction suggested immediately below apply to the latter.

The elements of the joint enterprise defense in a negligence case can be expressed as follows:

A joint enterprise exists when two or more persons have:

1. An express or implied agreement to enter into an undertaking.
2. A common purpose to be carried out by such undertaking.
3. A common (pecuniary interest in, interest in the profits of, interest in the monetary benefits of) such undertaking.
4. Equal authority to control the performance of the

undertaking[, even if some of them give up or never exercise that authority].

This statement of the elements is based on *Winslow v. Hammer*, 247 Neb. 418, 424–26, 527 N.W.2d 631, 635 (1995); Restatement (Second) of Torts § 491, comment *a* at 547 (1965); and NJI2d Civ. 6.43. This may serve as a basis for instruction in a case where its use is supported by the pleadings and the evidence. For details as to the kind of case where it does apply, see the *Winslow* case and the Restatement section both cited just above.

In *Winslow* there was no evidence of a pecuniary relationship between the driver-wife and the passenger-husband. It was, rather, a normal family outing. “Therefore, it was error for the trial court to instruct the jury regarding the joint enterprise defense.” *Winslow*, 247 Neb. at 426, 527 N.W.2d at 636.

V. HUSBAND AND WIFE

Whether a husband and wife are engaged in a joint enterprise is discussed in *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999) (noting that on the question of whether a joint venture existed “acts and circumstances between spouses may not have the same significance as the same acts and circumstances between strangers might have”); *Lackman v. Rousselle*, 7 Neb.App. 698, 703–10, 585 N.W.2d 469, 475–79 (1998) (Nebraska case law on joint enterprise emphasizes element of business or other pecuniary purpose), *aff’d* *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). See also *Winslow v. Hammer*, discussed above.

NJI2d Civ. 6.44

JOINT VENTURE—ORDINARY COURSE OF BUSINESS—NEGLIGENCE ACTION

A member of a joint venture is acting within the ordinary course of the business activity of the joint venture:

1. When (he, she, it) acts with the authority of the other members of the joint venture; or
2. When (he, she, it) does the kind of thing the joint venture is in business to do; does it substantially within any authorized limits on time and place; and does it with at least the partial intention of furthering the interests of the joint venture.

COMMENT & AUTHORITIES

Though there are no Nebraska cases on this particular point, in all

important respects the law regarding joint ventures is the same as the law regarding partnerships. (See NJI2d Civ. 6.40, Comment.) That fact indicates that instruction here would be the same as in the partnership cases. This instruction, then, is based on NJI2d Civ. 6.24. See NJI2d Civ. 6.24, Comment & Authorities.

See NJI2d Civ. 6.24, Comment & Authorities; NJI2d Civ. 6.40, Comment & Authorities.

NJI2d Civ. 6.45

JOINT VENTURE—ORDINARY COURSE OF BUSINESS—CONTRACT ACTION

A member of a joint venture is acting within the ordinary course of the business activity of the joint venture:

1. When (he, she, it) acts with the authority of the other members of the joint venture; or

2. When (he, she, it) is apparently carrying on the business activity of the joint venture in the usual way, unless (he, she, it) is not authorized to so act and the person with whom (he, she, it) is dealing knows that (he, she, it) has no such authority.

COMMENT & AUTHORITIES

This instruction is modeled after NJI2d Civ. 6.25. See NJI2d Civ. 6.24, Comment & Authorities; NJI2d Civ. 6.44, Comment & Authorities.

CHAPTER 7

NEGLIGENCE—MOTOR VEHICLES

TABLE OF INSTRUCTIONS

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NJI2d Civ. 7.01

STATUTES AND ORDINANCES STATED

The Nebraska statutes that apply to this case provide (here set out the substance of applicable statutes).

The (name of city) city ordinances that apply to this case provide (here set out the substance of applicable ordinances).

SPECIAL NOTE

The Nebraska Rules of the Road were revised in L.B. 370, First Session, 93rd Legislature (April 6, 1993), effective January 1, 1994. That revision changed the statutory section numbers for the Rules of the Road and it made a few, but only a very few, substantive changes in said rules.

The instructions in this chapter correspond with post-December 31, 1993 law. Almost all of the statutory citations in this chapter are to the currently effective, post-December 31, 1993 incarnation of the statute.

In the few places where the current statute substantively changes the law, both the former and the present citations are given, the substantive change is discussed, and any change in the instruction is discussed.

COMMENT & AUTHORITIES

Use only the applicable paragraphs. The only ordinances or statutes that should be set out in the instructions are those whose violation has been pleaded as a specific act of negligence, and then only when there is evidence supporting the violation of the ordinance. *Kluender v. Mattea*, 214 Neb. 327, 330–332, 334 N.W.2d 416, 419 (1983).

Regarding particular Nebraska statutes, see NJI2d Civ. 7.04, *et seq.*

“No evidence of the conviction of a person upon a charge of violating any provision of the Nebraska Rules of the Road shall be admissible in any court in any civil action.” Neb. Rev. Stat. § 60-693 (Reissue 2010). By its terms, this statute applies only to Nebraska state traffic regulations. In line with “the policy underlying [the statute], and the overwhelming weight of authority from other jurisdictions, [the Court has held] that evidence of conviction for a traffic infraction is not admissible in a civil suit for damages arising out of the same traffic infraction.” *Stevenson v. Wright*, 273 Neb. 789, 796, 733 N.W.2d 559, 565 (2007). This holding is based at least in part on the danger that unfair will substantially outweigh the probative value of the evidence of conviction of such a relatively minor (i.e., non-felony) crime. These infractions are not felonies and therefore are not subject to the general rule that a final judgment of conviction of a felony “is admissible to prove any fact essential to sustain the judgment.” *Id.* at 795, 733 N.W.2d at 565. Regarding the general rule, and its corresponding instruction, that violation of a statute, an ordinance, an administrative rule, or a safety regulation is evidence of negligence, see the extensive Authorities to NJI2d Civ. 3.03.

Where a home rule charter or an ordinance of a municipal corporation relative to any traffic regulation is in conflict with a state statute, the state statute law takes precedence. *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56, 59 (1982); *Omaha Parking Auth. v. City of Omaha*, 163 Neb. 97, 105, 77 N.W.2d 862, 869 (1956). See also Neb. Rev. Stat. § 60-6,108(3) (Reissue 2010).

The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto, even in home rule cities, such as Omaha, when a matter of statewide policy and concern is involved.

Herman v. Lee, 210 Neb. 563, 566, 316 N.W.2d 56, 59 (1982). In this situation, any such conflicting municipal ordinance or charter provision

would not be applicable, and violation of it would not be evidence of negligence. Attention, however, is directed to the following statutes covering the right of local authorities to change rules otherwise established by state law: Neb. Rev. Stat. §§ 60-677; 60-6,120; 60-6,121; 60-6,159; 60-6,186; 60-6,190 (Reissue 2010).

Chapter 60 of the Nebraska Statutes contains the legislative regulation of the use of public roads.

The provisions of the Nebraska Rules of the Road relating to operation of vehicles [as opposed to equipment of vehicles] refer exclusively to operation of vehicles upon highways except where a different place is specifically referred to in a given section, but [certain specified provisions relative to driving under the influence of alcohol or drugs, careless driving, and reckless driving] shall apply upon highways and anywhere throughout the state except private property which is not open to public access.

Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010). "Highway shall mean the entire width between the boundary limits of any street, road, avenue, boulevard, or way which is publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." Neb. Rev. Stat. § 60-624 (Reissue 2010). "Through highway" is defined at Neb. Rev. Stat. § 60-668 (Reissue 2010).

As a general rule, then, the legislative regulation of the use of public roads does not apply to the operation of motor vehicles on private property. Neb. Rev. Stat. § 60-6,108 (Reissue 2010) (quoted in part above); *Kresha v. Kresha*, 216 Neb. 377, 380–81, 344 N.W.2d 906, 909–10 (1984) (accident in farm field); *Bassinger v. Agnew*, 206 Neb. 1, 5–6, 290 N.W.2d 793, 796 (1980) (Neb. Rev. Stat. § 60-6,108, *supra*, replaced formerly applicable section; hospital driveway now considered private drive; statutory rules therefore inapplicable). The rules that do apply on private property are those of the common law. *Kresha v. Kresha*, 216 Neb. 377, 381, 344 N.W.2d 906, 910 (1984). The common law is to be found in "decisions in former cases bearing on the subject under inquiry." *Id.* Nebraska cases, if there are any; otherwise, decisions from other jurisdictions. *See also Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984).

The owner of non-public ways may control their use. Neb. Rev. Stat. § 60-6,108(2) (Reissue 2010).

As a general rule the statutory rules of the road apply to bicycle riders, Neb. Rev. Stat. § 60-6,134 (Reissue 2010), and operators of motorcycles, Neb. Rev. Stat. § 60-6,306 (Reissue 2010), just as they apply to drivers of other motor vehicles.

For exceptions to these rules of the road, *see* Neb. Rev. Stat. §§ 60-6,112 through 60-6,114 (Reissue 2010). The exemption in § 60-6,112 includes those working on the surface of a highway. *Gatzemeyer v.*

Neligh Township, 233 Neb. 329, 333, 445 N.W.2d 593, 595 (1989) made it clear that, while this statute exempts those workers from the statutory rules of the road, it does not exempt them from the generally applicable duty to exercise reasonable care for the safety of others.

Regarding obedience to peace officers, *see* Neb. Rev. Stat. § 60-6,159(1) and (2) (Reissue 2010). *See also* the discussion at N.J.I.2d Civ. 7.04, Comment.

NJI2d Civ. 7.02

EFFECT OF VIOLATION OF STATUTE OR ORDINANCE REGULATING TRAFFIC

See NJI2d Civ. 3.03.

NJI2d Civ. 7.03A

NEGLIGENCE ON THE PART OF A DRIVER— LOOKOUT, CONTROL, CONDITIONS AFFECTING VISIBILITY, AND OTHER CONSIDERATIONS

Drivers are negligent if they do something a reasonably careful driver in the same situation would not have done, or fail to do something a reasonably careful driver in the same situation would have done.

For example, drivers are negligent if they fail to see or hear those things that would have been seen or heard by a reasonably careful driver in the same situation. They are also negligent if they fail to keep their vehicles under such control as a reasonably careful driver would have, in the same situation.

Reasonably careful drivers take into consideration such facts as their own speed, the condition of their vehicle, the condition of the road, the presence of (snow, frost, fog, mist, smoke, et cetera), the presence of other vehicles, pedestrians, or objects, and any other factors that affect driving conditions.

[Drivers must use reasonable care even when they have the right-of-way.]

COMMENT

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

The first paragraph of this instruction expresses the general standard of care to which a driver is held. If the pleadings and the evidence

support the submission to the jury of claims of negligence by drivers and others, then give this instruction along with NJI2d Civ. 3.02. If the only issue of negligence to be submitted to the jury is negligence on the part of drivers, then give this instruction instead of NJI2d Civ. 3.02.

This instruction is written so that the trial court can weed out those parts that do not apply in a particular trial. Regarding the paragraph on the things taken into consideration by reasonably careful drivers, the court can make additions and deletions as warranted by the pleadings and the evidence. If there is an issue regarding a violation of a statute or an ordinance, or some other rule or regulation, *see* NJI2d Civ. 3.03; in an appropriate case, NJI2d Civ. 3.03 should be placed right after NJI2d Civ. 7.03A.

If it will make the instruction more clear, insert a word such as car, truck, or motorcycle in place of the word vehicle, and insert a word such as highway or street in place of the word road. Two general rules applicable here are: (1) the statutory rules of the road apply equally to bicycle riders and operators of motorcycles, as well as drivers of other motor vehicles; and (2) most of the statutory rules of the road do not apply to the operation of motor vehicles on private property. These general rules are discussed at NJI2d Civ. 7.01, Comment & Authorities.

This instruction can be adapted for use in a case where the allegedly negligent party was not a driver, but a pedestrian. On a related matter, regarding assumption of the risk and contributory negligence, *Demont v. Mattson*, 188 Neb. 277, 282, 196 N.W.2d 190, 193 (1972), stated that: "A passenger is not required to maintain the same lookout as the driver."

Regarding the duty of a driver and a pedestrian to look and listen when approaching a railroad crossing, *see* Neb. Rev. Stat. § 60-6,170 (Reissue 2010) and *Gonzales v. Union Pac. RR. Co.*, 292 Neb. 281, 289, 872 N.W.2d 579, 585 (2015) (finding that the statute "applies only to civil actions *in which* contributory negligence is a defense") (emphasis added). *Dresser v. Union Pac. RR. Co.*, 282 Neb. 537, 542, 809 N.W.2d 713, 718 (2011); *Wollenburg v. Conrad*, 246 Neb. 666, 672, 522 N.W.2d 408, 413 (1994); *Crewdson v. Burlington N. R.R. Co.*, 234 Neb. 631, 636, 640-41, 452 N.W.2d 270, 276, 278-79 (1990); *Kulhanek v. Union Pac. R.R.*, 8 Neb.App. 564, 598 N.W.2d 67 (1999). "[A]n engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way." *Dresser, supra*.

A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorists' safety and that of others. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). As a general rule, a motorist's failure to look, when

looking would have been effective in avoiding a collision, is negligence as a matter of law. *Keul v. Harless*, 222 Neb. 313, 383 N.W.2d 744 (1986). We have limited the application of this general rule to situations where another vehicle is indisputably located in a favored position and situations where a driver charged with negligence as a matter of law executed a dangerous driving maneuver which, in part, led to a collision. *Id.*

Malolepszy v. State, 273 Neb. 313, 321, 729 N.W.2d 669, 676 (2007) (citations omitted). *Accord* *Didonato v. Williams*, 232 Neb. 791, 794, 442 N.W.2d 378, 380 (1989). The rule that it is negligence as a matter of law for a driver not to see another driver who is in an indisputably favored position does not apply to a driver who actually sees the other. *Didonato v. Williams*, 232 Neb. 791, 794, 442 N.W.2d 378, 380 (1989). *See also* *Jones v. Goeden*, 232 Neb. 177, 180, 440 N.W.2d 199, 202 (1989). Whether a driver is in a favored position or not includes whether that driver has the right-of-way, and more. Regarding the difference between having the right-of-way and being in a favored position, *see* *Floyd v. Worobec*, 248 Neb. 605, 610–11, 537 N.W.2d 512, 516 (1995), which is quoted at length at NJI2d Civ. 7.04, Comment.

See also NJI2d 5.02 through 5.05 for a discussion of comparative negligence for most cases accruing on or after February 8, 1992 and the Authorities to NJI2d Civ. 2.02A for a discussion of the Nebraska comparative-negligence cases finding, as a matter of law, either that the plaintiff's failure to keep a lookout or to exercise reasonable control is more than slight negligence, or that the defendant's failure to do the same is less than gross negligence, and applying to cases that accrued before February 8, 1992 and a few cases that accrue on or after that date.

See also NJI2d Civ. 3.42 on concurring cause and NJI2d Civ. 3.43 on superseding cause and the discussion of causes versus conditions in the Comment to NJI2d Civ. 3.43.

AUTHORITIES

Negligence in general: NJI2d Civ. 3.03 and its Comment and Authorities.

Lookout: *E.g.*, *Springer v. Bohling*, 263 Neb. 802, 808, 643 N.W.2d 386, 392 (2002), *overruled on other grounds by* *DeWester v. Watkins*, 275 Neb. 173, 745 N.W.2d 330 (2008); *Melick v. Schmidt*, 251 Neb. 372, 379, 557 N.W.2d 645, 650 (1997); *Vilas v. Steavenson*, 242 Neb. 801, 807, 496 N.W.2d 543, 548 (1993); *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985); *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980); *Van Ostrand v. Beccard*, 188 Neb. 326, 196 N.W.2d 385 (1972); *Ederer v. Van Sant*, 184 Neb. 774, 172 N.W.2d 96 (1969); *Ritchie v. Davidson*, 183 Neb. 94, 158 N.W.2d 275 (1968); *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957). *See also* *McMullin Transfer, Inc. v. State*, 225 Neb. 109, 113–14, 402 N.W.2d 878, 881–82 (1987).

Control: *E.g.*, *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278

Neb. 289, 304, 770 N.W.2d 619, 631 (2009) (“A motorist is required to maintain reasonable control of the vehicle commensurate with the road conditions then and there existing at the time of the occurrence.”); *Haffke v. Grinnell*, 188 Neb. 323, 196 N.W.2d 390, 392 (1972); *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966); *Harris v. Pullen*, 169 Neb. 298, 99 N.W.2d 238 (1959); *Ripp v. Riesland*, 176 Neb. 233, 125 N.W.2d 699 (1964).

Both lookout and control: *Burkey v. Royle*, 233 Neb. 549, 555, 446 N.W.2d 720, 724 (1989); *Mantz v. Continental W. Ins. Co.*, 228 Neb. 447, 453–54, 422 N.W.2d 797, 802 (1988); *Circo v. Transit Auth. of City of Omaha*, 217 Neb. 497, 348 N.W.2d 908, 910 (1984); *McKenzie v. Ladd Trucking Co.*, 214 Neb. 209, 333 N.W.2d 402 (1983); *Parmenter v. Johnson*, 213 Neb. 725, 331 N.W.2d 263 (1983); *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978); *Laux v. Robinson*, 195 Neb. 601, 239 N.W.2d 786 (1976).

A motorist “[n]ot only must . . . look at a time when looking would have been effective, but must see what is in plain sight.” *Floyd v. Worobec*, 248 Neb. 605, 611, 537 N.W.2d 512, 516 (1995) (more extensively quoted at NJI2d Civ. 7.04, Comment).

Regarding nighttime as a condition affecting visibility:

Moreover, a driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he or she can stop in time to avoid a collision with an object within the area lighted by his or her vehicle’s headlights, and the driver is negligent if he or she fails to do so.

Wollenburg v. Conrad, 246 Neb. 666, 672, 522 N.W.2d 408, 413 (1994).

Regarding the presence of snow, frost, fog, mist, smoke, et cetera, see part III of the Comment to NJI2d Civ. 3.43 for an extensive list of relevant cases with a notation of the condition involved in each. In addition to the cases cited there, see *Edgerton v. Lawry*, 235 Neb. 100, 102, 453 N.W.2d 743, 744–45 (1990) (snow and ice); *Mantz v. Continental W. Ins. Co.*, 228 Neb. 447, 453–54, 422 N.W.2d 797, 802 (1988); *Vrba v. Kelly*, 198 Neb. 723, 725–26, 255 N.W.2d 269, 270–71 (1977); *Fleischer v. Rosentrater*, 190 Neb. 219, 226, 207 N.W.2d 372, 376 (1973) (Clinton, J. concurring); *Hacker v. Perez*, 187 Neb. 485, 487–88, 192 N.W.2d 166, 168–69 (1971).

Regarding the effect of a violation of a statute, ordinance, rule, or regulation, see NJI2d Civ. 3.03.

NJI2d Civ. 7.03B

RANGE OF VISION

Recommend no separate instruction.

COMMENT & AUTHORITIES

The “range of vision rule” boils down to this: Sometimes, taking into account a driver’s speed and how far he or she can see, that driver is negligent as a matter of law. In so far as there is a separate rule known as the range of vision rule, it is one for the court to apply or not, as a matter of law. Otherwise, how far a driver can see is one of the factors to take into account when deciding whether that driver was reasonably careful.

In *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966), the court discussed the “general rule that a motorist who cannot stop his automobile in time to avoid collision with an object within the range of his vision is negligent as a matter of law.” *Id.* at 130, 147 N.W.2d at 493 (syllabus by court) (difficult to determine exact extent to which exceptions have undercut general rule, but court consistently announces adherence to general rule; *id.* at 133, 147 N.W.2d at 495).

Exceptions . . . embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases.

Id. at 133–34, 147 N.W.2d at 495. *Accord* *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 430–31, 418 N.W.2d 539, 545 (1988).

More recently, the Court reiterated the rule that a motorist who “operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist’s path within his or her range of vision” is “negligent as a matter of law.” *Nickell v. Russell*, 247 Neb. 112, 121, 525 N.W.2d 203, 208 (1995) (person lying on road). *Accord* *Martin v. Roth*, 252 Neb. 969, 973, 568 N.W.2d 553, 556 (1997) (gravel placed on paved street during recent inclement weather); *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 152, 555 N.W.2d 778, 785 (1996); *German v. Swanson*, 250 Neb. 690, 693, 553 N.W.2d 724, 726 (1996).

In *Martin*, *Traphagan*, *Nickell* and *German*, the Court reiterated that there are exceptions. One exception applies “when the person or object is not discernible, precluding the motorist from seeing the person or object in time to stop.” *German*, 250 Neb. at 693, 553 N.W.2d at 726. As a variation on this exception, it applies “when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible.” *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 153, 555 N.W.2d 778, 785 (1996). *Accord* *Martin v. Roth*, 252 Neb. 969, 973–76, 568 N.W.2d 553,

556–557 (1997) (discussing both “indiscernible object” and “sudden stop” exceptions); *Nickell v. Russell*, 247 Neb. 112, 121, 525 N.W.2d 203, 208 (1995). *See also* *German v. Swanson*, 250 Neb. 690, 695–96, 553 N.W.2d 724, 727 (1996) (discussing exception, including: applicability turns on objective visibility of object, not reasonableness of motorists conduct) (White, C.J., dissenting). Regarding a driver who runs into a pedestrian, *see further* *NJI2d Civ.* 7.15.

As quoted above, *Bartosh* states the general boundaries of the exceptions as follows: The exceptions involve situations where reasonable minds might differ as to whether the motorist was exercising due care. The exceptions do not apply when reasonable minds cannot differ. Where reasonable minds cannot differ, there is no question for the jury and no place for jury instruction. Even after these more recent cases—*Martin*, *Traphagan*, *Nickell* and *German*—it still seems that the exceptions swallow the rule and that a “range of vision” case is just like every other negligence case: Fact questions are for the jury unless reasonable minds cannot differ. The “range of vision” rule applies where reasonable minds cannot differ as to range of vision. The “range of vision rule” is not for the jury, but for the judge.

There may be one other bit of force to the range of vision rule, but still one for the judge, not the jury. The range of vision rule seems to shift the burden of production: A motorist who hits an object or obstruction on the road is negligent as a matter of law unless the motorist produces evidence of an exception (such as the motorist’s own testimony that he or she did not see the object and providing a legitimate, non-negligent reason why he or she did not see the object). This may be the distinction between Nebraska and states that do not apply the range of vision rule. *See Martin v. Roth*, 252 Neb. 969, 973–77, 568 N.W.2d 553, 556–558 (1997) (consistent with, but does not cite, this Comment & Authorities’ discussion of remaining force of range of vision rule); *Nickell v. Russell*, 247 Neb. at 123, 525 N.W.2d at 210.

In sum, in so far as range of vision is a rule, it is one for the court to use in deciding whether to submit the negligence issue to the jury.

This question of range of vision was given extensive consideration in *Bartosh*. The cases predating *Bartosh* are discussed in that opinion. In addition to those cited above, here are some of the other range-of-vision cases decided since *Bartosh*: *Horst v. Johnson*, 237 Neb. 155, 159, 465 N.W.2d 461, 464 (1991); *Burkey v. Royle*, 233 Neb. 549, 555, 446 N.W.2d 720, 724 (1989); *Mantz v. Continental W. Ins. Co.*, 228 Neb. 447, 453, 422 N.W.2d 797, 802 (1988); *McCauley v. Briggs*, 218 Neb. 403, 406, 355 N.W.2d 508, 511 (1984); *Stanek v. Swierczek*, 209 Neb. 357, 359–60, 307 N.W.2d 807, 809–10 (1981); *Fink v. Meister*, 188 Neb. 248, 250, 196 N.W.2d 122, 123 (1972); *Newkirk v. Kovanda*, 184 Neb. 127, 130, 165 N.W.2d 576, 578–79 (1969); *Kehm v. Dumpert*, 183 Neb. 568, 572, 162 N.W.2d 520, 523 (1968). *See also* *Edgerton v. Lawry*, 235

Neb. 100, 102, 453 N.W.2d 743, 744 (1990), which has to do with the range-of-vision rule and the presence of snow or ice on the street surface.

NJI2d Civ. 7.04

STOP SIGNS—INTERSECTIONS

Nebraska statutes provide that drivers must stop for stop signs.

1. If there is a clearly marked stop line, they must stop immediately before crossing that line.

2. If there is no clearly marked stop line, they must stop immediately before entering the nearest crosswalk.

3. If there is neither a clearly marked stop line nor a [marked or unmarked] crosswalk, they must stop at the point that is nearest the intersecting (street, highway, roadway, et cetera) and provides a view of traffic approaching on the intersecting (street, highway, roadway, et cetera).

A driver at a stop sign must yield the right-of-way to cross traffic that has entered the intersection.

At an intersection where drivers on one (street, highway, roadway, et cetera) are required to stop and drivers on the other are not required to stop, the following rules apply:

1. Drivers required to stop must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for them to proceed into the intersection;

2. Drivers who are not required to stop have the right to assume that drivers who are required to stop will do so and will not start up again until it is safe. On the other hand, drivers who do not have stop signs are not relieved of their duty to exercise reasonable care.

COMMENT

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate.

Related definitions are found in Neb. Rev. Stat. §§ 60-606 through 60-676 (Reissue 2010). Section 60-667 defines “stop” as follows: “Stop, when required, shall mean a complete cessation of movement.” Section 60-616 defines “crosswalk.”

Section 60-6,148(2) states: “After having stopped, such driver shall

yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on such highway as to constitute an immediate hazard if such driver moved across or into such intersection." Neb. Rev. Stat. § 60-6,148(2) (Reissue 2010). Some of the cases, instead of referring to the hazard created by oncoming traffic, refer to the speed of the oncoming traffic. *See, e.g., Jershin v. Becker*, 217 Neb. 645, 351 N.W.2d 48, 52 (1984). The instruction states: "Drivers with a stop sign must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for the driver with the stop sign to proceed into the intersection." In the Committee's opinion, the "immediate hazard" from the instruction is a function of the other vehicle's speed and its distance from the intersection. If there is a case where the hazard is a function of something else, or something in addition, the part of the instruction just quoted above will have to be modified.

A driver with a stop sign, at a through cross-street, who pulls into the intersection and is struck by a vehicle traveling on the through street, is negligent as a matter of law. Whether the driver on the through street was speeding is relevant to that driver's contributory negligence, but it does not change the first driver's status as negligent as a matter of law. *Kasper v. Carlson*, 232 Neb. 170, 173-74, 440 N.W.2d 195, 197 (1989). This is consistent with the general rule that "the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position." *Jones v. Goeden*, 232 Neb. 177, 180, 440 N.W.2d 199, 202 (1989). *See also Didonato v. Williams*, 232 Neb. 791, 794, 442 N.W.2d 378, 380 (1989).

Floyd v. Worobec, 248 Neb. 605, 537 N.W.2d 512 (1995) explains further the points discussed in the previous paragraph. In this case, plaintiff was driving her car westbound on a through street; she was driving through an intersection protected by stop signs directed at northbound and southbound traffic. Defendant was driving his truck northbound. There was a "big pickup truck," apparently stopped, in or near the northbound-traffic lane and near the intersection in question; the "big pickup truck" obstructed plaintiff's view of northbound traffic (and, therefore, defendant's truck) and defendant's view of westbound traffic (and, therefore, plaintiff's car). Defendant's truck collided with plaintiff's car. The court discusses the difference between having the right-of-way and being in a favored position. Whether a driver is in a favored position or not includes whether that driver has the right-of-way, and more.

A motorist is required to yield the right-of-way to a vehicle traveling on a street protected by stop signs if the vehicle on the protected street is close enough to the intersection to pose an immediate hazard. Moreover, a driver has a duty to look both to the right and to the left and to maintain a proper lookout for the driver's safety and that of others. Consequently, one traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has

notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard [should] the driver at the stop sign moves into or across the intersection.

However, a driver approaching an intersection is not in a favored position and entitled to proceed merely because that driver has the right-of-way. Thus, while a driver who fails to see another who is in a favored position is negligent as a matter of law, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is “undisputably located in a favored position.”

The issue, therefore, is whether [plaintiff] was “undisputably located in a favored position.” As [we have stated]: “A vehicle is located in a ‘favored position’ when it is ‘within that radius which denotes the limit of danger,’ . . . a definition which focuses upon the vehicle’s geographical proximity to the collision point and the vehicle’s favored status under the applicable rules of the road.”

[T]here is nothing in the evidence from which it can be inferred that [plaintiff] violated any rule of the road so as to forfeit any favored position she otherwise enjoyed [—plaintiff testified she was driving within the speed limit; defendant testified he thought she was speeding but also testified he failed to see her car until impact, leaving his feeling on the matter without evidential value—] or that her automobile was other than within the radius of danger when [defendant] proceeded into the intersection. The existence of the parked truck blocking [the view] provided a condition, the existence of which defendant was obligated to take into account. Not only must a motorist look at a time when looking would have been effective, but must see what is in plain sight. [Defendant]’s having failed to see [plaintiff]’s automobile under the circumstances presented here establishes that [defendant] was negligent as a matter of law.

That being so, and there being no issue pled as to any contributory negligence on [plaintiff]’s part, it follows that the district court erred in not granting [plaintiff]’s motion for directed verdict.

Id. at 610–11, 537 N.W.2d at 516–17 (citations omitted). *Accord* Springer v. Bohling, 263 Neb. 802, 808, 643 N.W.2d 386, 392–93 (2002); Corcoran v. Lovercheck, 256 Neb. 936, 944–45, 594 N.W.2d 615, 621–22 (1999).

If there is evidence that the driver with the stop sign had been directed to proceed “by a peace officer or traffic-control signal,” Neb. Rev. Stat. § 60-6,148(2) (Reissue 2010) quoted in full below, then this

instruction will have to be modified. As an example of the modification required if there is evidence that a police officer directed a driver to proceed through a stop sign, change the first sentence of the instruction to read as follows:

“Nebraska statutes provide that drivers must stop for stop signs, unless a police officer directs them to do otherwise.”

Regarding obedience to peace officers, *see also* Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

Where there is evidence that one or more of the drivers violated speed or other rules of the road, *see* NJI2d Civ. 7.13 and NJI2d Civ. 7.14.

From the parenthetical “(street, highway, roadway, et cetera),” select the word most likely to be best understood by the jury, which usually will be the word used during the trial to describe the intersecting roadway.

In *Salazar v. Nemec*, 253 Neb. 298, 570 N.W.2d 366 (1997), two drivers collided while entering an intersection controlled by stop signs at each of its four entrances. The plaintiff requested a vehicle-on-the-right right-of-way instruction. (The requested instruction is quoted at NJI2d Civ. 7.10, Comment & Authorities.) The court said that this instruction “reflects Neb. Rev. Stat. § 60-6,150 (Reissue [2010]), which clearly applies on its face to noncontrolled intersections. . . . Several courts have held that at four-way stop signs, no driver has a preferred or favored status, and all have a duty to stop followed by a duty to use ordinary care as they proceed through the intersection.” *Salazar v. Nemec*, 253 Neb. 298, 300, 570 N.W.2d 366, 367 (1997) (per curiam) (paragraph break omitted). *See also* NJI2d Civ. 7.10.

AUTHORITIES

Neb. Rev. Stat. § 60-6,148(2) (Reissue 2010) provides:

Except when directed to proceed by a peace officer or traffic-control signal, every driver of a vehicle approaching an intersection where a stop is indicated by a stop sign shall stop at a clearly marked stop line or shall stop if there is no such line, before entering the crosswalk on the near side of the intersection or, if no crosswalk is indicated, at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, such driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on such highway as to constitute an immediate hazard if such driver moved across or into such intersection.

(The version of this statute operative prior to January 1, 1994 was dif-

ferent in one word from the above: where the first line of this statute says “peace officer,” the previous version said “police officer.” See NJI2d Civ. 7.01, Special Note.)

See, *Salazar v. Nemec*, 253 Neb. 298, 570 N.W.2d 366 (1997) (approving instruction) (per curiam); *Steinauer v. Sarpy Cty.*, 217 Neb. 830, 353 N.W.2d 715, 721 (1984); *Pickett v. Parks*, 208 Neb. 310, 303 N.W.2d 296, 297–98 (1981); *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355, 358 (1976); *Steinberg v. Pape*, 181 Neb. 806, 150 N.W.2d 912 (1967); *McKinney v. Cass Cty.*, 180 Neb. 685, 144 N.W.2d 416 (1966); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848, 855 (1960); *Owen v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958); *Bezdek v. Patrick*, 164 Neb. 398, 82 N.W.2d 583 (1957); *Borcharding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952); *Dale v. Omaha & Council Bluffs St. Ry. Co.*, 154 Neb. 434, 48 N.W.2d 380 (1951); *Meyer v. Hartford Bros. Gravel Co.*, 144 Neb. 808, 14 N.W.2d 660 (1944).

See also *McFarland v. King*, 216 Neb. 92, 341 N.W.2d 920 (1983) (related statute applies to 15-year-old boy riding bicycle); Neb. Rev. Stat. § 60-6,314 (Reissue 2010) (as a general rule, statutory rules of the road apply equally to bicycle riders and drivers of motor vehicles).

NJI2d Civ. 7.05

STOP SIGNS—TEMPORARILY REMOVED OR OBSTRUCTED

The following rules apply at an intersection where one of the (streets, highways, roadways, et cetera) is a through (street, highway, roadway, et cetera) and the other usually is controlled by a stop sign, but that stop sign has been temporarily removed or knocked down, or is so obstructed that a reasonably careful driver would not see it:

1. Drivers on the through (street, highway, roadway, et cetera) who (know, reasonably believe) that the intersecting (street, highway, roadway, et cetera) usually has a stop sign, and who do not know that the stop sign has been obstructed, knocked down, or temporarily removed, may assume that drivers on the intersecting (street, highway, roadway, et cetera) will stop.

2. Drivers on the through (street, highway, roadway, et cetera) who do know that the intersecting (street's, highway's, roadway's, et cetera) stop sign is obstructed, is down, or is not there, must treat the intersection as one not protected by a stop sign.

3. Drivers who know that the intersection they are approaching usually has a stop sign that would require them to stop, must come to a stop even if the stop sign in question has been obstructed, knocked down, or temporarily removed.

4. Drivers who do not know that the intersection they are approaching usually has a stop sign that would require them to stop, may treat the intersection as one not protected by a stop sign.

COMMENT & AUTHORITIES

McKinney v. Cass Cty., 180 Neb. 685, 144 N.W.2d 416 (1966); Gross v. Johnson, 174 Neb. 273, 117 N.W.2d 534 (1962); Hammon v. Brazda, 173 Neb. 1, 112 N.W.2d 272 (1961); Bell v. Crook, 168 Neb. 685, 97 N.W.2d 352 (1959).

“The absent stop sign in the Zeller case presents a situation analogous to two vehicles approaching or entering the same intersection ‘from different roadways at approximately the same time,’ *see* Neb. Rev. Stat. § 39-635(1) (Reissue [2016]), requiring the vehicle on the left to yield a qualified right-of-way to the preferred or favored vehicle on the right.” Zeller v. County of Howard, 227 Neb. 667, 674, 419 N.W.2d 654, 659 (1988) quoting predecessor to Neb. Rev. Stat. § 60-6,146 (Reissue 2010). Regarding this situation, *see* NJI2d Civ. 7.10.

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04.

Use only those parts of this instruction as are appropriate.

Regarding subparagraphs number 1 and 3, *see* NJI2d Civ. 7.04. Regarding subparagraphs number 2 and 4, *see* NJI2d Civ. 7.10.

Regarding the State’s liability for “claim[s] arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device” *see* NJI2d Civ. 8.72.

NJI2d Civ. 7.06

YIELD RIGHT-OF-WAY SIGNS

Nebraska statutes provide that drivers approaching yield [right-of-way] signs must slow their vehicles to a speed that is reasonable under existing conditions and, if safety so requires, must stop.

1. If a stop is required and there is a clearly marked stop line, they must stop immediately before crossing that line.

2. If a stop is required and there is no clearly marked stop line, they must stop immediately before entering the nearest crosswalk.

3. If a stop is required and there is neither a clearly marked stop line nor a [marked or unmarked] crosswalk, they must stop at the point that is nearest the intersecting (street, highway, roadway, et

cetera) and provides a view of traffic approaching on the intersecting (street, highway, roadway, et cetera).

After slowing or stopping, such drivers are required to yield the right-of-way to any cross traffic that either has entered the intersection or that is so close to the intersection and traveling at such a speed that it is not safe to proceed.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,148(3) (Reissue 2010). *Snipes v. Smith*, 191 Neb. 4, 6, 213 N.W.2d 456, 457 (1973) (yield sign; driver's view obstructed by snow bank; duty to stop at point near intersection where driver could see cross traffic); *Lemieux v. Sanderson*, 180 Neb. 311, 313-14, 142 N.W.2d 557, 560 (1966).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment.

If a yield sign has been obstructed or temporarily removed, an appropriate instruction will have to be drafted. Presumably, the rules in that situation are the same as those for a stop sign temporarily removed or obstructed. If so, then NJI2d Civ. 7.05 can serve as a model.

NJI2d Civ. 7.07A

GREEN LIGHT—VEHICULAR TRAFFIC

Nebraska statutes provide that drivers who have a green light may proceed straight through an intersection and they may turn right or left unless there is a sign prohibiting such a turn. They do not, however, have an absolute right to do so. Drivers who have a green light still must exercise such care as a reasonably careful driver would exercise under the circumstance.

1. They must yield the right-of-way to cross traffic that is lawfully within the intersection.

2. When turning right or left, they must yield the right-of-way to other vehicles and pedestrians lawfully within the intersection or an adjacent crosswalk.

3. When turning left, they must yield the right-of-way to drivers approaching from the opposite direction who are in the intersection or so close to the intersection and traveling at such a speed that it is not safe to proceed with the left turn.

4. They must yield the right-of-way to emergency vehicles that make use of proper audible or visual signals when they know or

should know that such emergency vehicles are in the intersection or so close to the intersection and traveling at such a speed that it is not safe for the driver with the green light to proceed into the intersection.

COMMENT

I. CROSS REFERENCES

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04.

Regarding a green arrow, see NJI2d Civ. 7.07B.

Regarding a pedestrian who has a green light, see Neb. Rev. Stat. § 60-6,123(1)(c) (Reissue 2010), and regarding pedestrian right-of-way generally, see NJI2d Civ. 7.15.

Regarding left-turning vehicles, see NJI2d Civ. 7.11.

Regarding emergency vehicles, see NJI2d Civ. 7.30.

II. USE OF THE INSTRUCTION

Use only those of the numbered subparagraphs, if any, as are appropriate under the pleadings and the evidence.

III. "LAWFULLY WITHIN" THE INTERSECTION

The statute applicable to subparagraphs numbered 1 and 2 of this instruction states:

Vehicular traffic facing a circular green indication may proceed straight through or turn right or left unless a sign at such place prohibits either such turn, but vehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such indication is exhibited.

Neb. Rev. Stat. § 60-6,123 (Reissue 2010).

The word lawfully appears in subparagraphs numbered 1 and 2 of the above instruction because it is in the statute. *Id.* This statute is quoted and discussed in *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996) (Court had previously said motorist's right-of-way subject to rights of cross traffic "already in" intersection; in each such case, vehicle already in intersection had entered lawfully; those cases "do not contradict the statutorily imposed duty to yield to those lawfully within the intersection;" *id.* at 303, 549 N.W.2d at 639).

Similarly, NJI2d Civ. 7.07B refers to pedestrians "lawfully within an adjacent crosswalk" and to others "lawfully using the intersection."

That too is the language of the applicable statute. Neb. Rev. Stat. § 60-6,123(1)(b) (Reissue 2010).

These instructions, and the statute, leave open the question of the driver's duty to those who are within the intersection or the crosswalk, but unlawfully so. In that regard, see the following.

■ *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996), says this much about the problem:

We hold that absent exceptional circumstances, a motorist on a favored street with a green light does not have the duty to anticipate the negligence of a motorist on a cross street who runs a red light. By exceptional circumstances, we mean where the driver could have easily avoided the accident by exercising the slightest degree of care.

Id. at 304, 549 N.W.2d at 639. *Accord* *Springer v. Bohling*, 263 Neb. 802, 810, 643 N.W.2d 386, 394 (2002).

■ The statutory general-rule regarding drivers' care for pedestrians is: "[E]very driver . . . shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway." Neb. Rev. Stat. § 60-6,109 (Reissue 2010). *Accord* *Tadros v. City of Omaha*, 269 Neb. 528, 536, 694 N.W.2d 180, 188 (2005). This statute creates two standards of care: "due care" and "proper precaution" and the latter is a higher standard of care than the former. This is discussed at NJI2d Civ. 7.15, Authorities.

■ Neb. Rev. Stat. § 60-6,151 (Reissue 2010) states that "[t]he driver of any other vehicle shall yield the right-of-way" to "an authorized emergency vehicle which makes use of proper audible or visual signals." In *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982), the court recognized that the identically worded predecessor to § 60-6,123, *supra*, "provides that traffic facing a green light may proceed unless there is another vehicle lawfully within the intersection." The court went on to recognize that "a driver [who] has a preferred right-of-way, such as [the driver of] an emergency vehicle" has a duty to exercise ordinary care. *Id.* at 567–69, 316 N.W.2d at 59–60. *See also* NJI2d Civ. 7.30 regarding emergency vehicles.

■ It seems that, where this problem exists, it can be taken care of with a careful combination of the proper instructions. *See*, for example, the discussion at NJI2d Civ. 7.13, Comment & Authorities.

■ Where it matters, be careful not to suggest that a driver may, with impunity, run down one who is "[un]lawfully within the crosswalk" or the intersection.

AUTHORITIES

Neb. Rev. Stat. § 60-6,123(1)(a) (Reissue 2010) (drivers who have a green light); *id.* at § 60-6,151 (preferred right-of-way for emergency vehicles); *id.* at § 60-6,147 (vehicle turning left). *E.g.*, *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996); *Maple v. City of Omaha*, 222 Neb. 293, 298, 384 N.W.2d 254, 258 (1986); *Herman v. Lee*, 210 Neb. 563, 568–69, 316 N.W.2d 56, 60 (1982); *Zavoral v. Pacific Intermountain Exp.*, 178 Neb. 161, 167–68, 132 N.W.2d 329, 333–34 (1965); *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466 (1955); *Angstadt v. Coleman*, 156 Neb. 850, 58 N.W.2d 507 (1953).

“A ‘go’ signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated . . . [R]ight-of-way is subject to the rights of those already in the intersection.”

Tadros v. City of Omaha, 269 Neb. 528, 537, 694 N.W.2d 180, 188 (2005) (paragraph breaks omitted) (quoting *Styskal v. Brickey*, 158 Neb. 208, 217, 62 N.W.2d 854, 861 (1954)).

Neb. Rev. Stat. § 60-6,151 (Reissue 2010) states that “[t]he driver of any other vehicle shall yield the right-of-way” to “an authorized emergency vehicle which makes use of proper audible or visual signals.” In *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982), the court recognized that the identically worded predecessor to § 60-6,123, *supra*, “provides that traffic facing a green light may proceed unless there is another vehicle lawfully within the intersection.” The court went on to recognize that “a driver [who] has a preferred right-of-way, such as [the driver of] an emergency vehicle” has a duty to exercise ordinary care. *Id.* at 567–69, 316 N.W.2d at 59–60. *See also* *NJI2d Civ.* 7.30 regarding emergency vehicles.

NJI2d Civ. 7.07B

GREEN ARROW—VEHICULAR TRAFFIC

Nebraska statutes provide that drivers who have a green arrow[, either alone or in combination with other traffic-control signals,] may cautiously enter the intersection to make the movement indicated by the arrow[or such other movement as is permitted by the other traffic-control signals facing them at the same time]. They must yield the right-of-way to pedestrians lawfully within the crosswalk and to other traffic lawfully using the intersection.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,123(1) (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment; NJI2d Civ. 7.07A, Comment.

NJI2d Civ. 7.08A

STEADY YELLOW LIGHT—VEHICULAR TRAFFIC

[A steady yellow light is a warning that the light is about to turn red.] Nebraska statutes provide that drivers approaching a steady yellow light[, as opposed to a blinking yellow light,] must stop before entering [the nearest crosswalk at] the intersection, if they can do so safely. If they cannot stop safely, then such drivers may cautiously proceed through the intersection.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,123(2)(a) (Reissue 2010). *Eden v. Spaulding*, 218 Neb. 799, 803, 359 N.W.2d 758, 761 (1984); *Zavoral v. Pacific Intermountain Exp.*, 178 Neb. 161, 168, 132 N.W.2d 329, 333 (1965).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment.

In an appropriate case the related instruction on the duty of a driver having the right of way, NJI2d Civ. 7.13, should also be given.

Regarding a steady yellow light and pedestrian traffic, see Neb. Rev. Stat. § 60-6,123(2)(b) (Reissue 2010). Regarding a flashing yellow light, see NJI2d Civ. 7.08B.

NJI2d Civ. 7.08B

FLASHING YELLOW LIGHT—VEHICULAR TRAFFIC

Nebraska statutes provide that drivers approaching a flashing yellow light may proceed (past the light, through the intersection), but must do so with caution.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,125(2) (Reissue 2004). This section of the code does not apply at railroad grade crossings. *Id.* at § 60-6,123(3) (cross referencing the statutory sections applicable at railroad grade crossings).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment.

Regarding a steady yellow light, see NJI2d Civ. 7.08A.

NJI2d Civ. 7.09A**STEADY RED LIGHT—VEHICULAR TRAFFIC**

Nebraska statutes provide that drivers who have a red light must stop.

1. If there is a clearly marked stop line, they must stop immediately before crossing that line.

2. If there is no clearly marked stop line, they must stop immediately before entering the nearest crosswalk.

3. If there is neither a clearly marked stop line nor a [marked or unmarked] crosswalk, they must stop before entering the intersection.

After stopping, and unless there is a (sign, traffic control device, et cetera) prohibiting right turn on red, drivers intending to make a right turn may start up again and cautiously enter the intersection to make the turn. They must, however, yield the right-of-way to pedestrians who are lawfully within the crosswalk and to other traffic lawfully using the intersection.

After stopping, and unless there is a (sign, traffic control device, et cetera) prohibiting left turn on red, drivers intending to make a left turn at the intersection of two one-way streets may cautiously proceed into the intersection to make the turn. They must, however, yield the right-of-way to pedestrians who are lawfully within the crosswalk and to other traffic lawfully using the intersection.

Except as just stated, drivers who have a red light must remain stopped at the light until it changes to green [or they receive some other lawful indication to proceed].

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,123(a)–(c) (Reissue 2004). *Himes v. Carter*, 219 Neb. 734, 735, 365 N.W.2d 840, 841 (1985); *Zavoral v. Pacific Intermountain Exp.*, 178 Neb. 161, 168–69, 132 N.W.2d 329, 333 (1965).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment; NJI2d Civ. 7.07A, Comment.

Use only those parts of this instruction as are appropriate.

Part of this instruction states exceptions to the driver's general duty to remain stopped at a red light until it changes to green. If there are other applicable exceptions, state them.

Regarding the rights and duties of a driver who enters an intersec-

tion on a green light, intending to make a signaled left turn, and is forced by oncoming traffic to stop in the intersection until his or her light turns red, *see* NJI2d Civ. 7.11, Comment & Authorities.

The section of the statute dealing with right turn on red, Neb. Rev. Stat. § 60-6,123(3)(b) (Reissue 2010), states that the turning driver must yield the right of way to pedestrians lawfully within an adjacent crosswalk. The section dealing with left turn on red, Neb. Rev. Stat. § 60-6,123(3)(c) (Reissue 2010), says he or she must yield to pedestrians and persons riding bicycles lawfully within an adjacent crosswalk. The Committee sees no reason for the inclusion of the bicycle rider in the one case and his or her exclusion in the other. The Committee has left the bicycle rider out of the pattern altogether. In a case involving a bicycle rider, refer to the statute and adapt the instruction as required, keeping in mind that Neb. Rev. Stat. § 60-6,314 (Reissue 2010) says that as a general rule the statutory rules of the road apply equally to bicycle riders and drivers of motor vehicles.

Regarding the fact that the statute says these persons must be within an “adjacent” crosswalk, it is the opinion of the Committee that just before the car hit the pedestrian, the crosswalk in which the latter was found was adjacent. The Committee could find no reason to include the word adjacent in the instruction. If there is a reason to do so, adapt the instruction accordingly.

In an appropriate case the related instruction on the duty of a driver having the right of way, NJI2d Civ. 7.13, should also be given.

Regarding a steady red light and pedestrian traffic, *see* Neb. Rev. Stat. § 60-6,123(3)(d) (Reissue 2010). Regarding either a flashing red light or a red light that does not turn green, *see* NJI2d Civ. 7.09B.

The statutory general-rule regarding drivers’ care for pedestrians is: “[E]very driver . . . shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway.” Neb. Rev. Stat. § 60-6,109 (Reissue 2010). *Tadros v. City of Omaha*, 269 Neb. 528, 536, 694 N.W.2d 180, 188 (2005). This section creates two different standards of care: “due care” is the standard applied to pedestrians in general and “proper precaution” is the standard applied to “any child or obviously confused or incapacitated person upon a roadway.” The latter is a higher standard of care. This is discussed at NJI2d Civ. 7.15, Authorities. Regarding pedestrian right-of-way, *see generally* NJI2d Civ. 7.15.

There is no statutory section dealing with a driver faced with a red light that is stuck on red, with cross traffic facing a signal stuck on green. If the law is that such a driver must treat the intersection as one controlled by a stop sign from his or her direction and uncontrolled,

from the direction of the cross traffic, then adapt NJI2d Civ. 7.04 and use it as the instruction.

NJI2d Civ. 7.09B

FLASHING RED LIGHT—VEHICULAR TRAFFIC

Nebraska statutes provide that drivers approaching a flashing red light must stop.

1. If there is a clearly marked stop line, they must stop immediately before crossing that line.

2. If there is no clearly marked stop line, they must stop immediately before entering the nearest crosswalk.

3. If there is neither a clearly marked stop line nor a [marked or unmarked] crosswalk, they must stop at the point that is nearest the intersecting (street, highway, roadway, et cetera) and provides a view of traffic approaching on the intersecting (street, highway, roadway, et cetera).

A driver stopped for a flashing red light must yield the right-of-way to cross traffic that has entered the intersection.

At an intersection where drivers on one (street, highway, roadway, et cetera) are required to stop and drivers on the other are not required to stop, the following rules apply:

1. Drivers required to stop by a flashing red light must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for the driver with the flashing red light to proceed into the intersection;

2. Drivers who are not required to stop have the right to assume that drivers who are required to stop will do so and will not start up again until it is safe. On the other hand, drivers who do not have a traffic signal that requires them to stop are not relieved of their duty to exercise reasonable care.

COMMENT & AUTHORITIES

See NJI2d Civ. 7.01, Special Note and Comment & Authorities; NJI2d Civ. 7.04, Comment.

Use only those parts of this instruction as are appropriate.

Neb. Rev. Stat. § 60-6,125(1) (Reissue 2010) says that the rules applicable to drivers approaching a flashing red light are the same as the

rules applicable to drivers approaching a stop sign. This instruction is essentially the same as the stop sign instruction, NJI2d Civ. 7.04. See NJI2d Civ. 7.04, Authorities.

NJI2d Civ. 7.10

VEHICLES APPROACHING INTERSECTION AT SAME TIME—RIGHT-OF-WAY

Nebraska statutes provide that when two vehicles come to an intersection at approximately the same time and there is no traffic control device to the contrary, then the vehicle on the right has the right-of-way.

Drivers on the right may assume that their right-of-way will be respected by drivers on the left, but they are not relieved of their duty to exercise reasonable care.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,146(1) (Reissue 2010). This statute is intended to avoid intersection collisions. Therefore, right-of-way is not “determined by the single test of which vehicle entered the intersection first. The driver [on the left] . . . is not justified in taking close chances, but has the duty to yield if there is a reasonable risk of collision should both vehicles continue on their course” *Kendall v. Hongsermeier*, 217 Neb. 109, 111–12, 347 N.W.2d 855, 856 (1984) (citing cases). *Accord Workman v. Stehlik*, 238 Neb. 666, 669–70, 471 N.W.2d 760, 763 (1991).

“When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection ‘at approximately the same time.’ ”

Curlile v. Lindner, 227 Neb. 510, 511, 418 N.W.2d 256, 257 (1988) (quoting *Kendall v. Hongsermeier*, 217 Neb. 109, 112, 347 N.W.2d 855, 856 (1984), in turn quoting *Gernandt v. Beckwith*, 160 Neb. 719, 721, 71 N.W.2d 303, 304 (1955)). More recently, this quotation appears in *Workman v. Stehlik*, 238 Neb. 666, 669, 471 N.W.2d 760, 763 (1991).

“The right-of-way granted by [this] statute is relative and the duty of avoiding collisions at uncontrolled intersections rests upon both drivers.” *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 600, 473 N.W.2d 392, 396 (1991). “[T]he right-of-way [of] . . . the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way.” *Pearson v. Richard*, 201 Neb. 621, 628–30, 271 N.W.2d 326, 330–31 (1978). *Accord Birchem v. Eggers*, 236 Neb. 775,

777-78, 463 N.W.2d 824, 826 (1990) (favored position may be forfeited because of excessive speed); *Russell v. Luevano*, 234 Neb. 581, 587-88, 452 N.W.2d 43, 47 (1990); *Schenk v. Yosten*, 229 Neb. 691, 693-94, 428 N.W.2d 510, 512-13 (1988).

In addition to the cases above, see, *e.g.*, *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 600, 473 N.W.2d 392, 396 (1991); *Remelius v. Ritter*, 222 Neb. 734, 737, 386 N.W.2d 860, 863 (1986); *Crink v. Northern Natural Gas Co.*, 200 Neb. 460, 462, 263 N.W.2d 857, 859 (1978); *Dovey v. Sheridan*, 189 Neb. 133, 201 N.W.2d 245 (1972); *Weber v. Southwest Neb. Dairy Suppliers, Inc.*, 187 Neb. 606, 193 N.W.2d 274 (1971), *appeal after remand*, 190 Neb. 389, 208 N.W.2d 667 (1973).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

This rule does not apply to vehicles “entering a highway from an acceleration lane, ramp, or any other approach road.” Neb. Rev. Stat. § 60-6,146(2) (Reissue 2010). In that situation, the vehicle so entering the highway shall yield the right-of-way even if both vehicles approach the entry point at the same time and the vehicle entering the highway is to the right. *Id.* This rule does not apply to an intersection where one of the intersecting roads is paved and the other is unpaved. In that case, if there is no traffic control device, drivers on the paved road have the right-of-way. *Id.* at § 60-6,146(3).

In *Salazar v. Nemec*, 253 Neb. 298, 570 N.W.2d 366 (1997), two drivers collided while entering an intersection controlled by stop signs at each of its four entrances. The plaintiff requested the following instruction: “Nebraska statutes provide that when two vehicles come to an intersection at approximately the same time and there is no traffic control device to the contrary, then the vehicle on the right has the right-of-way.” The court said that this requested instruction “reflects Neb. Rev. Stat. § 60-6,150 (Reissue 1993), which clearly applies on its face to noncontrolled intersections. . . . Several courts have held that at four-way stop signs, no driver has a preferred or favored status, and all have a duty to stop followed by a duty to use ordinary care as they proceed through the intersection.” *Salazar v. Nemec*, 253 Neb. 298, 300, 570 N.W.2d 366, 367 (1997) (per curiam) (paragraph break omitted). See also NJI2d Civ. 7.04.

NJI2d Civ. 7.11

LEFT TURNS—RIGHT-OF-WAY

Nebraska statutes provide that drivers who are turning left must yield the right-of-way to vehicles approaching from the opposite direction and [in the intersection or] so close and traveling at such a speed that it is not safe to proceed with the left turn.

COMMENT & AUTHORITIES

“The driver of a vehicle who intends to turn left within an intersec-

tion or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard." Neb. Rev. Stat. § 60-6,147 (Reissue 2010).

E.g., Getzschman v. Yard Co., Inc., 229 Neb. 231, 235–36, 426 N.W.2d 499, 502 (1988); Enyeart v. Swartz, 213 Neb. 732, 734, 331 N.W.2d 513, 515 (1983), appeal after remand, 218 Neb. 425, 355 N.W.2d 786 (1984); Krug v. Laughlin, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981); Schanaman v. Ramirez, 206 Neb. 212, 215, 292 N.W.2d 39, 41 (1980); Kirshenbaum v. Figueroa, 204 Neb. 70, 73–74, 281 N.W.2d 408, 410 (1979). Ambrosio v. Price, 495 F.Supp. 381, 387 (D.Neb.1979).

Nebraska's premier case on left turns stated the following:

This court has long recognized the danger inherent in left-hand turns.

The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, *the left-hand turn across a favored public highway between intersections is a particularly dangerous one*. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger.

(Emphasis supplied.) Petersen v. Schneider, 153 Neb. 815, 819, 46 N.W.2d 355, 358 (1951), *modified* 154 Neb. 303, 47 N.W.2d 863.

Accordingly, a left-turning motorist . . . has certain statutorily imposed duties, as well as the duties imposed by the common law. A left-turning motorist has the duty to continuously signal his or her intention to turn left during not less than the last 100 feet before turning. *See* Neb. Rev. Stat. § 60-6,161 (Reissue 1993).

A left-turning motorist also has the duty not to turn unless and until the movement can be made with reasonable safety. *Id.* This court has held, under the predecessor to § 60-6,161, that "the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances." Petersen v. Schneider, 153 Neb. at 819, 46 N.W.2d at 358. *Accord* Rowedder v. Rose, 188 Neb. 664, 199 N.W.2d 18 (1972).

The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections The failure to look at a time when looking would have been effective is negligence as a matter of law.

Huntwork v. Voss, 247 Neb. 184, 187–88, 525 N.W.2d 632, 635 (1995). Much of the above also appears in Harrison v. Seagroves, 250 Neb. 495, 503, 549 N.W.2d 644, 649 (1996). *Accord* in part, Melick v. Schmidt, 251 Neb. 372, 379, 557 N.W.2d 645, 650 (1997) (a driver must maintain a proper lookout to the front and rear, including observations immediately before impending movement; a driver who fails to look at a time when looking would be effective, is negligent as matter of law, but when a driver looks, but, because of unusual conditions or circumstances, does not see, negligence is usually jury question).

This instruction applies whether the left turn is at an intersection or between intersections, as for example, a left turn into a driveway. *See* the Authorities, below. If the turn in question was in an intersection, then this instruction may not be necessary. It may be that other instructions will include this rule of law. *See, e.g.,* NJI2d Civ. 7.07A.

The instruction refers to drivers “so close and traveling at such a speed,” while the statute refers to drivers who “constitute an immediate hazard.” Neb. Rev. Stat. § 60-6,147 (Reissue 2004). Regarding that difference in wording, *see* NJI2d Civ. 7.04, Comment.

Regarding a left turning driver’s failure to see an oncoming car, *see* Didonato v. Williams, 232 Neb. 791, 794, 442 N.W.2d 378, 380 (1989) and NJI2d Civ. 7.03A.

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

See NJI2d Civ. 7.18 (required positioning of left-turning vehicles); NJI2d Civ. 7.19 (signal required of left-turning vehicle). *See also* NJI2d Civ. 7.03A (lookout).

NJI2d Civ. 7.12A

EMERGING FROM PRIVATE DRIVE

Nebraska statutes provide that a driver emerging from (an alley, a driveway, a private road, a building) shall stop immediately before driving onto a sidewalk and shall yield the right-of-way to any vehicles approaching on the (street, highway, roadway, et cetera) and to any pedestrians approaching on any sidewalk.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,149 (Reissue 2010). Krul v. Harless, 222 Neb. 313, 318–19, 383 N.W.2d 744, 748–49 (1986); McFarland v. King, 216 Neb. 92, 95, 341 N.W.2d 920, 922–23 (1983); Rief v. Foy, 198 Neb. 572, 574–75, 254 N.W.2d 86, 88 (1977); Laux v. Robinson, 195 Neb. 601, 604, 239 N.W.2d 786, 788 (1976). *See also* Hilferty v. Mickels, 171 Neb. 246, 106 N.W.2d 40 (1960); Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956); Kohrt v. Hammond, 160 Neb. 347, 70 N.W.2d 102 (1955); Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N.W. 747 (1936).

This is the instruction applying to drivers emerging from a private drive. NJI2d Civ. 7.12B is the instruction applying to drivers entering a private drive.

Regarding the change to the section of the statute being instructed on here, where the former version of the statute specified drivers “driving onto a sidewalk or onto the sidewalk area extending across [an] alley, driveway, road, or building entrance,” Neb. Rev. Stat. § 39-638 (Reissue 1988), the current version just says “before driving onto a sidewalk,” Neb. Rev. Stat. § 60-6,149 (Reissue 2010). Regarding this change in the Rules of the Road in general, *see* NJI2d Civ. 7.01, Special Note.

See also NJI2d Civ. 7.01, Special Note and Comment & Authorities.

NJI2d Civ. 7.12B

ENTERING A PRIVATE DRIVE

Nebraska statutes provide that a driver entering (an alley, a driveway, a private road, a building) shall yield the right-of-way to any pedestrians approaching on any sidewalk.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,149 (Reissue 2010); NJI2d Civ. 7.12A, Comment & Authorities.

This is the instruction applying to drivers entering a private drive. NJI2d Civ. 7.12A is the instruction applying to drivers emerging from a private drive. This instruction is based on the second paragraph of the statute that supports NJI2d Civ. 7.12A. The predecessor statute, effective prior to January 1, 1994, did not contain a second paragraph, and did not specify a rule for a driver entering the alley, etc. *See* NJI2d Civ. 7.12A, Comment & Authorities.

See also NJI2d Civ. 7.01, Special Note and Comment & Authorities.

NJI2d Civ. 7.13

DUTY OF DRIVER HAVING RIGHT-OF-WAY—STOP SIGN, YIELD SIGN, TRAFFIC LIGHT

Recommend no separate instruction.

COMMENT & AUTHORITIES

Although the 1969 version of this work contained an instruction on this subject, the Committee believes that a separate instruction is not

warranted. This subject is taken care of in other instructions, including: the negligence instructions, NJI2d Civ. 2.01 and NJI2d Civ. 3.02; the instruction on the right to assume another's reasonable care, NJI2d Civ. 3.01; the instructions on contributory negligence, NJI2d Civ. 2.02A, and assumption of risk, NJI2d Civ. 2.02B; and various instructions in this chapter. (*See also* NJI2d Civ. 3.09 and NJI2d Civ. 3.23.) These instructions, alone or in combination, will handle this subject.

NJI2d Civ. 7.14

SPEED

Nebraska statutes provide:

1. No person shall drive at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

2. No person shall drive [(here describe the appropriate vehicle),] (here insert appropriate word or phrase describing the appropriate location, such as "in a residential district," "in a business district," et cetera), faster than (here insert appropriate speed).

3. No person shall drive at such a slow speed that the normal and reasonable movement of traffic is impeded, except when such a slow speed is either in compliance with law or necessary for safe driving.

COMMENT

See NJI2d Civ. 7.01, Special Note and Comment & Authorities. *See also* NJI2d 7.03A regarding road conditions and a driver's duty to maintain reasonable control.

Use only those parts of this instruction as are appropriate.

The appropriate inserts regarding vehicle types are found in Neb. Rev. Stat. § 60-6,187 (Reissue 2010). The appropriate inserts regarding location and speed are found in Neb. Rev. Stat. § 60-6,186(1) (Reissue 2010). For special situations, see Neb. Rev. Stat. § 60-6,190 (Reissue 2010).

Subparagraph number 3 expresses the general rule. There are exceptions. Neb. Rev. Stat. § 60-6,193(2) (Reissue 2010). If an exception is applicable, subparagraph 3 will have to be changed as appropriate.

A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all

other facts and circumstances of the case in determining whether or not the violation is negligent.

Hartman v. Brady, 201 Neb. 558, 563, 270 N.W.2d 909, 912 (1978). This point is discussed in detail at N.JI2d Civ. 3.03. "The provisions of [the Nebraska Revised Statutes] which set maximum speed limitations shall not be construed to relieve the plaintiff in any action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident." Neb. Rev. Stat. § 60-6,194 (Reissue 2010). "[T]he statutory speed limit does not control the issue of whether [the defendant] was proceeding at a negligent rate of speed." *Huntwork v. Voss*, 247 Neb. 184, 189, 525 N.W.2d 632, 636 (1995).

Regarding a vehicle traveling at less than the normal speed of traffic at that time and place and under existing conditions, see N.JI2d Civ. 7.21.

NJI 7.14 (1969) was titled "Speed—Forfeiture of Right of Way." It stated that, as a matter of law, driving at an unlawful speed resulted in the loss of any right-of-way the driver might have otherwise had. Authorities, NJI 7.14 (1969). That law has been changed.

The statutory provision upon which NJI 7.14 [(1969)] was based has been repealed and there is no forfeiture of right-of-way by unlawful speed statute. L.B. 994 (1969); [Laws 1971, L.B. 265, 11, repealing Neb. Rev. Stat. 39-728; and Laws 1973, L.B. 45,125, repealing Neb. Rev. Stat. 39-751].

In *Epperson v. Utley*, 191 Neb. 413, 215 N.W.2d 864 (1974), the Supreme Court stated, "It is beyond doubt that the Legislature in 1969 expressly excluded the forfeiture provision from the applicable statutes. The intent was clear. The trial court properly refused to instruct on forfeiture of right of way by unlawful speed. The inference to the contrary, found in dicta, in *Hacker v. Perez*, 187 Neb. 485, 192 N.W.2d 166 (1971), that forfeiture of right-of-way by unlawful speed is 'inherent' in other regulations covering right-of-way is expressly disapproved." *Id.* at 420, 191 Neb. 427, 215 N.W.2d 869.

NJI 7.14 (pocket part 1975).

As a general rule, it is negligence as a matter of law "to drive a motor vehicle on a public highway, . . . at a speed or in such a manner that it cannot be stopped or its course be changed in time to avoid a collision with [something] discernible within his range of vision in the direction he is travelling." *Harrison v. Seagroves*, 250 Neb. 495, 504, 549 N.W.2d 644, 650 (1996). Regarding the so-called "range of vision rule," see N.JI2d Civ. 7.03B.

"The speed of a motor vehicle is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it

may not exceed the applicable statutory standard.” *Harrison v. Seagroves*, 250 Neb. 495, 504, 549 N.W.2d 644, 650 (1996). *Accord, e.g.*, *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 304, 770 N.W.2d 619, 631 (2009) (“A motorist is required to maintain reasonable control of the vehicle commensurate with the road conditions then and there existing at the time of the occurrence.”). *See also* NJI2d 7.03A.

In *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001), one of the plaintiff’s allegations of negligence was that defendants had been “participating in a speed contest.” There was a city ordinance against speed contests. The trial court gave a “speed contest” instruction, based on the local ordinance. The Supreme Court approved the instruction. *Id.* at 166–67, 631 N.W.2d at 461.

AUTHORITIES

Neb. Rev. Stat. §§ 60-6,185, 60-6,186, 60-6,187 and 60-6,193 (Reissue 2010). *Huntwork v. Voss*, 247 Neb. 184, 189–90, 525 N.W.2d 632, 636–37 (1995); *Koncaba v. Scotts Bluff Cty.*, 237 Neb. 37, 41, 464 N.W.2d 764, 767 (1991) (regarding statutory section now numbered § 60-6,186, *supra*); *Oberhelman v. Blount*, 196 Neb. 42, 46, 241 N.W.2d 355, 358–59 (1976).

NJI2d Civ. 7.15

PEDESTRIAN RIGHT-OF-WAY

Nebraska statutes provide that[, unless otherwise directed by a peace officer,] pedestrians shall obey the instructions of any traffic-control devices specifically applicable to them.

Nebraska statutes provide that pedestrians facing a WALK signal may proceed across the (street, highway, roadway, et cetera) in the direction indicated by such signal and shall be given the right-of-way by all drivers; no pedestrian shall start to cross the (street, highway, roadway, et cetera) in the direction of a DON’T WALK signal; a pedestrian who has partly completed his or her crossing on the WALK signal shall immediately proceed to a (sidewalk, sidewalk or safety island, et cetera) while the DON’T WALK signal is showing.

Nebraska statutes provide that[, except as a point where a pedestrian tunnel or overhead pedestrian crossing has been provided,] if there are no working traffic-control signals, then drivers must yield the right-of-way to pedestrians who are crossing a (street, highway, roadway, et cetera) within a crosswalk and are within either the lane in which the driver is proceeding or the lane immediately adjacent thereto.

Nebraska statutes make it unlawful for pedestrians to suddenly

leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impossible for the driver to stop.

Nebraska statutes provide that whenever a vehicle is stopped to allow a pedestrian to cross the (street, highway, roadway, et cetera) either at an unmarked crosswalk at an intersection or at any marked crosswalk, other drivers approaching from the rear shall not pass such stopped vehicle.

Nebraska statutes provide that pedestrians who cross the (street, highway, roadway, et cetera) anywhere other than either at an unmarked crosswalk, at an intersection, or at any marked crosswalk must yield the right-of-way to all vehicles upon the (street, highway, roadway, et cetera).

Nebraska statutes provide that pedestrians who cross a (street, highway, roadway, et cetera) at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided must yield the right of way to all vehicles upon the roadway.

Nebraska statutes provide that, between adjacent intersections at which traffic-control signals are in operation, pedestrians shall not cross a (street, highway, roadway, et cetera) at any place except in a marked crosswalk.

Nebraska statutes provide that, unless authorized to do so by traffic-control devices, pedestrians shall not cross a (street, highway, roadway, et cetera) intersection diagonally. Where traffic-control devices do authorize diagonal crossing, pedestrians shall cross only in accordance with the traffic-control devices pertaining to such crossing movements.

Nebraska statutes provide that, notwithstanding any other provisions of Nebraska law, all drivers shall avoid negligently hitting any pedestrian upon any (street, highway, roadway, et cetera), shall give an audible signal when necessary, and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a (street, highway, roadway, et cetera).

Nebraska statutes provide that where a sidewalk is provided and its use is (practicable, feasible, practical, et cetera), it shall be unlawful for any pedestrian to walk along and upon an adjacent (street, highway, roadway, et cetera). Where there is no sidewalk, [or use of the sidewalk[s] is not (practicable, feasible, practical, et cetera),] pedestrians walking along and upon a (street, highway, roadway, et cetera) shall walk only on a shoulder, as far as (practicable, feasible, practical, et cetera) from the edge of the (street, highway, roadway, et cetera). Where neither a sidewalk nor a shoulder is available,

pedestrians who walk along and upon a (street, highway, roadway, et cetera) shall walk as near as (practicable, feasible, practical, et cetera) to its edge and, if it is a two-lane (street, highway, roadway, et cetera), only on its left side.

Nebraska statutes provide that no person shall stand in a (street, highway, roadway, et cetera) for the purpose of soliciting a ride, employment, contributions, or business from the occupant of any vehicle.

Nebraska statutes provide that no person shall stand in or near a (street, highway, roadway, et cetera) for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a (street, highway, roadway, et cetera).

Nebraska statutes provide that drivers may not drive through or within a safety zone.

Unless otherwise provided by law, the right of pedestrians to use the (street, highway, roadway, et cetera) is equal to that of drivers. Among other things, this means that both pedestrians and drivers must act as reasonably careful persons would with respect to their own safety and the safety of others.

COMMENT

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are applicable. If a number of the paragraphs of this instruction are applicable, they can be set up as follows:

“Nebraska statutes provide as follows:

1. . . .

2. . . .

[et cetera].”

If a violation of an ordinance is claimed, this too should be stated.

Violation of these statutory sections is not negligence per se, but merely evidence of negligence. *Hurlbut v. Landgren*, 200 Neb. 413, 417, 264 N.W.2d 174, 176-77 (1978). *See* NJI2d Civ. 3.03.

Neb. Rev. Stat. § 60-6,118 (Reissue 2010) gives the Nebraska Department of Roads the power to adopt and implement “a manual providing a uniform system of traffic control devices on all highways within this state which, together with any supplements adopted by the

department, shall be known as the Manual on Uniform Traffic Control Devices.” “[T]he placement of traffic control devices is a discretionary function, although once a decision to utilize a particular device has been made, the device is required to conform to the Manual.” *Blaser v. County of Madison*, 288 Neb. 306, 316, 847 N.W.2d 293, 301–02 (2014). An attorney with a traffic-control-device case should consult that manual.

Regarding obedience to peace officers, in addition to the Authorities below, see also Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

Regarding pedestrians and emergency vehicles, see NJI2d Civ. 7.31.

Regarding the right-of-way of pedestrians on a sidewalk extending across an alley, building entrance, driveway, et cetera, see NJI2d Civ. 7.12A and 7.12B, which are based on Neb. Rev. Stat. §§ 60-6,149 (Reissue 2010).

One of the paragraphs of this instruction says that Nebraska statutes provide that there are certain things all drivers shall do, “notwithstanding any other provisions of Nebraska law.” This is based on Neb. Rev. Stat. § 60-6,109 (Reissue 2010). That section does not use the words “notwithstanding any other provisions of Nebraska law;” instead, it says “[n]otwithstanding the other provisions of the Nebraska Rules of the Road . . .” There may be situations, then, where the language of the instruction will not be correct and will need to be rewritten to reflect the limits stated in the statute.

Neb. Rev. Stat. § 60-6,306 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to operators of motorcycles and drivers of other motor vehicles. Neb. Rev. Stat. § 60-6,314 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to bicycle riders and drivers of motor vehicles.

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that “(1) Pedestrians except in areas specifically designated for that purpose; (2) hitchhikers or walkers;” other specified activities, animals, and specified vehicles are prohibited from freeways “at all times except by permit from [specified authority].” Freeway is defined at § 60-621 (Reissue 2010).

AUTHORITIES

Every paragraph of this instruction but the last is taken from Chapter 60 of the Nebraska Revised Statutes. Neb. Rev. Stat. §§ 60-6,109 and 60-6,152 through 60-6,158 (Reissue 1998). Numbered to designate the paragraphs in the order in which they appear in the instruction, these are the sections of the code that support the principles stated.

(1) Neb. Rev. Stat. § 60-6,152(1) (Reissue 2010).

(2) Neb. Rev. Stat. §§ 60-6,124 (Reissue 2010). (If the pedestrian

control signal uses the walking person and upraised hand signals, this paragraph of the instruction may have to be altered, perhaps just by changing the words “WALK” and “DON’T WALK” to lower case.)

Neb. Rev. Stat. § 60-6,118 (Reissue 2010) gives the Nebraska Department of Roads the power to adopt and implement “a manual providing a uniform system of traffic control devices within the State. It shall be known as the Manual on Uniform Traffic Control Devices (Manual)”. A part of the manual deals with the timing of the “DON’T WALK” signal—the flashing part of the signal and the following solid part. Those timing provisions are interpreted in *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005). (Interpretation of that manual is a question of law. *Id.* at 534, 694 N.W.2d at 186.) “The placement of traffic control devices is a discretionary function, although once a decision to utilize a particular device has been made, the device is required to conform to the Manual.” *Blaser v. County of Madison*, 288 Neb. 306, 316, 847 N.W.2d 293, 300–01 (2014).

(3) Neb. Rev. Stat. § 60-6,153(1) (Reissue 2010).

(4) Neb. Rev. Stat. § 60-6,153(2) (Reissue 2010). The 1969 version of this work had a somewhat different instruction, a common-law instruction entitled “Duty of Pedestrian Moving From Place of Safety.” NJI 7.16 (1969). The Committee believes that the common-law rule has been replaced by the just-cited statutory rule; therefore, the Committee omitted that instruction in favor of this paragraph of this one.

“[A] place of safety is ‘any place established by the evidence that is occupied by the pedestrian just prior to sudden movement [by the pedestrian] where he is then safe from injury, considering the facts and circumstances in each case then existing.’ ” *Tadros v. City of Omaha*, 269 Neb. 528, 538, 694 N.W.2d 180, 189 (2005) (quoting *Bashus v. Turner*, 218 Neb. 17, 20, 352 N.W.2d 161, 164 (1984)).

Though there are differences, the 1969 instruction and this one are sufficiently alike to make it worth citing these common-law authorities: *Bashus v. Turner*, 218 Neb. 17, 19–21, 352 N.W.2d 161, 163–65 (1984); *Gerhardt v. McChesney*, 210 Neb. 351, 355–56, 314 N.W.2d 258, 262 (1982); *Ybarra v. Wassenmiller*, 206 Neb. 164, 170–71, 291 N.W.2d 725, 729 (1980); *Hrabik v. Gottsch*, 198 Neb. 86, 89–90, 251 N.W.2d 672, 675 (1977); *Lileikis v. Kudirka*, 180 Neb. 742, 747–48, 145 N.W.2d 441, 443–44 (1966); *Steel v. Nordin*, 175 Neb. 900, 906, 124 N.W.2d 921, 925 (1963); *Palmer v. McDonald*, 171 Neb. 727, 740, 107 N.W.2d 655, 663 (1961). *Strudl v. American Family Mutual Ins. Co.*, 536 F.2d 242, 247 (8th Cir.1976).

(5) Neb. Rev. Stat. § 60-6,153(3) (Reissue 2010). *Tadros v. City of Omaha*, 269 Neb. 528, 536, 694 N.W.2d 180, 188 (2005).

(6) Neb. Rev. Stat. § 60-6,154(1) (Reissue 2010). “[A] pedestrian crossing between intersections is held to a higher standard of care than

one crossing at a crosswalk, where the pedestrian is afforded the right-of-way. A pedestrian crossing between intersections is required to keep a constant lookout for his or her own safety in all directions of anticipated danger. When crossing at a point not within the crosswalk, a pedestrian is required to yield the right-of-way to all vehicles on that roadway.” *Hines v. Pollock*, 229 Neb. 614, 617–18, 428 N.W.2d 207, 209 (1988) (citations omitted).

When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he or she cannot see and proceeds regardless of that fact, the situation ordinarily presents a question of fact for the fact finder. Where a pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.

German v. Swanson, 250 Neb. 690, 694, 553 N.W.2d 724, 726 (1996) (citation omitted).

Prior to being transferred to Chapter 60 of the Nebraska Revised Statutes, this statute was in Chapter 39. Cited from Chapter 39, this statute is quoted in *Carpender v. Bendorf*, 246 Neb. 77, 81, 516 N.W.2d 619, 622 (1994) (recognizing “intersection” can be T-intersection, and “crosswalk” can be unmarked).

(7) Neb. Rev. Stat. § 60-6,154(2) (Reissue 2010).

(8) Neb. Rev. Stat. § 60-6,154(3) (Reissue 2010).

(9) Neb. Rev. Stat. § 60-6,154(4) (Reissue 2010).

(10) Neb. Rev. Stat. § 60-6,109 (Reissue 2010). This section creates two different standards of care: “due care” is the standard applied to pedestrians in general and “proper precaution” is the standard applied to “any child or obviously confused or incapacitated person upon a roadway.” The latter is a higher standard of care. *State v. Welch*, 275 Neb. 517, 525, 747 N.W.2d 613 (2008) (“obviously” modifies “both ‘confused’ persons and ‘incapacitated’ persons”). *Accord Hines v. Pollock*, 229 Neb. 614, 619, 428 N.W.2d 207, 210 (1988) (interpreting same statute but before it was transferred to § 60-6,109). *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981) says that due care under this section means the absence of negligence. (*Mattan* also says this section is not unconstitutionally vague.)

(11) Neb. Rev. Stat. § 60-6,156 (Reissue 2010).

(12) Neb. Rev. Stat. § 60-6,157(1) (Reissue 2010).

(13) Neb. Rev. Stat. § 60-6,157(2) (Reissue 2010).

(14) Neb. Rev. Stat. § 60-6,158 (Reissue 2010). “Safety zone shall

mean an area or space officially set apart within a roadway for the exclusive use of pedestrians and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as such area.” Neb. Rev. Stat. § 60-657 (Reissue 2010).

(15) The final paragraph of this instruction is supported by *Kozeny v. Miller*, 243 Neb. 402, 409, 499 N.W.2d 75, 81 (1993) (citing *NJI2d Civ. 7.15*); *Holly v. Mitchell*, 213 Neb. 203, 210–11, 328 N.W.2d 750, 755 (1982) (right of pedestrian to “lawful use of a street” is equal to that of driver; “each is obliged to act as a reasonably prudent person would with respect to the movements of the other.”); *Ybarra v. Wassenmiller*, 206 Neb. 164, 168–69, 291 N.W.2d 725, 728 (1980); *Bassinger v. Agnew*, 206 Neb. 1, 6, 290 N.W.2d 793, 797 (1980) (accident on private drive; common law applied).

Regarding the rights of pedestrians on a sidewalk extending across an alley, building entrance, road, or driveway, see *NJI2d Civ. 7.12A* and *7.12B*.

Hennings v. Schufeldt, 222 Neb. 416, 421, 384 N.W.2d 274, 277–78 (1986) (pedestrian crossing street between intersections, outside of crosswalk); *Holly v. Mitchell*, 213 Neb. 203, 210–11, 328 N.W.2d 750, 755 (1982) (walking within crosswalk); *Gerhardt v. McChesney*, 210 Neb. 351, 355–56, 314 N.W.2d 258, 262 (1982); *Simet v. Sage*, 208 Neb. 13, 16, 301 N.W.2d 600, 602 (1981); *Ybarra v. Wassenmiller*, 206 Neb. 164, 168–69, 291 N.W.2d 725, 728 (1980) (walking on driveway of drive-in banking facility); *Bassinger v. Agnew*, 206 Neb. 1, 6, 290 N.W.2d 793, 797 (1980) (walking on private drive; common law applied); *Dunlap v. Coleman*, 201 Neb. 148, 151, 266 N.W.2d 527, 529 (1978); *Hurlbut v. Landgren*, 200 Neb. 413, 416–17, 264 N.W.2d 174, 176–77 (1978) (crossing at intersection of two one-way streets); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964) (apparently drunk and either walking longitudinally or standing on highway, near his stalled car); *McCarty v. Morrow*, 173 Neb. 643, 114 N.W.2d 512 (1962); *Johnson v. Anoka-Butte Lumber Co.*, 141 Neb. 851, 5 N.W.2d 114 (1942). *Strudl v. American Family Mutual Ins. Co.*, 536 F.2d 242, 247 (8th Cir.1976) (though questionable whether this pedestrian was doing so, pedestrian entitled to use unmarked crosswalk even though marked crosswalk ran parallel thereto on other side of intersection).

NJI2d Civ. 7.17

MOVING A STOPPED VEHICLE—RIGHT-OF-WAY

Nebraska statutes provide that a person who moves a stopped[, standing, or parked] vehicle must wait until it can be moved with reasonable safety and must yield the right-of-way to all other vehicles and pedestrians affected by such movement.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,150 (Reissue 2010); *Kozeny v. Miller*, 243

Neb. 402, 408, 499 N.W.2d 75, 80 (1993) (specifically approving this instruction).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Regarding obedience to peace officers, *see* Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

NJI2d Civ. 7.18

RIGHT-AND LEFT-HAND TURNS—REQUIRED POSITION AND METHOD OF TURNING

Nebraska statutes regarding right turns provide that both the approach and the turn itself shall be made as close as practicable to the right-hand (curb, edge, side) of the (street, highway, roadway, et cetera).

Nebraska statutes regarding left turns provide that drivers must approach the turn in the extreme left-hand lane lawfully available to traffic moving in their same direction and that, as nearly as is practicable, they must complete the turn in the extreme left-hand lane lawfully available to traffic moving in their same direction on the (street, highway, roadway, et cetera) they are entering. Whenever practicable, left turns must be made in that portion of the intersection to the left of the center of the intersection.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,159(1) and (2) (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate.

See also NJI2d Civ. 7.19, which deals with the signal required when drivers turn or move to the right or the left; and NJI2d Civ. 7.11, which deals with right-of-way and left-turning vehicles.

This instruction is based on Neb. Rev. Stat. § 60-6,159(1)–(3) (Reissue 2010). This statute also says that appropriate authorities may install traffic-control devices that require a different course from those set out in instruction, and that, where that has been done, drivers must obey them. *Id.* at 60-61,159(3). Where that has been done, this instruction will have to be rewritten to state the correct rule as signaled by the particular device installed.

NJI2d Civ. 7.19

TURNING OR MOVING RIGHT OR LEFT, OR STOPPING—SIGNAL REQUIRED

Nebraska statutes provide that drivers may not turn [or (change lanes, move right or left on a (street, highway, roadway, et cetera))] unless it is reasonably safe to do so and they have (here insert description of kind of signal such drivers are required to give). This signal must be given continuously for at least the last one hundred feet before the turn [or (lane change, move to the right or left)].

Nebraska statutes provide that, unless there is no opportunity to do so, drivers must not stop or suddenly decrease their speed without first signalling to the driver immediately to the rear their intention to do so by (here insert description of kind of signal such drivers are required to give).

COMMENT & AUTHORITIES

Neb. Rev. Stat. §§ 60-6,161 through 60-6,163 (Reissue 2010). *Huntwork v. Voss*, 247 Neb. 184, 187–88, 525 N.W.2d 632, 635 (1995) (quoted at length at NJI2d Civ. 7.11, Comment & Authorities).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

See also NJI2d Civ. 7.18, which deals with the required positioning of vehicles making right-or left-hand turns; and NJI2d Civ. 7.11, which deals with right-of-way and left-turning vehicles.

Where the instruction says “(here insert description of kind of signal such drivers are required to give),” insert a description of the kind of signal required by Neb. Rev. Stat. §§ 60-6,161(2) (distance of signal), 60-6,162(2) (signal lights), 60-6,163 (hand and arm signals) (Reissue 2010).

Neb. Rev. Stat. § 60-6,161(4) (Reissue 2010) lists some situations where signals are not to be given.

See also NJI2d Civ. 7.15.

NJI2d Civ. 7.20

U-TURNS

Nebraska statutes provide that there are certain places where (drivers are not allowed to make U-turns, vehicles (are not allowed to, may not) be turned around so as to proceed in the opposite direction). Those places are:

1. Upon any curve;

2. Near the crest of a (hill, grade) where the vehicle cannot be seen by drivers approaching from either direction within five hundred feet; and
3. Any place where such turns are prohibited by signs.

Nebraska statutes provide that no vehicle, except authorized emergency vehicles, shall (make a U-turn on a freeway, be turned at any place on a freeway so as to proceed in the opposite direction).

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,160 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that pedestrians (except in certain areas), bicycles, motor scooters not having motors of more than ten horsepower, and other specified activities, animals, and vehicles are prohibited from using a freeway “at all times except by permit from [specified authority].” Freeway is defined at Neb. Rev. Stat. § 60-621 (Reissue 2010).

NJI2d Civ. 7.21

DRIVING ON RIGHT HALF OF ROADWAY

Nebraska statutes provide that all drivers must drive on the right half of any (street, highway, roadway, et cetera) that is wide enough for them to do so, except:

1. When overtaking and passing another vehicle proceeding in the same direction;
2. When an obstruction makes it necessary to drive to the left of the center of the (street, highway, roadway, et cetera) and there are no vehicles (approaching, traveling in the proper direction) on the unobstructed portion of the (street, highway, roadway, et cetera) within such distance as to constitute an immediate hazard;
3. When driving on a (street, highway, roadway, et cetera) that is divided into three marked lanes for traffic; or
4. When driving on a one-way (street, highway, roadway, et cetera).

[Anyone who drives to the left of the center of the (street, highway, roadway, et cetera) because one of these exceptions applies must

(here insert a statement of any special rules applicable to the situation that creates the exception).]

Nebraska statutes provide that a vehicle being driven at less than the normal speed of traffic, at the time and place and under the conditions then existing, shall be driven in the furthest right-hand lane then available for traffic, or as close as possible to the right-hand curb or edge of the (street, highway, roadway, et cetera). Such a vehicle shall stay in that lane except when either overtaking and passing another vehicle proceeding in the same direction or preparing for a left turn at an intersection or into a private road or driveway.

Nebraska statutes provide that on a (street, highway, roadway, et cetera) having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle shall be driven to the left of the centerline of the (street, highway, roadway, et cetera) except:

1. When authorized to do so by traffic-control devices designating certain lanes to the left side of the center of the (street, highway, roadway, et cetera) for use by traffic not otherwise permitted to use such lanes;
2. When an obstruction makes it necessary to drive to the left of the center of the (street, highway, roadway, et cetera) and there are no vehicles (approaching, traveling in the proper direction) on the unobstructed portion of the (street, highway, roadway, et cetera) within such distance as to constitute an immediate hazard; or
3. When crossing the centerline in making a left turn into or from an alley, private road, or driveway, unless such movement is otherwise prohibited by one or more signs.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,131 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate.

Regarding overtaking and passing vehicles traveling in the same direction, *see* NJI2d Civ. 7.22A and 7.22B. Regarding passing vehicles proceeding in opposite directions, *see* NJI2d Civ. 7.23. If those special rules are applicable, they may be better worked into this instruction, NJI2d Civ. 7.21, than stated separately.

Regarding speed in general, *see* NJI2d Civ. 7.14.

NIJ2d Civ. 7.22A**PASSING VEHICLES PROCEEDING IN THE SAME DIRECTION—PASSING ON THE LEFT**

Nebraska statutes provide that[, except where overtaking and passing on the right is permitted,] the following rules shall govern the overtaking and passing of vehicles proceeding in the same direction:

1. Drivers overtaking another vehicle proceeding in the same direction shall first give a visible signal of their intention and shall pass to the left of the other vehicle, at a safe distance, and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle;
2. Drivers being passed by vehicles proceeding in the same direction shall give way to the right in favor of the overtaking vehicle and shall not increase their speed until completely passed by the overtaking vehicle; and
3. Drivers of vehicles overtaking bicycles, animals, animal-drawn vehicles, or farm vehicles proceeding in the same direction shall give an audible signal of their intention to pass while they are between one hundred and three hundred feet away from overtaking the vehicle or animal, and then pass without giving another audible signal.
4. Drivers on an undivided two-lane roadway shall not pass other vehicles [by driving on the left side of the center of the roadway] unless:

(a) they can see at least as far ahead as the distance it will take to complete the pass; and

(b) the passing lane is free from oncoming traffic for a distance sufficient to allow them to pass and to return to (an authorized lane of travel, the right-hand lane, et cetera) safely clear of the vehicle passed and before coming within two hundred feet of any approaching traffic.

[This does not permit the crossing of the centerline for the purpose of overtaking and passing another vehicle on an undivided highway providing for two or more lanes of traffic in each direction.]

5. After overtaking and passing another vehicle, a driver shall return to (an authorized lane of travel, the right-hand lane, et cetera) as soon as practicable.

Nebraska statutes provide that drivers shall not pass other vehicles or drive to the left of the center of a [two-way] roadway in any of the following situations:

1. While driving in a no-passing zone;
2. While approaching within one hundred feet of or while crossing any intersection or railroad grade crossing;
3. If the view is obstructed, while approaching within one hundred feet of any bridge, viaduct, or tunnel; or
4. While approaching either a curve [in the (street, highway, roadway, et cetera)] or the (crest of a grade, top of a hill) where the view is obstructed within such a distance as to create a hazard in the event (another vehicle is approaching, someone is coming) from the opposite direction.

COMMENT & AUTHORITIES

Neb. Rev. Stat. §§ 60-6,133, 60-6,135, 60-6,136 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate.

Regarding overtaking and passing on the right, *see* NJI2d Civ. 7.22B. Regarding vehicles passing each other while proceeding in opposite directions, *see* NJI2d Civ. 7.23. *See also* NJI2d Civ. 7.21 and the Comment & Authorities thereto.

Neb. Rev. Stat. § 60-627 (Reissue 2010) states that “[t]he junction of an alley with a highway shall not constitute an intersection.”

The limitations stated in the final paragraph of the instruction, and its four subparagraphs, do not apply “upon a one-way roadway,” in certain cases where there is an obstruction in the driver’s side of the roadway, or to a driver “turning left into or from an alley, private road, or driveway unless otherwise prohibited by signs.” Neb. Rev. Stat. § 60-6,136(2) (Reissue 2010). *See also* Neb. Rev. Stat. § 60-6,110 (Reissue 1998) regarding the driver’s duty to obey “lawful order[s]” of a peace officer. If one or more of those situations is involved, this instruction will have to be adapted accordingly.

Regarding signs or markings defining a no passing zone, *see* Neb. Rev. Stat. § 60-6,137 (Reissue 2010). If that situation is involved, prepare an instruction based on that section of the statute.

“Moreover, [a] motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding circumstances.”

Harrison v. Seagroves, 250 Neb. 495, 504, 549 N.W.2d 644, 650 (1996) (multiple internal quotation marks omitted).

NJI2d Civ. 7.22B**PASSING VEHICLES PROCEEDING IN THE SAME DIRECTION—PASSING ON THE RIGHT**

Nebraska statutes provide that overtaking and passing on the right is permitted only when it may be safely done upon the pavement or main-traveled portion of the roadway and one of the following situations exists:

1. The vehicle to be overtaken is making or about to make a left turn;
2. Upon a two-way street or highway with an unobstructed roadway, not occupied by parked vehicles, of sufficient width for two or more lanes of moving vehicles going in the same direction when the passing vehicle is traveling in one of such lanes;
3. Upon a one-way street, or upon any roadway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and of sufficient width for two or more lanes of moving vehicles.

Nebraska statutes provide that drivers shall not pass other vehicles in any of the following situations:

1. While driving in a no-passing zone;
2. While approaching within one hundred feet of or while crossing any intersection or railroad grade crossing;
3. If the view is obstructed, while approaching within one hundred feet of any bridge, viaduct, or tunnel; or
4. While approaching either a curve [in the (street, highway, roadway, et cetera)] or the (crest of a grade, top of a hill) where the view is obstructed within such a distance as to create a hazard in the event (another vehicle is approaching, someone is coming) from the opposite direction.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,134 (Reissue 2010) supports the first half of the instruction.

Regarding what is roughly the second half of this instruction, note the following:

■ First, from NJI2d Civ. 7.22A, Comment & Authorities, note the discussion of situations in which the limitations stated in that part of the instruction do not apply. If one or more of those situations is involved, this instruction will have to be adapted accordingly.

■ Second, as with all of these instructions, use only the parts that are applicable under the pleadings and the evidence. It seems unlikely that this part of this instruction will often apply in the case of vehicles proceeding in the same direction and passing on the right. For example, the situation addressed in subparagraph 4 seems unlikely to be applicable to the situation where a vehicle is passing on the right.

■ Third, the statutory section on which this part of the instruction is based is Neb. Rev. Stat. § 60-6,136 (Reissue 2010). That section seems to have been written having in mind the situation where vehicles are proceeding in the same direction and one passes the other on the left, and not where one passes the other on the right. (*See particularly* subparagraph 4 of this part of the instruction.) There is nothing in the body of this section, however, that limits its application to passing on the left. Therefore, the Committee felt compelled to apply this section to both situations.

See also NJI2d Civ. 7.22A, Comment & Authorities.

NJI2d Civ. 7.23

PASSING VEHICLES PROCEEDING IN THE OPPOSITE DIRECTION

Nebraska statutes provide that vehicles passing each other while proceeding in opposite directions shall each keep to the right-hand side of the (street, highway, roadway, et cetera)[, passing left to left]. [On (streets, highways, roadways, et cetera) having width for not more than one lane of traffic in each direction, each driver shall give to the other, as nearly as possible, at least one half of the main-traveled portion of the (street, highway, roadway, et cetera).]

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,132 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Regarding one vehicle overtaking and passing other vehicles that are traveling in the same direction, *see* NJI2d Civ. 7.22A and NJI2d Civ. 7.22B. *See also* NJI2d Civ. 7.21, and the Comment & Authorities thereto.

NJI2d Civ. 7.24**FOLLOWING VEHICLES AHEAD**

Nebraska statutes provide that drivers shall not follow other vehicles more closely than is reasonable and prudent, and that they shall have due regard for the speed of vehicles they are following and the traffic upon and the condition of the roadway.

Nebraska statutes provide that [except for funeral processions] drivers in a caravan or motorcade outside of a business or residential district shall allow sufficient space between each such vehicle so as to enable any other vehicle to enter and occupy such space without danger.

Nebraska statutes provide that, except when overtaking to pass, if drivers are (towing, pulling, drawing) (trailers, semitrailers, other vehicles, et cetera), are outside of business or residential districts, and are following other vehicles, then:

1. They shall leave between their vehicles and the one ahead sufficient space for an overtaking vehicle to enter and occupy without danger; and
2. They shall not follow more closely than one hundred feet behind another vehicle (towing, pulling, drawing) (a trailer, a semitrailer, another vehicle, et cetera).

How much space is sufficient depends on the speed at which the vehicles are traveling, traffic and road conditions, and other relevant circumstances.

Nebraska statutes provide that, except when driving within a business or residential district or when overtaking to pass, drivers shall not follow more closely than one hundred feet behind a highway maintenance vehicle if:

1. The highway maintenance vehicle is engaged in plowing snow, removing deposited material from the surface of the road, or spreading salt, sand, or other material upon the surface of the road or is in motion on or near the traveled portion of a road performing other highway maintenance duties; and
2. The highway maintenance vehicle is displaying a flashing amber or white light.

Nebraska statutes provide that, except when overtaking to pass,

drivers outside of a business or residential district shall not follow more closely than one hundred feet behind a vehicle displaying flashing amber or white lights.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,140 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate.

If a vehicle in a caravan or motorcade is towing another vehicle, the second paragraph of this instruction may have to be modified to include language from Neb. Rev. Stat. § 60-6,140(2) (Reissue 2010) that is applicable to the towing situation.

In the opinion of the Committee, the apparent conflict between the penultimate paragraph and the final paragraph of this instruction is resolved by the maxim of legislative construction that the more specific controls the general: the final paragraph does not apply in situations covered by the penultimate paragraph.

NJI2d Civ. 7.25

DIVIDED HIGHWAYS—DRIVING ONTO OR ACROSS THE MEDIAN

Nebraska statutes provide that where a median divides a highway into two or more roadways, drivers shall drive only upon the right-hand roadway, unless directed or permitted to do otherwise by traffic-control devices or [other] competent authority.

Nebraska statutes provide that no one is allowed to drive onto or across a median on a freeway unless specifically directed to do so by competent authority. On (highways, roadways, et cetera) other than freeways, Nebraska statutes provide that no one is allowed to drive any vehicle over, across, or within any median except through an opening in such median or at a crossover or intersection as established by (competent authority, the public authority having jurisdiction over such (highway, roadway), et cetera).

Nebraska statutes provide that, except for drivers of authorized emergency vehicles or drivers of wreckers or other vehicles assisting a stranded vehicle, no one is allowed to use any freeway emergency-entrance or median-crossover intended only for emergency vehicles. When drivers of authorized emergency vehicles or drivers of wreckers or other vehicles assisting a stranded vehicle are using such

entrances or crossovers, they may not drive in such a manner as to create a hazard to any other vehicle.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,141 (Reissue 2010).

Freeway is defined at Neb. Rev. Stat. § 60-621 (Reissue 2010), and highway is defined *id.* at § 60-624.

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate. If more than one of the paragraphs of this instruction are to be given, then it may be preferable to combine them into one paragraph with subparagraphs, as follows:

“Where a median divides a highway into two or more roadways, Nebraska statutes provide:

1. That drivers shall drive only upon the . . .
2. (et cetera).”

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that pedestrians (except in certain areas), bicycles, motor scooters not having motors of more than ten horsepower, and other specified activities, animals, and vehicles are prohibited from using a freeway “at all times except by permit from [specified authority]”. Freeway is defined at Neb. Rev. Stat. § 60-621 (Reissue 2010).

NJI2d Civ. 7.26

DRIVING ON HIGHWAY SHOULDERS

Nebraska statutes provide that, with four exceptions, no one shall drive on the shoulders of a highway. The four exceptions are: driving on the shoulder to safely remove a vehicle from traffic lanes; driving implements of husbandry on the shoulder; federal mail carriers driving on the shoulder while delivering the United States mail; and operating a bicycle on the paved shoulder of a highway that is within the state highway system, but is not part of the National System of Interstate and Defense Highways.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,142 (Reissue 2010).

This instruction is based on a statute that was amended, effective

January 1, 1994, to include the exception applicable to bicycles. Neb. Rev. Stat. § 60-6,142 (Reissue 2010).

It may be advisable either to substitute something more specific in place of “implements of husbandry” or to add a definitional instruction. Neb. Rev. Stat. § 60-625 (Reissue 2010) defines implement of husbandry as follows: “every vehicle or implement designed and adapted exclusively for agricultural, horticultural, or livestock raising operations or for lifting or carrying an implement of husbandry and in either case usually primarily used off of any highway.”

It is anticipated that the final part of this instruction, including “that is within the state highway system, but is not part of the National System of Interstate and Defense Highways,” will be tailored to the facts of the case rather than given as written.

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that pedestrians (except in certain areas), bicycles, motor scooters not having motors of more than ten horsepower, and other specified activities, animals, and vehicles are prohibited from using a freeway (as defined at § 60-627 (Reissue 2010)) “at all times except by permit from [specified authority].”

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

NJI2d Civ. 7.27

ENTERING AND LEAVING RESTRICTED ACCESS ROADWAYS

Nebraska statutes provide that vehicles may enter and leave controlled access (highways, roadways, et cetera) only at entrances and exits established by (competent authority, the public authority having jurisdiction over such (highway, roadway), et cetera).

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,143 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

It may be preferable to tailor this instruction so that it identifies the particular controlled access highway involved and the specific public authority with jurisdiction.

See also Neb. Rev. Stat. §§ 60-6,144 (restrictions on use of controlled access highways) and 60-6,145 (official signs on controlled access highways) (Reissue 2010).

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that pedestrians (except in certain areas), bicycles, motor scooters not having motors of

more than ten horsepower, and other specified activities, animals, and vehicles are prohibited from using a freeway (as defined at § 60-627 (Reissue 2010)) "at all times except by permit from [specified authority]."

NJI2d Civ. 7.28

STOPPING, STANDING, OR PARKING UPON A ROADWAY, FREEWAY, OR BRIDGE

I. IN GENERAL

Nebraska statutes provide that except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of law enforcement officers or traffic-control devices, no person shall stop, stand, or park any vehicle:

1. On the traffic side of a vehicle that is stopped or parked at the edge or curb of a street;
2. On a sidewalk;
3. Within an intersection;
4. On a crosswalk;
5. Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately opposite the ends of a safety zone [unless the Department of Roads or the local authority indicates a different length by signs or markings];
6. Alongside or opposite any street excavation or obstruction when doing so would obstruct traffic;
7. Upon any bridge or other elevated structure upon a highway;
8. Within a highway tunnel;
9. On any railroad track; or
10. At any place where official signs prohibit stopping.

Nebraska statutes provide that except when done momentarily to pick up or discharge passengers, or when necessary to avoid conflict with other traffic, or in compliance with law or the directions of law enforcement officers or traffic-control devices, no person shall stand or park any vehicle, whether occupied or not:

1. In front of a [public or private] driveway;
2. Within fifteen feet of a fire hydrant;

3. Within twenty feet of a crosswalk at an intersection;
4. Within thirty feet of any flashing signal, stop sign, yield sign, or other traffic-control device located at the side of a part of a (highway) that is improved, designed, or ordinarily used for vehicular traffic;
5. Within twenty feet of the driveway entrance to any fire station and, on the side of a street opposite the entrance to any fire station, within seventy-five feet of such entrance when properly signposted; or
6. At any place where official signs prohibit standing.

Nebraska statutes provide that except when done temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers, or when necessary to avoid conflict with other traffic, or in compliance with law or the directions of law enforcement officers or traffic-control devices, no person shall park any vehicle, whether occupied or not:

1. Within fifty feet of the nearest rail of a railroad crossing; or
2. At any place where official signs prohibit parking.

Nebraska statutes provide that a person having control or charge of a vehicle shall not allow such vehicle to stand unattended on a (highway) without first stopping its motor, locking the ignition, removing the key from the ignition, effectively setting the brakes, and, when it is standing upon that portion of a (highway) improved, designed, or ordinarily used for vehicular traffic, turning its front wheels to the curb or side of such (highway).

II. NON-FREEWAYS, OUTSIDE BUSINESS OR RESIDENTIAL DISTRICT

Nebraska statutes provide that the following [additional] rules govern drivers who stop, park, or leave vehicles standing on a (highway) outside of a business or residential district:

1. Regarding the part of the (highway) that is improved, designed, or ordinarily used for vehicular traffic, they must leave enough of that part of the (highway) unobstructed so as to permit the free passage of other vehicles.
2. They must stop, park, or leave the vehicle so that there is a clear view of the vehicle for two hundred feet in each direction upon the (highway).
3. If it is practicable to stop, park, or leave the vehicle standing

off of the part of the (highway) that is improved, designed, or ordinarily used for vehicular traffic, they must do so.

4. Such a vehicle shall not be stopped, parked, or left on the (highway) for more than twenty-four hours.
5. [Except for police, fire department, civil defense, ambulance or authorized Department of Roads or local authority personnel,] (No, no) one is allowed to loiter, stand, or park a vehicle upon any bridge, road, or structure that is above or below the part of a (highway) that is improved, designed, or ordinarily used for vehicular traffic.

These rules apply whether the vehicle is attended or unattended. They do not apply when a vehicle is disabled in such a way that it is impossible to avoid stopping and temporarily leaving it in violation of these rules.

III. FREEWAYS

Nebraska statutes provide that no one is allowed to stop, park, or leave vehicles standing on a freeway except:

1. In designated areas; or
2. When directed to do so by a law enforcement officer; or
3. When the vehicle is disabled or inoperable, or the driver is ill or incapacitated, in which case the driver is allowed to park, stop, or stand on the shoulder, facing in the direction of travel, with all wheels and projecting parts of the vehicle completely clear of the traveled lanes of the freeway, for no longer than twelve hours.

[Except for police, fire department, civil defense, ambulance or authorized Department of Roads or local authority personnel,] (No, no) one is allowed to loiter, stand, or park a vehicle upon any bridge, road, or structure that is above or below the part of a (highway) that is improved, designed, or ordinarily used for vehicular traffic.

COMMENT & AUTHORITIES

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of the instruction as are applicable. In a particular case, it may be easier for the jury to understand this instruction if its parts are combined in some different way; if that is the case, adapt the instruction to serve that end.

A party who claims that his or her vehicle was disabled in such a

way that it was impossible to avoid stopping and temporarily leaving it in violation of these rules has the burden of proving same. *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980). *See also Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977).

Regarding obedience to peace officers, see Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

Where the instruction says “(highway),” substitute the appropriate word most likely to be understood by the jury. Highway is defined at Neb. Rev. Stat. § 60-624 (Reissue 2010).

Parking is defined at *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 763–64, 530 N.W.2d 241, 243–44 (1995).

Crosswalk is defined in Neb. Rev. Stat. § 60-613 (Reissue 2010); safety zone, *id.* at § 60-657; freeway, *id.* at § 60-621; intersection, *id.* at § 60-627.

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that “(1) Pedestrians except in areas specifically designated for that purpose; (2) hitchhikers or walkers;” and other specified activities, animals, and vehicles are prohibited from using a freeway (as defined at § 60-621 (Reissue 2010)) “at all times except by permit from [specified authority].”

Neb. Rev. Stat. § 60-6,167 (Reissue 2010) covers parking regulations dealing with parallel parking versus angle or center parking. It limits where the various kinds of parking may be done, including saying that parallel parking must be done with the wheels parallel to and within twelve inches of the curb or edge of the roadway. Section 60-6,167 also empowers the Department of Roads or local authorities to prohibit stopping, standing, or parking. If those things are involved, consult that section of the statute.

The statutory authorities for this instruction are found at Neb. Rev. Stat. §§ 60-6,164, and 60-6,166 through 60-6,168 (Reissue 2010). The word “roadway” is used in the statute. It is defined at Neb. Rev. Stat. § 60-656 (Reissue 2010). Where the statute uses the word roadway, the instruction uses this part of the definition: “the part of a (highway) that is improved, designed, or ordinarily used for vehicular traffic.” A particular case may require a more particular definition of roadway than the one used in the instruction. If so, consult the statute and adapt this instruction as necessary.

NJI2d Civ. 7.29

EQUIPMENT OF VEHICLES: LIGHTS, MIRRORS, BRAKES, HORNS, AND THE LIKE

No pattern instructions have been prepared. See the Comment & Authorities, below.

COMMENT & AUTHORITIES

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

See *Youngs v. Potter*, 237 Neb. 583, 587, 467 N.W.2d 49, 51 (1991) (tractor driven on highway, without proper mirrors or lights).

Prior to 1994, "Equipment of Vehicles" was grouped together in a single subpart of the Nebraska Rules of the Road: part (f) of Article 6 of Chapter 39 of the Nebraska Revised Statutes. Effective January 1, 1994, this material has been moved to Chapter 60, and spread through parts (q), (r), (t), (x) and (y) of that chapter. Included are such subjects as: mirrors, §§ 60-6,253, *et seq.*; slow-moving-vehicle emblems, § 60-6,241; clearance lights, § 60-6,235; requirements relating to long and protruding loads, § 60-6,304; brakes, §§ 60-6,244, *et seq.*; horns, 60-6,285; windshield wipers, § 60-6,255; lights and reflectors, §§ 60-6,219, *et seq.*, all currently published in Chapter 60, Reissue 2004. Adapt these sections of the Nebraska Rules of the Road to suit the case at hand.

Regarding the related topic of windshield and window stickers, see NJI2d Civ. 7.34.

NJI2d Civ. 7.30**AUTHORIZED EMERGENCY VEHICLES—
EXCEPTIONS FROM RULES OF THE ROAD**

No pattern instruction has been prepared. Adapt Neb. Rev. Stat. § 60-6,114 (Reissue 2010) as necessary to fit the facts of the case at hand.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,114 (Reissue 2010). *Lee v. City of Omaha*, 209 Neb. 345, 350–51, 307 N.W.2d 800, 804 (1981).

In Nebraska, emergency vehicles operating audible sirens and visible warning lights are privileged to exceed posted speed limits and enter intersections against red lights if done safely. However, the driver of such an emergency vehicle is under a duty to drive with due regard for the safety of others. In an action involving allegations that the driver of an emergency vehicle acted negligently, the driver's actions are measured against those of a reasonable person exercising due care under the same emergency circumstances.

City of LaVista v. Andersen, 240 Neb. 3, 8, 480 N.W.2d 185, 189 (1992) (citations omitted) (see also NJI2d Civ. 7.07A and NJI2d Civ. 7.31).

See *Gatzemeyer v. Neligh Township*, 233 Neb. 329, 333, 445 N.W.2d

593, 595 (1989) (statutory exemption from rules of road for those working on surface of highway does not exempt same from generally applicable duty to exercise reasonable care for safety of others).

Regarding obedience to peace officers, see Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

NJI2d Civ. 7.31

OPERATION OF VEHICLES UPON THE APPROACH OF EMERGENCY VEHICLES

Nebraska statutes provide that when an authorized emergency vehicle is approaching, is nearby, and is using the proper audible or visual signals, [then, unless otherwise directed by any police or traffic officer,] other drivers [on a two-way (street, highway, road, et cetera)] shall:

1. Yield the right-of-way;
2. Immediately move over to the right, to a position that is:
 - (a) as close as possible and parallel to the (curb, edge [of the street, highway, road, et cetera], side [of the street, highway, road, et cetera]) and
 - (b) clear of any intersection; and
3. Stop, and stay stopped, until the emergency vehicle has passed by.

Nebraska statutes provide that when an authorized emergency vehicle is approaching, is nearby, and is using the proper audible or visual signals, [then, unless otherwise directed by any police or traffic officer,] other drivers [on a one-way (street, highway, road, et cetera)] shall:

1. Yield the right-of-way;
2. Immediately move to a position that is:
 - (a) both as close as possible and parallel to either (curb, edge [of the street, highway, road, et cetera], side [of the street, highway, road, et cetera]) and
 - (b) clear of any intersection; and
3. Stop, and stay stopped, until the emergency vehicle has passed by.

Nebraska statutes provide that when an authorized emergency vehicle is approaching, is nearby, and is using the proper audible or visual signals, [then, unless otherwise directed by any police or traffic officer,] pedestrians shall yield the right-of-way until the emergency vehicle has passed by.

The statute(s) just described do not relieve the driver of the emergency vehicle from the duty to drive with due regard for the safety of all persons using the (street, highway, road, et cetera).

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,151 (Reissue 2010). *Maple v. City of Omaha*, 222 Neb. 293, 298, 384 N.W.2d 254, 258 (1986); *Stephen v. City of Lincoln*, 209 Neb. 792, 799, 311 N.W.2d 889, 894 (1981); *Lee v. City of Omaha*, 209 Neb. 345, 348-50, 307 N.W.2d 800, 803 (1981); *Winston v. Davis*, 187 Neb. 522, 525-26, 192 N.W.2d 413, 416 (1971); *State v. Otto*, 184 Neb. 597, 600-01, 169 N.W.2d 612, 614-15 (1969).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Use only those parts of this instruction as are appropriate. The first paragraph of this instruction is to be used when the “other drivers” were on a two-way street. The second is to be used when they were on a one-way street. The third is to be used when the “other” is not a driver, but a pedestrian. (Regarding pedestrians generally, see NJI2d Civ. 7.15.) The fourth paragraph is to be used, when applicable, in combination with any of the first three.

“It is settled in this state that failing to see one favored under the rules of the road constitutes negligence as a matter of law.” *City of LaVista v. Andersen*, 240 Neb. 3, 8, 480 N.W.2d 185, 189 (1992) (favored vehicle here was emergency vehicle).

Regarding obedience to peace officers, see Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

See also NJI2d Civ. 7.30, Comment & Authorities.

NJI2d Civ. 7.32

BACKING ON ROADWAY OR SHOULDER OF FREEWAY

Nebraska statutes provide that drivers are not allowed to back their vehicles on any (street, highway, roadway, et cetera) unless it can be done with safety and without interfering with other traffic.

Nebraska statutes provide that drivers are not allowed to back their vehicles on the roadway or shoulder of any freeway.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,169 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Where the first paragraph of the instruction uses the parenthetical (street, highway, roadway, et cetera), the statute uses the word “roadway.” The second paragraph of the instruction takes the word “roadway” from the statute. Roadway is defined at Neb. Rev. Stat. § 60-656 (Reissue 2010). A particular case may require a more particular definition of roadway than any of those contained within the parenthetical or than just the use of the word roadway itself. If so, consult the statute and adapt this instruction as necessary.

Neb. Rev. Stat. § 60-6,144 (Reissue 2010) provides that pedestrians (except in certain areas), bicycles, motor scooters not having motors of more than ten horsepower, and other specified activities, animals, and vehicles are prohibited from using a “at all times except by permit from [specified authority].” Freeway is defined at § 60-621 (Reissue 2010).

Regarding obedience to peace officers, see Neb. Rev. Stat. § 60-6,110 (Reissue 1993).

NJI2d Civ. 7.33**DRIVING UPON SIDEWALK**

Nebraska statutes provide that no one is allowed to drive a vehicle upon a sidewalk [or sidewalk area] except upon a [permanent or duly authorized temporary] driveway.

COMMENT & AUTHORITIES

Neb. Rev. Stat. § 60-6,178 (Reissue 2010).

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

Sidewalk is defined at Neb. Rev. Stat. § 60-662 (Reissue 2010). “Vehicle shall mean every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved solely by human power or used exclusively upon stationary rails or tracks.” *Id.* at § 39-602(114). Neb. Rev. Stat. § 60-676 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to operators of motorcycles and drivers of other motor vehicles. Neb. Rev. Stat. § 60-6,314 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to bicycle riders and drivers of motor vehicles.

Regarding obedience to peace officers, see Neb. Rev. Stat. § 60-6,110 (Reissue 2010).

NJI2d Civ. 7.34**OVERLOADING FRONT SEAT OR OBSTRUCTING DRIVER'S VIEW**

Nebraska statutes provide that no one shall drive a vehicle when it is loaded so as to obstruct the driver's view to the front or sides or to interfere with the driver's control of the vehicle's driving mechanism.

Nebraska statutes provide that no one shall drive a vehicle when there are so many persons in the front seat, exceeding three persons, so as to obstruct the driver's view to the front or sides or to interfere with the driver's control of the vehicle's driving mechanism.

Nebraska statutes provide that no passenger shall ride in such a position as to interfere with the driver's view to the front or sides or to interfere with the driver's control of the vehicle's driving mechanism.

Nebraska statutes provide that, except as otherwise required by law, no one shall drive a vehicle [on a highway] with any sign, poster, or other non-transparent material upon the front windshield, side wings, or side or rear windows of the vehicle.

COMMENT & AUTHORITIES

The first three paragraphs: Neb. Rev. Stat. § 60-6,179 (Reissue 2010).

The fourth paragraph: Neb. Rev. Stat. § 60-6,255 (Reissue 2010).

Use only those parts of this instruction as are appropriate.

See NJI2d Civ. 7.01, Special Note and Comment & Authorities.

NJI2d Civ. 7.40**AUTOMOBILE PASSENGER—LOOKOUT, ADVICE, AND WARNING**

Nebraska law provides that ordinarily passengers do not have to watch the road or give the driver advice on how to drive. However, if they do become aware of danger, or if they reasonably should anticipate danger, then they must warn the driver unless they reasonably believe that the driver is already aware of the danger or they reasonably believe that a warning would not help or the driver would not pay any attention to it.

COMMENT & AUTHORITIES

Drawbridge v. Douglas Cty., 209 Neb. 806, 810, 311 N.W.2d 898, 902 (1981); Circo v. Sisson, 193 Neb. 704, 709–12, 229 N.W.2d 50, 53–54 (1975). *See also* the cases cited at Authorities, NJI 7.53 (1969). The law supporting this instruction is common law. Though the cases cited happen to be guest-passenger cases, there does not seem to be any reason to limit this rule to guest-passengers as opposed to other passengers.

The word “ordinarily” is in the instruction because there may be situations where the passenger does have to watch the road or give the driver advice on how to drive.

This instruction should not be routinely given; the Committee recommends that the users of this work take particular care to give this instruction only when the pleadings and the evidence warrant giving it.

“This defense is applicable whether the plaintiff-passenger is suing his host under the guest statute or the driver of another vehicle.” Comment, NJI 7.53 (1969).

NJI2d Civ. 7.50A**THROUGH 7.54.**

Recommend no separate instruction.

SPECIAL NOTE

NJI2d Civ. 7.50A-7.54 were pattern instructions on Nebraska’s Guest Passenger Statute. The Unicameral repealed this statute in 1992; it applied to civil actions accruing before February 8, 1992. Those instructions and their Comments and Authorities have been omitted from this book.

The deleted instructions are NJI2d Civ. 7.50A, Motor Vehicle Guest Statute—Burden of Proof—Passenger not a Guest; NJI2d Civ. 7.50B, Motor Vehicle Guest Statute—Burden of Proof—Driver Under the Influence of Intoxicating Liquor; NJI2d Civ. 7.50C, Motor Vehicle Guest Statute—Burden of Proof—Gross Negligence; NJI2d Civ. 7.51, Motor Vehicle Guest Statute—Definition of Gross Negligence; NJI2d Civ. 7.52, Motor Vehicle Guest Statute—Definition of “Under the Influence of Intoxicating Liquors”; NJI2d Civ. 7.53, Motor Vehicle Guest Statute—Definition of Guest; and NJI2d Civ. 7.54, Motor Vehicle Guest Statute—Duty to Anticipate Danger.

If anyone has occasion to consult those instructions, please see the 2014-2015 edition of this book. For instruction on how some of this is handled today, *see* NJI2d Civ. 2.01 through 2.02A-2 and NJI2d 5.04 and part XII of its Comment & Authorities.

NJ12d Civ. 7.60

FAMILY PURPOSE DOCTRINE—DEFINITION AND BURDEN OF PROOF

[(Name of appropriate defendant) is the owner of the car that was driven by (name of driver).] If you find that (driver) was negligent, and therefore liable to plaintiff, then you must find that (appropriate defendant) is also liable to plaintiff if, and only if, the plaintiff proves by the greater weight of the evidence, each and all of the following:

1. That (appropriate defendant) was the (here insert words telling the jury what they must find in order to find that the appropriate defendant was the head-of-household);

2. That (appropriate defendant) made the car available for (his, her) family's use;

3. That (driver) was both a member of (appropriate defendant)'s family and a person for whose use the car was made available; and

4. That (driver) was using the car both for the purpose for which it was made available and with the expressed or implied authority of (appropriate defendant).

[For purposes of this instruction,] (The, the) fact that (driver) was over the age of (insert age of majority) does not mean that (he, she) was not a member of (appropriate defendant)'s family.

COMMENT

The first sentence of this instruction appears as follows: "[Name of appropriate defendant) is the owner of the car that was driven by (name of driver).]" This sentence has been included because the Committee feels that if that fact is true, it is useful to state it. Use it only when it is true as a matter of law that the person specified is the owner of the car. As discussed below, one need not be the owner of the car to be the head of the driver's household; do not be misled into thinking that this instruction only applies where the head-of-household is the owner.

This instruction states that the alleged head-of-household "is . . . liable to plaintiff if, and only if, the plaintiff proves" the items listed in the rest of the instruction. This will not always be true. It is possible, for example, that the plaintiff alleges that this particular defendant is liable both as a head-of-household and through a principal and agent relationship. Where this part of the instruction is not accurate, it will have to be rewritten.

There are three open questions with this instruction:

(1) The first problem appears in the first subparagraph, where the judge is to tell the jury what they need to find in order to find that the appropriate defendant was the head-of-household. The problem is this: how is head-of-household to be defined for the jury?

(2) The second appears in the second subparagraph, which says that the defendant made the car available for his or her family's use. Must the car have been made generally available (*e.g.*, the family car) or is it enough that it was made available for the use of this particular driver on this particular occasion (*e.g.*, parent, who has borrowed the neighbor's car for the day, hands the keys to child and says "Run to the store and get us some milk. Please.")?

(3) The third appears in the third subparagraph: how far does head-of-household's family extend?

Regarding the first of these questions, any time the appropriate person is the head-of-household as a matter of law, omit the first numbered subparagraph and the problem of how to define head-of-household disappears. In this regard, and without comment on its current validity, the Committee notes the following:

Although not always necessarily true as a matter of fact, this court has specifically held that the father is the head of the household as a matter of law. This is logical in this state because the law is well settled that it is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relationship. Likewise the law is well settled that a father is primarily liable for the support of his minor children, his liability being independent of the assets of the mother.

Marcus v. Everett, 195 Neb. 518, 527, 239 N.W.2d 487, 492 (1976) (citations omitted).

Regarding the second of these questions, the Committee has not been able to find an answer in Nebraska law. It is the Committee's opinion, however, that the law here is the same whether the car is generally available for the family's use or was available for the family's use on one occasion only, the occasion of the incident under litigation. The Committee agrees with Prosser: "It has been held that the car must be made available for general use, and not merely to take out on a particular occasion, although whatever policy may underlie this odd business would appear to apply no less to the special permission." Prosser and Keeton *On the Law of Torts* § 73, at 525 (W. Keeton gen. ed. 5th ed. 1984). In a particular case, this second subparagraph may be a little vague on the very point being discussed, as it is possible to read it either restrictively or expansively. In those cases, it may be necessary to rewrite this subparagraph.

The third question is How far does head-of-household's family extend? Some of the cases on this subject state that the head-of-household must have a "[l]egal or moral obligation" to support the driver and the driver must have a "[c]orresponding state of dependence" on the head-of-household for support. *E.g.*, *Piechota v. Rapp*, 148 Neb. 442, 447, 27 N.W.2d 682, 686 (1947) quoting *Hogg v. MacDonald*, 128 Neb. 6, 11, 257 N.W. 274, 276 (1934). Those words are not found in this instruction. Instead, using the word more often found in more recent cases, subparagraph 3 of the instruction states that plaintiff must prove that the driver was a member of defendant's "family". *E.g.*, *Ramsey v. Rimpley*, 196 Neb. 516, 517, 244 N.W.2d 78, 79 (1976) (extensively quoted in the Authorities, below). The Committee's thinking, in this regard comes in three parts:

(1) "Family" better defines the requirement. The obligation and dependence language is a way of defining family.

(2) Often, this element will not be in issue. The definition of family—how far a "household" extends—is a question of law for the judge. Often, the judge's decision on this point will effectively decide the driver's status. That is, once the judge defines how far a household reaches in general, a particular driver either fits within that definition or not and there is not factual dispute or jury question on this point. When this is the case, this part of the third subparagraph of the instruction should be dropped.

(3) If there is a jury question as to whether the driver was a family member, the trial judge will have to do one of two things:

■ Draft and give an instruction defining family. This, coupled with the third subparagraph of this instruction, will take care of the problem.

■ Rewrite the third subparagraph of the instruction so that, rather than stating plaintiff must prove the driver was a member of defendant's family, it gives a more specific statement of just what the plaintiff must prove, whether it be language about "state of dependence" or "legal or moral obligations" or whatever language is appropriate.

Quoting Prosser:

To come within the application of the doctrine, the defendant must own the automobile, or be in control of its use, or at least have some recognized property interest in it or supply it, and he must have made it available for family use, rather than for use in his business The owner need not . . . be the head of the family. The driver must be a member of the defendant's immediate household, as distinguished from a more distant or collateral relative such as a brother-in-law. The fact that the driver is an adult son or daughter usually is held not

to prevent the agency relation where he or she is still a member of the household.

Prosser and Keeton on the Law of Torts § 73 (W. Keeton gen. ed. 5th ed. 1984). Picking up on part of this quotation from Prosser, there is Nebraska authority for the proposition that the head-of-household need not be the owner of the car. *McBroom v. Wolsleger*, 180 Neb. 622, 624, 144 N.W.2d 199, 200 (1966).

This instruction also tells the jury that the driver must have been using the car with the expressed or implied authority of the head-of-household. On that point, *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980) states: "The inference of implied approval of use of a family vehicle arises necessarily when prior use of the vehicle is established and certainly when there is no proof or inference of express disapproval." *Id.* at 496, 293 N.W.2d at 410. *See also* Prosser and Keeton on the Law of Torts, *supra*.

"[T]he purpose of the family-purpose doctrine is to provide financial responsibility for the negligence of financially irresponsible family members." *Russell v. Luevano*, 234 Neb. 581, 585, 452 N.W.2d 43, 47 (1990). This purpose is not served by imputing the driver's negligence to the family-purpose head-of-household in a law suit filed by the latter, against a third party, for his or her own damages; in this situation, then, the general rule is that the negligence of the family-purpose driver is not imputed to the head-of-household. *Id.* (The head-of-household, however, "may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the accident," *id.* at 586, 452 N.W.2d at 47, which is another way of saying that one may not recover damages from another unless an act or omission of the other was a proximate cause of that damage.)

Regarding imputed negligence generally, *see* N.J.I2d Civ. 3.25, Comment. Regarding the imputation of a parent's contributory negligence when a child sues a third party for damages suffered by the child or when the parent sues a third party for damages suffered by the parent because of injuries to the child, *see* N.J.I2d Civ. 3.26A and N.J.I2d Civ. 3.26B.

Regarding an automobile accident in which a family-purpose driver is killed and another driver is injured, the injured driver may file a personal injury action against the head of the deceased driver's household, under the family-purpose doctrine, without first filing the claim in the estate of the deceased driver. *Marcus v. Everett*, 195 Neb. 518, 521-22, 239 N.W.2d 487, 489-90 (1976).

See also *Chlopek v. Schmall*, 224 Neb. 78, 81, 396 N.W.2d 103, 106 (1986) (where no allegations of personal negligence on part of mother and where negligence of daughter imputed only to father, mother should have been dismissed from suit).

AUTHORITIES

[I]n order to recover under the family purpose doctrine, four essential elements must be proved: “(1) that the defendant who is sought to be charged with liability was the head of [the] family, (2) that [the defendant] furnished the car for the use and pleasure of his [or her] family, (3) that the driver of the automobile was a member of [defendant’s] family and one for whose use and pleasure the car was furnished, and (4) that the driver was, at the time of the accident, using the car [for the purpose] for which it was furnished with the authority, expressed or implied, of the head of the family.”

Ramsey v. Rimpley, 196 Neb. 516, 517-18, 244 N.W.2d 78, 79 (1976), quoting *Marcus v. Everett*, 195 Neb. 518, 526, 239 N.W.2d 487, 492 (1976). The Committee has inserted into the above quotation the bracketed words “for the purpose”. Neither *Marcus* itself, nor *Marcus* as quoted in *Ramsey*, contains those words. In *Marcus*, the Court said it was stating the rule of NJI 7.20 (1969). That instruction does include those words. It seems that their omission from the quotation was inadvertent. *Dunn v. Hemberger*, 230 Neb. 171, 181-82, 430 N.W.2d 516, 523 (1988) also quotes most of this part of *Marcus*; in brackets, *Dunn v. Hemberger* adds back in the words “for the purpose.”

[U]nder the family-purpose doctrine, the negligence of the driver of the family-purpose car is imputed to the parent owner in actions by third parties to recover for personal injuries or property damage proximately caused by the negligent acts of the family-purpose driver. However, the negligence of the family purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner’s own injuries or property damage.

Paprocki v. Stopak, 213 Neb. 523, 525, 330 N.W.2d 475, 476-77 (1983). See also *Leonard v. Wilson*, 238 Neb. 1, 2-3, 468 N.W.2d 604, 605-06 (1991). The head-of-household need not, however, be the owner of the car. See the Comment, above.

For a complete discussion of the pre-1976 history of the rule, see *Marcus*. See also *Looney v. Pickering*, 232 Neb. 32, 35-37, 439 N.W.2d 467, 469 (1989).

NJI2d Civ. 7.61

**NEGLIGENCE OF DRIVER NOT IMPUTED TO
PASSENGER BY REASON OF STATUS AS
PASSENGER**

Recommend no separate instruction.

COMMENT & AUTHORITIES

There are a number of ways passengers may become defendants or may be barred from recovering as plaintiffs. They may themselves be negligent (NJI2d Civ. 3.02), or they may assume the risk of riding with an incompetent driver (NJI2d Civ. 3.12). They may be the driver's employer, partner, or principal to the driver's agent (NJI2d Civ. 6.01, *et seq.*), or, perhaps, joint venturers with the driver (NJI2d Civ. 6.40). Passengers may be heads-of-household (NJI2d Civ. 7.60), or their negligence may be based on a theory of negligent entrustment (NJI2d Civ. 7.62).

Passengers do not, however, become liable or barred from recovery solely because they are passengers; that is, a driver's negligence is not imputed to his or her passengers by reason of their status as passengers.

Where the passenger is the owner and where the passenger "assumes to direct or has the power to direct the operation of the automobile and to exercise control over it," the negligence of the driver is imputable to the passenger-owner. *Boker v. Luebbe*, 198 Neb. 282, 286, 252 N.W.2d 297, 299 (1977), quoting *Kremlacek v. Sedlacek*, 190 Neb. 460, 464, 209 N.W.2d 149, 153 (1973). At least that is true, says the opinion in *Boker*, when the driver is operating the car on a learner's permit, under the supervision of the passenger who is the driver's parent. *Boker*, 198 Neb. at 288, 252 N.W.2d at 300. (The plaintiff in *Boker* argued that the doctrine of imputed negligence as applied between drivers and passengers should be abolished. The court said "we need not, and do not, decide whether the doctrine [applies] . . . in factual situations different from the one presented in this case." *Id.*) *Weber v. Sw. Neb. Dairy Suppliers, Inc.*, 187 Neb. 606, 610-11, 193 N.W.2d 274, 277 (1971), *appeal after remand*, 190 Neb. 389, 208 N.W.2d 667 (1973), stated the same rule in a case that involved an owner as a passenger.

Making the point more generally, *Sandrock v. Taylor*, 185 Neb. 106, 115-16, 174 N.W.2d 186, 193 (1970) put it this way:

This state, for many years, has followed the rule that the negligence of a driver is not imputable to a passenger except where the driver is the servant or agent of the passenger, or where the driver and passenger are engaged in a joint enterprise or where the passenger assumes to direct operation of the automobile and to exercise control over it . . . Unless some relationship existed between the passenger and the driver which gave a passenger authority to direct or assist in the operation of the automobile, a passenger has ordinarily been classified as a guest, and the negligence of a driver has not been imputed to the passenger.

In *Strother v. Herold*, 230 Neb. 801, 433 N.W.2d 535 (1989), a passenger alleged a joint enterprise between her driver, Herold, and another passenger, Monie, alleging that each should be held equally liable

for her injuries. The court stated: "If Herold and Monie were involved in a joint enterprise at the time of the accident, Herold's negligence, if any, may be imputed to Monie, making Monie equally responsible." *Id.* at 804, 433 N.W.2d at 537. The court went on to find, as a matter of law, that there was no joint enterprise: Monie was a guest without an equal right to control the operation of the car.

In *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995), the court laid out the elements of the affirmative defense of joint enterprise in cases where the passenger from one vehicle sues the driver of the other vehicle. This issue is discussed at NJI2d Civ. 6.40, Comment & Authorities.

The Committee recommends no separate instruction. The jury will be told what the plaintiff must prove in order to recover, and they will be told what the defendant must prove in order to establish contributory negligence, or assumption of the risk, or whatever affirmative defense is alleged. That should be enough. Negative instruction telling the jury that the passenger is not to be considered negligent simply because he or she was a passenger in a car driven by a negligent driver is not necessary.

If, however, there is a case where it is advisable to instruct the jury on the negative of imputed negligence, a situation where there is some danger that otherwise the jury might impute the driver's negligence to the passenger, then a specific instruction will have to be drafted, one that fits the facts of the case at hand. How that might be done is discussed in the Comment to NJI2d Civ. 3.25.

NJI2d Civ. 7.62

NEGLIGENT ENTRUSTMENT

Before the plaintiff can recover against the defendant [on (his, her, its) claim (here identify claim involved, perhaps with the words "of negligent entrustment")], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant permitted (name of driver) to drive (his, her, its) (car, truck, motorcycle, boat, motor vehicle, et cetera);
2. That, at the time the defendant permitted (driver) to drive the (vehicle), the defendant either knew, or in the exercise of reasonable care should have known, that (driver) was so (inexperienced, incompetent, reckless, intoxicated, addicted to intoxication, incapable, et cetera) that (he, she) was unable to operate the (vehicle) properly;
3. That (driver) was negligent in one or more of the ways claimed by the plaintiff;

4. That this negligence on the part of (driver) was a proximate cause of the (insert descriptive word such as occurrence, accident, collision, et cetera);
5. That the (occurrence, accident, collision, et cetera) was a proximate cause of some damage to the plaintiff; and
6. The nature and extent of that damage.

SPECIAL NOTE

The first numbered paragraph of this instruction reads as follows: "1. That the defendant permitted (name of driver) to drive (his, her, its) (car, truck, motorcycle, boat, motor vehicle, et cetera)." This paragraph assumes that the defendant is the owner of the vehicle in question and, therefore, is only appropriate when the defendant is the owner of the vehicle in question. (The paragraph was written in that way because, as explained in the Comment below, prior to 2008 it seemed that the defendant in such a case had to be the owner. The cause of action did not lie against anyone else.)

If the defendant who negligently entrusted the motor vehicle is not the owner but rather is someone to whom the owner entrusted the vehicle (and then the defendant entrusted it to someone else), then that paragraph does not seem appropriate. Instead of saying "1. That the defendant permitted (name of driver) to drive (his, her, its) (car, truck, motorcycle, boat, motor vehicle, et cetera)," that paragraph should say "1. That the defendant permitted (name of driver) to drive the (car, truck, motorcycle, boat, motor vehicle, et cetera)."

It may also be necessary to add a new paragraph to the instruction when the defendant who negligently entrusted the vehicle is not the owner. The key to negligent entrustment is that the one who entrusted the vehicle had control over the vehicle. If the defendant is not the owner, it may be necessary to add a paragraph that will be inserted in between what appear above as paragraphs numbered 1 and 2 (it will be numbered "2" and what appear above as paragraphs 2 through 6 will be renumbered 3 through 7) and that will read as follows:

"2. That the (vehicle) was under the control of the defendant at the time the defendant permitted (name of driver) to drive the (vehicle)."

COMMENT

This instruction does not apply in cases involving the guest statute. See *Gertsch v. Gerber*, cited and quoted in the Authorities, below; *Kreifels v. Wurtele*, 206 Neb. 491, 496, 293 N.W.2d 407, 410 (1980) (in a

guest case, to prove negligent entrustment against father, son must be shown to be grossly negligent); *Wagner v. Mines*, 203 Neb. 143, 147–48, 277 N.W.2d 672, 675 (1979).

This is the Burden of Proof part of the Statement of the Case instruction in a case that involves negligent entrustment of a motor vehicle but does not involve Nebraska's guest statute. For the rest of the statement of the case instruction, see NJI2d Civ. 2.01 and 2.01A.

“[A]n owner of a motor vehicle, who knowingly entrusts it to an underage, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle.” *Wagner v. Mines*, 203 Neb. 143, 146, 277 N.W.2d 672, 674 (1979), quoting *Gertsch v. Gerber*, 193 Neb. 181, 184, 226 N.W.2d 132, 134 (1975). *Accord* *Vilas v. Steavenson*, 242 Neb. 801, 808–09, 496 N.W.2d 543, 549–50 (1993), *overruled on other grounds by* *DeWester v. Watkins*, 275 Neb. 137, 745 N.W.2d 330 (2008); *Keller v. Wellensiek*, 186 Neb. 201, 206–07, 181 N.W.2d 854, 858 (1970). If this rule is involved, subparagraph two of the instruction may have to be changed. Assuming that the vehicle involved is a car owned by the defendant, who is female, and driven by John Smith, who is male, then, depending on the pleadings and the evidence, the following might be an appropriate rewriting of this subparagraph:

“2. That, at the time the defendant permitted John Smith to drive her car, she either:

(a) knew that he was an underage, unlicensed minor; or

(b) in the exercise of reasonable care should have known, that he was so inexperienced that he was unable to operate the car properly.”

An action for negligent entrustment can be had against one who has control of the entrusted property (and not just against one who owns the entrusted property). *DeWester v. Watkins*, 275 Neb. 173, 180, 745 N.W.2d 330 (2008). In *DeWester*, the father who owned the car entrusted it to his son who in turn allowed an underage girl to drive. She rolled the car and died from the injuries sustained. Her estate sued the son, alleging negligent entrustment. The Court held that “negligent entrustment [is] defined with reference to control of the entrusted property, and a defendant’s ownership of the property is not a prerequisite for liability for negligent entrustment.” *DeWester*, 275 Neb. at 180, 745 N.W.2d at 336.

In the process, the Court adopts Restatement (Second) of Torts §§ 308, 390 (1965). The former (§ 308) states that

[i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is

likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

The latter (§ 390) states that

one who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

The Court also notes that Nebraska's Motor Vehicle Operator's License Act makes it a Class III misdemeanor "for any person '[t]o authorize or knowingly permit a motor vehicle owned by him or her or under his or her control to be driven upon any highway by any person who is not authorized under the act or is in violation of any of the provisions of the act' And we have "held that a person who violates that statute 'is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle.'" *DeWester*, 275 Neb. at 179-80, 745 N.W.2d at 336 (first quoting the Motor Vehicle Operator's License Act § 60-491(10) (emphasis supplied in *DeWester*); second quoting *Gertsch v. Gerber*, 193 Neb. 181, 184, 226 N.W.2d 132, 134 (1975)).

Wagner v. Mines and *Gertsch v. Gerber*, quoted above, speak of the owner of a motor vehicle who knowingly entrusts it to an underage, unlicensed minor because on the facts it was the owner who entrusted the vehicle directly to the underage, unlicensed driver. The main point of *DeWester* is that negligent entrustment can also lie against a non-owner who has a vehicle entrusted to him or her and then, in turn, entrusts it to another.

In 1993, the Court had seemed to hold that negligent entrustment only applied against the owner of the vehicle in question, and to a non-owner to whom the vehicle had been entrusted and who, in turn, entrusted it to the one driving at the time of the incident that caused the damage under litigation. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993). To the extent that *Vilas* is inconsistent with *DeWester*, the former is overruled by the latter. "A defendant's ownership of entrusted property is not a prerequisite to liability for negligent entrustment." *DeWester*, 275 Neb. at 181, 745 N.W.2d at 330.

Neb. Rev. Stat. §§ 60-462, *et seq.*, and particularly § 60-4,118 through 60-4,118.06 (Reissue 2010) deals with age and other requirements for the licensing of drivers. On the general topic of licensing driv-

ers, see also § 60-484 (Reissue 2010), amended by 2011 Neb. Laws, L.B. 215.

“Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956) involved a negligent entrustment of Sherlock’s car to one Duffy, who in turn loaned it to Hull, and it was held to be a question for the jury whether this was within the causal chain.” NJI 7.22, Comment (1969).

Neb. Rev. Stat. § 60-6,306 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to operators of motorcycles and drivers of other motor vehicles. Neb. Rev. Stat. § 60-6,314 (Reissue 2010) provides that, as a general rule, the statutory rules of the road apply equally to bicycle riders and drivers of motor vehicles.

One who entrusts his or her automobile to a driver known to be intoxicated may thereby be liable for damage caused by the latter’s negligent operation of the automobile. NJI2d Civ. 7.62, Authorities; Pelzek v. American Legion, 236 Neb. 608, 614, 463 N.W.2d 321, 325 (1990) (Shanahan, J. dissenting). One who sells alcohol to a minor, in violation of state law, is not thereby liable for the latter’s subsequent negligent operation of an automobile. Pelzek v. American Legion, 236 Neb. 608, 610–11, 463 N.W.2d 321, 323–24 (1990).

“A defendant owes the plaintiff a duty when there is an applicable statute or ordinance.” Kozicki v. Dragon, 255 Neb. 248, 251, 583 N.W.2d 336, 339 (1998). If there is an applicable key-in-the-ignition ordinance, then there is a duty to one injured by a stolen car parked in violation of the ordinance or statute. Whether leaving the key in the ignition was a proximate cause of the subsequent injury, or whether the action of the thief is an efficient intervening cause, is a separate question. There is, however, a duty—a duty created by the statute or ordinance. Kozicki v. Dragon, 255 Neb. 248, 251–54, 583 N.W.2d 336, 339–40 (1998) (citing and discussing cases). This is discussed in detail at NJI2d Civ. 3.03.

Though not a matter of *negligent* entrustment, a related question concerns the insurance company’s liability when its insured owner gives permission to drive his or her vehicle for a restricted purpose and the driver violates the restriction. In Barry v. Tanner, 250 Neb. 116, 547 N.W.2d 730 (1996), Dervin took his car to Tanner for rust repair. He left the keys with the car. Tanner drove the car to purchase his dinner and was involved in an accident causing personal injury and property damage to Barry. The question was whether Tanner qualified as an “insured” under Dervin’s insurance policy.

We [have] adopted the liberal or initial permission rule. The position of this court on the initial permission doctrine reflects the view that automobile liability insurance is for the benefit of the public as well as insureds. Litigation as to the scope of the permission—the purpose, the time, or place of use—and similar issues should not be permitted or encouraged.

* * * *

We hold that where initial permission to use an insured vehicle has been given by one having proper authority to give permission to the person operating it at the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated.

Id. at 121–22, 547 N.W.2d at 733–34.

See also N.J.I2d Civ. 7.01, Comment & Authorities.

AUTHORITIES

“[T]he law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others.”

Gibb v. Strickland, 245 Neb. 325, 329, 513 N.W.2d 274, 278 (1994), quoting *Deck v. Sherlock*, 162 Neb. 86, 90–91, 75 N.W.2d 99, 102 (1956). See also Restatement (Second) of Torts § 308 (1965).

“In Nebraska, in a case not involving the guest statute, . . . an owner of a motor vehicle, who knowingly entrusts it to an underage, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle.” *Gertsch v. Gerber*, 193 Neb. 181, 184, 226 N.W.2d 132, 134 (1975). *Wagner v. Mines*, 203 Neb. 143, 146–47, 277 N.W.2d 672, 674 (1979) quotes much of the above and then continues:

However, the fact that the owner of a car may be negligent in entrusting a vehicle to a minor does not dispose of the issue [A] plaintiff must likewise plead and prove that such negligent entrustment was the proximate cause of the accident and injury[, i.e.,] that the driver operated the automobile negligently and that [the driver’s] negligence was a proximate cause of the accident. The act of allowing a person to operate a vehicle, knowing the driver to be inexperienced or incompetent, is negligence. It becomes a proximate cause of the injury when it combines with the negligent acts of the driver causing the damage.

Id. Accord Vilas v. Steavenson, 242 Neb. 801, 808–09, 496 N.W.2d 543, 549–50 (1993) (owner must knowingly entrust car to driver; here owner provided car for son, and son entrusted car to friend; doctrine does not

apply to owner, since he did not knowingly entrust car to driver, and doctrine does not apply to son, since he did not own vehicle).

The entrustment may be by express or implied permission. *Gibb v. Strickland*, 245 Neb. 325, 330, 513 N.W.2d 274, 278 (1994), *overruled on other grounds by DeWester v. Watkins*, 275 Neb. 137, 745 N.W.2d 330 (2008). And, as discussed in the Comment, *supra*, the entrustment must be knowing.

NJI2d Civ. 7.70

FAILURE TO WEAR SEAT BELTS—MITIGATION OF DAMAGES

If you find that the plaintiff was injured as a result of the (occurrence, accident, collision, et cetera) involved in this case and you assess damages against the defendant for those injuries, then you must consider the defendant's claim that the plaintiff was not wearing (his, her) seat belt.

If the defendant proves, by the greater weight of the evidence,

1. That the plaintiff was not wearing (his, her) seat belt at the time of the (occurrence, accident, collision, et cetera) involved in this case; and

2. That if the plaintiff had been wearing (his, her) seat belt (he, she) would have been injured less,

then you must reduce the amount of money you award to the plaintiff for (his, her) injuries.

You do this by figuring, first, the total amount of money that will fairly compensate the plaintiff for (his, her) injury and, second, the part of that total that is attributable to the plaintiff's failure to have been wearing (his, her) seat belt. If the second figure is five percent or less of the first, you subtract it from the first. If the second figure is more than five percent of the first, then you reduce the first figure by five percent.

COMMENT & AUTHORITIES

Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

Neb. Rev. Stat. § 60-6,273 (Reissue 2010). *Fickle v. State*, 273 Neb. 990, 1004, 735 N.W.2d 754, 768 (2007). Absent such a statute, failure to wear a seat belt does not constitute a violation of the duty to mitigate damages. *Welsh v. Anderson*, 228 Neb. 79, 81, 421 N.W.2d 426, 428 (1988). “[T]he doctrine of mitigation applies only to post event occurrences.” *Id.* at 84, 421 N.W.2d at 429.

NJI2d Civ. 4.70 is the general instruction on mitigation of damages. See the Comment to NJI2d Civ. 4.70. If the pleadings and the evidence support the defense of mitigation of damages for failure to wear a seat belt and otherwise, then NJI2d Civ. 7.70 and NJI2d Civ. 4.70 will have to be worked together.

Effective January 1, 1994, part (u) of the Nebraska Rules of the Road legislates the use of “occupant protection systems.” Neb. Rev. Stat. §§ 60-6,265 through 60-6,273 (Reissue 2010). For purposes of the jury instruction, “seat belt” still seems to be the appropriate appellation for the devices defined therein as “occupant protection systems.” *Id.* at § 60-6,265.

Generally regarding the 1993 reenactment of the Rules of the Road, see the Special Note to NJI2d Civ. 7.01.

For the definition of occupant protection system, see Neb. Rev. Stat. § 60-6,265 (Reissue 2010). Regarding what restraints are required in what vehicles, see *id.* at § 60-6,266. Regarding child passengers and the use of occupant protection systems, see *id.* at §§ 60-6,267 through 60-6,269. Regarding when use of these systems is required, and when it is excepted, and enforcement and penalties, other than as regards children, see *id.* at §§ 60-6,270 through 60-6,273, §§ 60-6,267 and 60-6,268 (Reissue 2010) are amended by 2011 Neb. Laws, L.B. 67. On a related matter, §§ 60-6,278 through 60-6,282 require that operators and passengers of motorcycles and mopeds wear helmets.

It is improper to instruct on this defense unless there is evidence “regarding the extent to which the injuries to plaintiff would have been diminished had she been wearing a seatbelt. Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial.” *Vredevelde v. Clark*, 244 Neb. 46, 54, 504 N.W.2d 292, 298 (1993).

In *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006), the plaintiff originally alleged that the defendant had been negligent in the design and manufacture of its seatbelt system. Prior to trial, she moved to exclude any evidence or reference to her use of the seatbelt. (Defendant had some evidence that she had her 9-month-old son in her lap, between her body and the seatbelt.) The court denied her motion. She dismissed her allegations regarding the seatbelt and stipulated to a 5-percent reduction in her damages. Defendant offered evidence that she was not wearing her seatbelt properly. The court sustained objections to this evidence. *Id.* at 220-22, 710 N.W.2d at 831-

33. The Supreme Court affirmed. "The evidence of seatbelt misuse was not admissible in regard to the issue of liability or proximate cause. This is true whether the seatbelt was misused or not used at all. The trial court's reduction of the jury's award by 5 percent represented the full mitigation of damages available." *Id.* at 222, 710 N.W.2d at 833.

In a bench trial involving a \$1 million statutory cap on damages to an innocent third party injured during a vehicular pursuit by the police, the court found that the plaintiff sustained \$3 million in damages, applied the 5% reduction to the \$3 million and then reduced the damages to \$1 million. The defendant argued that the 5% reduction should have been applied after the reduction to \$1 million. The Supreme Court affirmed the trial court. *Werner v. County of Platte*, 284 Neb. 899, 924, 926, 824 N.W.2d 38, 60, 61 (2012).

Under Nebraska's comparative negligence statute, "[t]he failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party." *Fickle v. State*, 273 Neb. 990, 1004, 735 N.W.2d 754 (2007). This is discussed at part III of the Comment to NJ12d Civ. 5.04.

CHAPTER 8

LIABILITY OF OWNERS, OCCUPANTS, AND LESSORS OF LAND

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A. TRESPASSER**NJI2d Civ. 8.01****DEFINITION OF TRESPASSER**

A trespasser is a person who enters or remains on someone else's (premises) without the express or implied consent of the person who has [lawful] possession of the (premises).

COMMENT & AUTHORITIES**I. ORGANIZATION OF THIS CHAPTER**

Historically, Nebraska recognized five categories of entrants upon land: trespassers, licensees, invitees (including business visitors), children, and those using land for recreational purposes, with permission and without charge. *Heins v. Webster Cty.*, 250 Neb. 750, 552 N.W.2d

51 (1996), prospectively abolished most of the common-law classifications of licensee and invitee and combined them into one category—"lawful entrants." With a very few exceptions, in causes of action accruing after August 23, 1996, entrants upon the premises of another no longer have the status of licensee or invitee. Most entrants who were formerly classified as licensees or invitees are now classified as lawful entrants. *See generally* NJI2d Civ. 8.25, Comment & Authorities and NJI2d Civ. 8.26, Comment & Authorities.

That said, this chapter is organized as follows:

Trespassers: This instruction, NJI2d Civ. 8.01, and the next, NJI2d Civ. 8.02, deal with trespassers upon the premises of another. They apply when the plaintiff is a trespasser upon the defendant's premises.

Licensees: NJI2d Civ. 8.11 and 8.12 deal with licensees upon the premises of another. They apply in this kind of case: one where the cause of action accrued pre-*Heins*, that is, on or before August 23, 1996 and where the plaintiff was a licensee upon the defendant's premises, and now, over 20 years later, it is unlikely, or, more likely, impossible, that there will be any such cases. However, the licensee instructions may still apply—seem to apply—in this category of case: those involving firefighters who enter land on official business and perhaps other like entrants. *See* part III of the Comment & Authorities of NJI2d Civ. 8.11, under the heading "Firefighters and Like Entrants."

Invitees: NJI2d Civ. 8.21 through 8.24 deal with invitees upon the premises of another. They apply to causes of action that accrued prior to or on the decision date of *Heins* and where the plaintiff was an invitee upon the defendant's premises. This includes entrants who were business visitors. The finer points of pre-*Heins* law regarding invitees may have some value today because the essential elements of a cause of action for invitees and, now, for lawful entrants are the same.

Lawful Entrants: NJI2d Civ. 8.25 through 8.28 deal with lawful entrants upon the premises of another. They apply to causes of action that accrued post-*Heins*, that is, on or after August 23, 1996, and where the plaintiff was a lawful entrant upon the defendant's premises.

Children: NJI2d Civ. 8.51 applies when the litigation involves children on the defendant's premises.

Persons Using Land for Recreational Purposes, with Permission and without Charge: NJI2d Civ. 8.61 applies to causes of action where the plaintiff entered the defendant's premises for recreational purposes, with defendant's permission and without charge.

Ultrahazardous Activities: NJI2d Civ. 8.41 and 8.42 have to do with injury caused by ultrahazardous activities carried on upon the premises.

Suits against State or Local Government: NJI2d Civ. 8.71 and 8.72 apply when state or local government is the defendant.

II. TRESPASSER DEFINED

Post-Heins “[w]e retain a separate classification for trespassers because we conclude that one should not owe a duty to exercise reasonable care to those not lawfully on one’s property.” *Heins v. Webster Cty.*, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996). *Accord* *Herrera v. Fleming Cos.* 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003). This is discussed further at NJI2d Civ. 8.21, Comment.

The following cases and authorities support the definition of trespasser in the above instruction: *Terry v. Metzger*, 241 Neb. 795, 798, 491 N.W.2d 50, 53 (1992); *Bosiljevac v. Ready Mixed Concrete Co.*, 182 Neb. 199, 202–03, 153 N.W.2d 864, 867 (1967) (dictum; Restatement cited with approval); *Malolepszy v. Central Mkt.*, 143 Neb. 356, 361, 9 N.W.2d 474, 477 (1943) (dictum); *Haley v. Deer*, 135 Neb. 459, 462–63, 282 N.W. 389, 392 (1938) (trespasser neither suffered nor invited to enter); Restatement (Second) of Torts § 329 (1965) (trespasser defined); *W. Page Keeton, et al., Prosser and Keeton on the Law of Torts* § 58, at 393 (5th ed. 1984).

III. CASES WHERE THE STATUS OF THE PLAINTIFF IS IN QUESTION

Where there is a jury question as to whether the plaintiff was a trespasser or a lawful entrant, instruct the jury as follows: First, give the jury an instruction on the issues, using NJI2d Civ. 2.01(I)(A) as a model. Second, give the jury an instruction that says:

“You must decide whether, at the time of the (occurrence, accident, fall, et cetera) in question in this case, the plaintiff was a lawful entrant or a trespasser on the defendant’s (premises).”

Third, give the jury the instructions defining trespasser and the one defining lawful entrant. This instruction, NJI2d Civ. 8.01, is the one defining trespasser. NJI2d Civ. 8.25 is the instruction defining lawful entrant. Fourth, give the jury the appropriate effect of findings and burden of proof instructions: give NJI2d Civ. 8.02 for injury to a trespasser and, depending on the particular case, give one, two, or all three of the lawful-entrant instructions: NJI2d Civ. 8.26 (harm on the premises caused by a condition), NJI2d Civ. 8.27 (harm on the premises caused by an activity), and NJI2d Civ. 8.28 (harm on the premises caused by acts of third persons). Fifth, along with these instructions, tell the jury which instructions they must use if they determine that the plaintiff was a trespasser and which they must use if they determine that the plaintiff was a lawful entrant. As always, submit only those issues supported by the pleadings and the evidence.

As noted above, there are a few entrants upon land whom Nebraska law still classifies as licensees, including fire fighters fighting a fire. This is discussed at NJI2d Civ. 8.11, Comment & Authorities. If there is

a jury question as to whether the plaintiff was a trespasser or a licensee or a lawful entrant, then instruct the jury following the model set out just above but add the instruction for licensees that is discussed at NJI2d Civ. 8.11, Comment & Authorities.

IV. TAILORING THE INSTRUCTIONS IN THIS CHAPTER

“Condition”: Many of the instructions in this chapter use the word “condition” to describe the thing that was the proximate cause of the plaintiff’s bodily injury or other damage. More often than not, the nature of the condition involved in the litigation will not be in issue. When that is so, remove the word “condition” from the instructions given to the jury and, in its place, insert a word or phrase identifying the particular condition involved.

“Premises”: Many of the instructions in this chapter contain the word “premises” in parentheses. When it aids clarity, substitute for “premises” either a different word or phrase generally describing the premises, such as “property,” “land,” “building,” “home,” et cetera, or a word or phrase specifically describing the particular premises involved.

V. RECOVERY FOR BODILY INJURY ALONE OR THAT PLUS OTHER DAMAGES?

“Damage” and “Bodily Injury”: One question that arises in connection with the instructions in this chapter is whether plaintiff’s recovery is limited to bodily injury or whether plaintiff may recover for other kinds of damage. Some of the pattern instructions in this chapter use the word “damage” and some use the words “bodily injury.” The Restatement characterizes the extent of defendant’s liability by using either the words “bodily harm” or the words “physical harm.” As used in the Restatement, “bodily harm” is equivalent to “bodily injury;” these instructions use the words “bodily injury.” As used in the Restatement, “physical harm” is equivalent to “damage;” these instructions use the word “damage.” Restatement (Second) of Torts § 7 (1965). These pattern instructions try to use the appropriate words for the situation, based on the following.

The Restatement’s position is that some trespassers may only recover for bodily injury; other trespassers and all lawful entrants (licensees and invitees) may recover for injuries to the person and other kinds of damage. Three of the liability-to-trespassers sections of the Restatement speak of “liability for bodily harm.” Restatement (Second) of Torts §§ 334, 335, and 337 (1965). Two speak of “liability for physical harm.” Restatement (Second) of Torts §§ 336 (activities dangerous to known trespassers) and 339 (artificial conditions highly dangerous to trespassing children) (1965). All of the lawful entrant (licensee and invitee) sections speak of “liability for physical harm.” And the Restatement section on attractive nuisance, which corresponds with NJI2d Civ. 8.51, speaks of “liability for physical harm.”

This limitation may make sense, the idea being that a greater duty is owed to trespassing children and to lawful entrants than is owed to adult trespassers. In any event, one of the instructions in this chapter, NJI2d Civ. 8.02, parenthetically limits plaintiff's recovery to "bodily injury." The use of the words "bodily injury" reflects two things: (1) under the Restatement view recovery by a trespasser may be limited to recovery for injuries to the person; (2) the question is whether and under what circumstances a trespasser may recover for damage, rather than just bodily injury, and the Committee is not sure of the answer. The Committee is sure, however, that the trespasser who proves up under NJI2d Civ. 8.02 may at least recover for bodily injury. The use of parentheses reflects the Committee's uncertainty regarding Nebraska law on the subject.

As a final word of caution, even in the above-discussed instances where the Restatement limits recovery to bodily injury, it questions whether that limitation will stand the test of time. Comment b to Restatement (Second) of Torts § 337 (1965) states:

The few cases in which the situation covered by this Section has arisen have involved artificial conditions with a risk of death or serious bodily harm to the trespasser, and such harm has in fact resulted. No reason is apparent, however, for any limitation of the rule to such cases, and it may reasonably be expected to apply to natural conditions on the land, or to the risk of harm less than death or serious bodily harm, including to the trespasser's property.

NJI2d Civ. 8.02

INJURY TO TRESPASSER—EFFECT OF FINDINGS AND BURDEN OF PROOF

If you find that the plaintiff was a trespasser on the defendant's (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant acted willfully or wantonly, or that the defendant

- a. knew or had reason to know that the plaintiff was on (his, her, its) premises, or from facts within (his, her, its) knowledge should have known that trespassers constantly intruded upon the part of (his, her, its) (premises) in question, and

- b. failed to warn of a hidden danger or peril that (he,

she, it) knew about but that was unknown to and unobservable by the plaintiff in the exercise of reasonable care;

2. That this willful or wanton act or this failure to warn was a proximate cause of some (bodily injury) to the plaintiff; and

3. The nature and extent of that (injury).

COMMENT & AUTHORITIES

I. IN GENERAL

For the most part, the common-law entrant-upon-land classifications of licensee and invitee were prospectively abolished in *Heins v. Webster Cty.*, 250 Neb. 750, 552 N.W.2d 51 (1996). *Heins* combined most of the entrants formerly classified as licensees and all of the entrants formerly categorized as invitees and combined them into one new classification: "lawful entrants." This is discussed at NJI2d Civ. 8.11, Comment & Authorities. The Court went on to state that an occupant of land owes a lawful entrant the duty of reasonable care. "We retain a separate classification for trespassers because we conclude that one should not owe a duty to exercise reasonable care to those not lawfully on one's property." *Heins*, 250 Neb. at 761, 552 N.W.2d at 57. See generally NJI2d Civ. 8.11, Comment & Authorities.

This statement of the occupant's duty to warn trespassers is a combination of the following four things: the rule of *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988) and *Terry v. Metzger*, 241 Neb. 795, 491 N.W.2d 50 (1992); the rule of the Restatement; the Committee's best judgment as to how *Guenther* affects an occupant's duty to a trespasser; and the effect of the definitional instructions at NJI2d Civ. 8.81.

II. TAILORING THIS INSTRUCTION

Use only those parts of this instruction as are appropriate under the pleadings and the evidence. For example, the instruction is written to be used in the situation where there is an issue of fact as to whether or not the plaintiff was a trespasser. If the plaintiff was a trespasser as a matter of law, then the beginning of this instruction should be changed to read as follows:

"The plaintiff was a trespasser on the defendant's (premises). Before the plaintiff can recover against . . ."

For a second example, it could be that there is no jury question regarding whether the defendant's acts caused the occurrence or whether the occurrence caused bodily injury to the plaintiff, and the only jury questions are, first, whether the defendant's acts were willful or wanton or met the failure to warn standard and, second, the nature

and extent of the injury. In that situation, the first subparagraph of the instruction should be rewritten and the second should be removed.

For a third example, in the Committee's view, insofar as the defendant in a premises liability case owes a duty to trespassers, the duty is twofold: (1) a duty not to inflict injury willfully or wantonly; and (2) a duty to warn certain trespassers of certain hidden dangers. It is the Committee's view that the defendant owes to all trespassers (except children; regarding children, *see* the cross-references below, in this Comment & Authorities) the duty not to inflict injury willfully or wantonly. *See* Restatement (Second) of Torts § 333 (1965). This instruction is written to impose that duty. The defendant, however, only owes some trespassers (*i.e.*, known trespassers and constant trespassers) the duty to warn of certain hidden dangers. Restatement (Second) of Torts §§ 334 through 337 (1965). (Regarding known trespassers, *see* Restatement (Second) of Torts § 336 (1965); regarding constant trespassers, *see* Restatement (Second) of Torts § 334 (1965).) On the theory that it is easier to delete from a pattern than to add to it, this instruction is written to include both duties. If only one duty is involved in the case being instructed, the pattern will have to be altered accordingly.

For a fourth example, if the plaintiff has only made one claim against the defendant, the bracketed portion of this instruction—"[on (his, her, its) claim of (here identify claim involved)]"—may not be necessary.

The 1969 version of this work contained two instructions on the duty a possessor owes to a trespasser, one that applied when a condition of the premises caused the injury, NJI 8.02 (1969), and one that applied when an activity being carried on upon the premises caused the injury, NJI 8.03 (1969). In the latter case, if the possessor knew or should have known that the plaintiff was on the premises, he or she had a duty to use reasonable care for the safety of the plaintiff. It is the opinion of the Committee that this distinction is no longer appropriate and that the above instruction states the rule whether the injury is caused by a condition or an activity—"hidden danger or peril" encompasses both activities and conditions.

III. THE IDENTITY OF THE DEFENDANT

A. THE DUTY RUNS WITH DEFENDANT'S POSSESSION OF THE PREMISES

The duty described in this instruction devolves upon defendants "by virtue of their occupation and possession of the premises." *Gubalke v. Estate of Anthes*, 189 Neb. 385, 388, 202 N.W.2d 836, 839 (1972) (citing, *inter alia*, Restatement (Second) of Torts § 333 (1965)). That is to say, this is the duty of the one in possession of the land; it does not seem to be the duty of the owner who is not in possession.

[T]he rights and liabilities arising out of the condition of

land, and activities conducted upon it, have been concerned chiefly with the possession of the land This development has occurred for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place.

W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 57 (5th ed. 1984). *Accord* *Hofferber v. City of Hastings*, 275 Neb. 503, 515, 747 N.W.2d 389, 398–99 (2008) (“[T]he person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place.”) (quoting *Prosser and Keeton*, *supra*).

However, there can be cases where the owner of the land is not the possessor/occupant and yet “is in the best position to discover and control its dangers, and often is responsible for creating them in the first place. There is no reason that this duty should not apply to such an owner as well. And there are many cases that do apply the duty to an owner not in possession. *See* NJI2d 8.26, Comment & Authorities. *See also, e.g.*, *Ginn v. Lamp*, 234 Neb. 198, 201, 450 N.W.2d 388, 390 (1990) (noting that the defendant was alleged to be the “custodial agent” over the land on which plaintiff was injured and holding that, “One who is in complete control over land is under the same duty to protect others from the condition of such land as is the actual possessor.”)

B. WHERE IT IS A QUESTION OF FACT WHETHER THE PARTY SUED IS THE PROPER DEFENDANT

The instruction says: “If you find that the plaintiff was a trespasser on the defendant’s (premises), then before the plaintiff can recover” This statement assumes there is no question that the party sued is the proper defendant. If this is an issue for the jury, then change the beginning of the instruction to read as follows:

“If you find that the plaintiff was a trespasser at the time of the (occurrence), then”

And add the following new subparagraph, placing it first and renumbering those already in the instruction:

“1. That the defendant was in possession of the (premises) at the time in question;”

Or, as discussed in the immediately previous part of this Comment & Authorities,

“1. That the defendant was the (owner, occupant) of the (premises) at the time in question.”

IV. DEFENDANT MUST HAVE ACTED WILLFULLY OR WANTONLY

This instruction states that the defendant must have acted “willfully or wantonly.” (The definitions of “willful” and “wanton” are at NJI2d Civ. 8.81.) Under Nebraska case law regarding trespasser recovery, there is some question as to whether the defendant must have acted both willfully *and* wantonly or must have acted either willfully *or* wantonly. The Committee believes that the latter—willfully *or* wantonly—is the correct standard.

The plaintiff in *Bosiljevac v. Ready Mixed Concrete Co.*, 182 Neb. 199, 203, 153 N.W.2d 864, 867 (1967), was a trespasser. Since he was a trespasser, said the Court, the defendant owed “the duty to refrain from willfully and wantonly injuring him.” *Bosiljevac*, 182 Neb. at 203, 153 N.W.2d at 867. Likewise, in *Terry v. Metzger*, 241 Neb. 795, 798, 491 N.W.2d 50, 53 (1992), the Court said that the defendant’s duty is to refrain from willfully “and” wantonly injuring a trespasser. Later in *Terry*, the Court stated states the following: the requirements for “‘willful *and* wanton’ conduct are well established: ‘In order for an action to be willful *or* wanton . . .’” *Id.* (emphasis added). The Court has written of a duty to avoid “willful *and* wanton” injury and it has written of a duty to avoid “willful *or* wanton” injury. Of those two, it is the opinion of the Committee that “willful *or* wanton” is the correct statement of the duty.

The Committee believes that when the Court uses the concept of “willful” and that of “wanton,” it uses them as shorthand for the duty stated in the Restatement (Second) of Torts. The duty an occupant owes a trespasser is stated in the Restatement with a variety of details. The details in the Restatement all boil down to a duty to refrain from willfully *or* wantonly injuring a trespasser. Restatement (Second) of Torts §§ 334 through 337 (1965).

Special Note: The substance of the rule stated in this Section is often applied by calling the actor’s failure to exercise reasonable care to prevent his activities from causing harm to a known trespasser “wanton” or “willful” misconduct. The words “wanton” or “willful” are also often used to describe conduct which is called in the Restatement of this Subject “conduct in reckless disregard of the safety of others.” Because of the ambiguous use of these words, they are not used in the Restatement of this Subject.

Restatement (Second) of Torts § 336, comment e (1965). (The definitional instruction NJI2d Civ. 8.81 is designed to deal with the problem of the ambiguity of the words “willful” and “wanton.”)

In the context of this duty, the Court has, to some extent, gone back and forth between using “or,” on the one hand, or “and,” on the other. In a different context, the Court has recognized a general confusion be-

tween “or” and “and.” *Baker’s Supermkts. v. State*, 248 Neb. 984, 993, 540 N.W.2d 574, 580 (1995) (“or,” which is disjunctive, and “and,” which is conjunctive, are so frequently interchanged that, in statutory construction, “or” may be read as “and” where strict reading leads to unreasonable result and defeats intent of statute). The Committee believes that the common-law equivalent of this has happened here.

The Committee believes that the disjunctive “or” is the proper conjunction: the defendant must have acted willfully or wantonly, one or the other. The pre-*Heins* licensee cases required two definitions, one for willful and one for wanton. The pattern trespasser instruction drafted by the Committee requires the same two definitions. NJI2d Civ. 8.81 contains those two definitions: one for willful and one for wanton.

As the pattern instructions use these words, including the definitional instruction at NJI2d Civ. 8.81, the proper conjunction for the trespasser cases seems to be “or,” the conjunction used in the pattern instruction. Perhaps if the pattern instruction (at NJI2d Civ. 8.81) defined “willful” and “wanton” differently than it does, the duty towards a trespasser would be defined as requiring both willfulness and wantonness.

In sum, as the words are used in these patterns, the Committee believes that “or” is the proper conjunction for the first clause of subparagraph number one of the pattern instruction. The Committee may be in error: Perhaps “and” is the proper conjunction. If so, the pattern will have to be changed.

V. CROSS REFERENCES

This pattern instruction, NJI2d Civ. 8.02, is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty a possessor of land owes to trespassers. For the Issues and the rest of the Effect of Findings parts, use NJI2d Civ. 2.01 as a model.

Children: Under Nebraska law, it seems that there are two theories under which a defendant may be liable in a premises liability case for damages suffered by a trespasser. The difference has to do with whether the trespasser is a child. This instruction, NJI2d Civ. 8.02, deals with the trespasser who is not a child. NJI2d Civ. 8.51 deals with the trespasser who is a child and the “attractive nuisance” doctrine.

Premises: Regarding the use of the word “premises,” see NJI2d Civ. 8.01, Comment & Authorities.

Injury: Use of the words “bodily injury” and “injury,” is discussed at NJI2d Civ. 8.01, Comment & Authorities. As explained there, recovery may or may not be limited to bodily injury, and it may be that the word “damage” or “harm” should be substituted.

“Willful” and “Wanton”: These terms are defined at NJI2d Civ. 8.81. The use of “willful or wanton” is discussed above, in this Comment & Authorities.

Had Reason to Know: “Had reason to know” and “should have known” are defined at NJI2d Civ. 8.84.

Affirmative defenses are discussed at NJI2d Civ. 2.20A through 2.02D.

B. LICENSEE

NJI2d Civ. 8.11

DEFINITION OF LICENSEE

No such instruction is called for except perhaps as discussed in the Comment & Authorities below.

COMMENT & AUTHORITIES

I. THE CATEGORY LICENSEE HAS BEEN ALMOST ENTIRELY ELIMINATED

Historically Nebraska recognized five categories of entrants upon land: trespassers, licensees, invitees (including business visitors), children, and those using land for recreational purposes, with permission and without charge. *Heins v. Webster Cty.*, 250 Neb. 750, 552 N.W.2d 51 (1996) prospectively abolished the common-law classifications of invitee (but retaining the separate classification for certain persons invited to use premises for recreational purposes; see NJI2d Civ. 8.61) and licensee (except perhaps for firefighters fighting on official business and other like entrants upon land; see the discussion below in Part III of this Comment & Authorities, under the heading “Firefighters and Like Entrants”) and combined them into one category: “lawful entrants.” *Accord* *Herrera v. Fleming Cos.* 265 Neb. 118, 122, 655 N.W.2d 378, 381–82 (2003). After *Heins*, then, almost all invitees and licensees are classified as “lawful entrants.”

With the possible exception of continued application of the Firefighters Rule (discussed below in this Comment & Authorities under the heading “Firefighters and Like Entrants”), licensee instructions do not apply to post-*Heins* cases; they do not apply to causes of action that accrue after August 23, 1996. With some editing, they may apply to causes of action by firefighters entering premises to fight fire and other like entrants. They do apply to causes of action that accrued on or before August 23, 1996. *See also*, NJI2d Civ. 8.01, Comment & Authorities.

And since *Heins* was decided over 20 years ago, it is unlikely (and

likely impossible) that licensee cases other than those fitting under the Firefighters Rule exist today.

Regarding the Firefighters Rule, *see* part III of this Comment & Authorities, under the heading “Firefighters and Like Entrants.”

II. LICENSEE INSTRUCTION

In the event that there are still pre-*Heins* causes of action where licensee instruction is needed, including (and likely limited to) cases involving firefighters entering premises to fight fires and perhaps other like entrants, *see* part I of this Comment & Authorities and NJ12d Civ 8.11, Comment & Authorities, part III, under the heading “Firefighters and Like Entrants.” This section of this Comment & Authorities, part II, contains the licensee instructions that appeared in editions of this book preceding the 2004 edition. The instructions appear here exactly as they did there. Since pre-*Heins* cases are well over 20 years old, the Comments and Authorities have been deleted. For whatever it may be worth, the instruction itself is in this footnote.¹

III. FIREFIGHTERS AND LIKE ENTRANTS

It seems that instruction on a licensee’s burden of proof still applies in cases of injury to a firefighter who entered the premises to fight a fire. *Syracuse Rural Fire Dist. v. Pletan*, 254 Neb. 393, 401, 577 N.W.2d 527, 532 (1998). Nebraska follows a rule of law called the Firefighters Rule. “‘[A] fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or

8.11

¹Former NJ12d Civ. 8.11 and 8.12:

A. DEFINITION OF A LICENSEE (FORMER NJ12d Civ. 8.11)

A licensee is a person who is not a business visitor but who is privileged to enter or remain on another’s (premises) by the [express or implied] consent of its possessor.

B. DAMAGE TO LICENSEE—EFFECT OF FINDINGS AND BURDEN OF PROOF (FORMER NJ12d Civ. 8.12)

1. Instruction

If you find that the plaintiff was a licensee on the defendant’s (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by

the greater weight of the evidence, each and all of the following:

1. That the defendant acted willfully or wantonly, or that the defendant failed to warn the plaintiff of a hidden danger or peril that was

a. known to the defendant and

b. unknown to and unobservable by the plaintiff in the exercise of reasonable care;

2. That this willful or wanton act or this failure to warn was a proximate cause of some damage to the plaintiff; and

3. The nature and extent of that damage.

wanton negligence or a designed injury, except in certain cases where there may be a duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.' " *Syracuse Rural Fire Dist.*, 254 Neb. at 401, 577 N.W.2d at 532. It seems that this not only applies to firefighters fighting a fire, but also firefighters on the premises on other official business. The cases that say that this applies to a firefighter fighting a fire all involve firefighters doing just that and that is not so much a limitation, but rather a statement of a fact in the case at hand.

The change in the law wrought by *Heins* applies to causes of action that accrue after the judgment date in *Heins*, that is, after August 23, 1996. *Syracuse Rural Fire Dist.*, was decided two years after *Heins*, but the cause of action accrued over a year before the decision in *Heins*. It is possible that *Syracuse Rural Fire Dist.* is simply applying pre-*Heins* law to a pre-*Heins* cause of action. It is also possible—and, on reading *Syracuse Rural Fire Dist.*, it seems likely—that the Firefighters' Rule still governs injury to firefighters who enter premises on official business. If that is the case, then, with some editing, this instruction expresses the effect of findings and burden of proof.

As noted above, firefighters may still be licensees (or, at least, their burden of proof the same as that which used to apply to licensees). The Firefighters Rule may still apply to causes of action that accrue after *Heins*. Except in certain cases of hidden danger or peril known to the owner or occupant but unknown to or unobservable by a firefighter exercising ordinary care, the duty owed a firefighter who enters premises to fight a fire is that duty that used to be owed to a licensee: the duty to refrain from injuring the fire fighter by willful or wanton negligence or a designed injury. So long as firefighters enter the premises in the exercise of their official duty, this is true even if they are expressly invited to do so. *Nared v. School Dist. of Omaha*, 191 Neb. 376, 380, 215 N.W.2d 115, 118 (1974). The Court has also stated that the duty is the same even if the owner or occupant started the fire intentionally (in this case, under a permit) or negligently. *Syracuse Rural Fire Dist.*, 254 Neb. at 403, 577 N.W.2d at 534. See also the following pre-*Heins* cases: *Moravec v. Moravec*, 216 Neb. 412, 414–15, 343 N.W.2d 762, 764 (1984); *Wax v. Co-Operative Refinery Ass'n*, 154 Neb. 805, 806–07, 49 N.W.2d 707, 710 (1951); *Fentress v. Co-Operative Refinery Ass'n*, 149 Neb. 355, 357, 31 N.W.2d 225, 227 (1948).

Prior to *Heins*, the Court had also held that the following are also licensees: police officers responding to emergency calls, *Nared v. School Dist. of Omaha*, 191 Neb. 376, 378–79, 215 N.W.2d 115, 118 (1974); and, as a general rule, others who enter as a matter of right, such as inspectors, NJI 8.11 (1969), Authorities. And this may include others who enter the premises as a matter of right.

Regarding a case in which a firefighter or like entrant is the defendant, see the discussion of the Tort Claims Acts. at NJI2d Civ. 8.72.

NJI2d Civ. 8.12**DAMAGE TO LICENSEE—EFFECT OF FINDINGS
AND BURDEN OF PROOF**

No such instruction is called for except as discussed in the Comment & Authorities to NJI2d Civ. 8.11, above.

COMMENT & AUTHORITIES

See NJI2d Civ. 8.11, Comment & Authorities.

C. LAWFUL ENTRANTS**NJI2d Civ. 8.21****DEFINITION OF BUSINESS VISITOR AND INVITEE**

No such instruction is called for except as discussed in the Comment & Authorities below.

COMMENT & AUTHORITIES**I. THE CATEGORY OF INVITEE (INCLUDING BUSINESS VISITOR) HAS BEEN ELIMINATED**

Heins v. Webster Cty., 250 Neb. 750, 552 N.W.2d 51 (1996) prospectively abolished most, if not all, of the common-law classification of licensee and all of the common-law classification of invitee. This is discussed above, at NJI2d Civ. 8.11, Comment & Authorities and at NJI2d Civ. 8.26, Comment & Authorities.

**II. BUSINESS VISITOR AND INVITEE INSTRUCTION FOR PRE-
HEINS CAUSES OF ACTION**

The invitee instructions that appeared in the 2003 edition of this book appear here exactly as they did there. The Comments and Authorities are omitted. *Heins* did away with *most* of the common-law classifications of licensees and all of the common-law classifications of invitees and combined them into a new classification: lawful entrants. Therefore, a separate instruction on business visitors and invitees is not needed. However, this instruction is identical to the instruction for the lawful entrants. (As discussed in the Comment & Authorities to NJI2d Civ. 8.11, instruction on a licensee's burden of proof does still seem to be needed in a case of injury to a firefighter who entered the premises to fight a fire or, it seems, on other official business.)

Since *Heins* was decided over 20 years ago the pre-*Heins* instruc-

tions for business visitors and invitees applicable to before the decision in *Heins* are omitted.

NJI2d Civ. 8.22

DAMAGE TO BUSINESS VISITOR—CONDITION OF PREMISES—EFFECT OF FINDINGS AND BURDEN OF PROOF

The modern version of and authority for this instruction is at NJI2d Civ. 8.26, the instruction regarding damage to a lawful entrant caused by a condition on the premises.

NJI2d Civ. 8.23

DAMAGE TO BUSINESS VISITOR—ACTIVITIES ON PREMISES—EFFECT OF FINDINGS AND BURDEN OF PROOF

The modern version of and authority for this instruction is at NJI2d Civ. 8.27, the instruction regarding damage to a lawful entrant caused by activities on the premises.

NJI2d Civ. 8.24

DAMAGE TO BUSINESS VISITOR—ACTS OF THIRD PERSONS—EFFECT OF FINDINGS AND BURDEN OF PROOF

The modern version of and authority for this instruction is at NJI2d Civ. 8.28, the instruction regarding damage to a lawful entrant caused by a condition on the premises.

NJI2d Civ. 8.25

DEFINITION OF LAWFUL ENTRANT

A lawful entrant is a person who (enters, is allowed to remain, enters or is allowed to remain) on someone else's (premises) with the [express or implied] (consent, invitation) of the possessor of the (premises).

COMMENT & AUTHORITIES

I. APPLICABILITY OF INSTRUCTION

This instruction is appropriate for use in causes of action arising af-

ter August 23, 1996. It is not appropriate for use in causes of action that arose on or before August 23, 1996, and it is unlikely, or likely impossible, that there are any such cases now, over 20 years later. Historically Nebraska recognized five categories of entrants upon land: trespassers, licensees, invitees (including business visitors), children, and those using land for recreational purposes, with permission and without charge. With a few possible exceptions, *Heins v. Webster Cty.*, 250 Neb. 750, 552 N.W.2d 51 (1996) prospectively abolished the common-law classifications of licensee and invitee and combined them into one classification: "lawful entrants." This is discussed at NJI2d Civ. 8.11, Comment & Authorities. After *Heins*, almost all licensees and invitees are classified as "lawful entrants."

II. THE POSSIBILITY THAT THE ABOVE INSTRUCTION IS NOT NEEDED AT ALL

It is possible that in the routine case there is no need for an instruction defining lawful entrants. It will only be needed when there is an issue of fact whether the entrant was a trespasser (*see* NJI2d Civ. 8.01 and 8.02), lawful entrant (*see* NJI2d Civ. 8.26), child, (*see* NJI2d Civ. 8.51), firefighter fighting a fire or, it seems, on other official business and like entrants (*see* NJI2d Civ. 8.11, Comments & Authorities, for a discussion of the Firefighters Rule), or person using the land for recreation with and without charge (*see* NJI2d Civ. 8.61). Mirroring what was just said, if there is no question of fact regarding the status of the lawful entrant, then this instruction is not necessary and, if necessary, the judge can simply instruct the jury on the status and then give the instruction applicable to a an entrant of said status.

Where the classification of the entrant is in question it does seem best, however, to give the jury both the trespasser and the lawful-entrant instructions so that they might have the latter to contrast with the former. Each classification may be better understood when compared with the other. In any event, unless the Court finds that the single instruction approach is a correct one, it seems prudent not to take that chance and, instead, to give instruction defining both trespassers and lawful entrants and to tell the jury that they must find that the plaintiff is one or the other.

III. THE FIRST PARENTHETICAL IN THE INSTRUCTION

This instruction states: "A lawful entrant is a person who (enters, is allowed to remain, enters or is allowed to remain) on someone else's (premises) with the [express or implied] (consent, invitation) of the possessor of the (premises)." One may be a lawful entrant because one was either expressly or impliedly invited to enter. One may be a lawful entrant because one is allowed to remain. The first parenthetical in the instruction is to suggest that, depending on the facts of the case at bar, the trier of fact may have to answer one of three questions. That is, if

the plaintiff's status as a lawful entrant is a fact question, that fact question may present itself as one of three questions: The fact question may be "Did the possessor invite the plaintiff to enter?" The fact question may be "Did the possessor consent to the plaintiff remaining?" Or the fact question may be "Did the possessor either invite the plaintiff to enter or consent to the plaintiff remaining?" The first parenthetical in the instruction invites the user to tailor the instruction to fit to facts of the case at bar, tailor the instruction in light of which of these three questions is the appropriate one on the facts of the case.

IV. THE DEFINITION

This instruction applies to what were formerly categorized as licensees and invitees (including business visitors). The instruction combines the definitions of licensee and invitee. Here are some of the Nebraska cases defining each, though as the law stands today each would be called a "lawful entrant."

Licensee: "A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor." Same quotation: *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 400, 631 N.W.2d 510, 523 (2001) (citing cases); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 801, 553 N.W.2d 143, 146 (1996). *Accord*, e.g., *Reicheneker v. Reicheneker*, 264 Neb. 682, 688, 651 N.W.2d 224, 230 (2002); *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 540-41, 604 N.W.2d 414, 418 (2000); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 834, 572 N.W.2d 356, 359 (1998); *Alexander v. Warehouse*, 253 Neb. 153, 157, 568 N.W.2d 892, 895 (1997); *Olson v. SID No. 177*, 251 Neb. 380, 386, 557 N.W.2d 651, 655 (1997); *McIntosh v. Omaha Pub. Schs.*, 249 Neb. 529, 535, 544 N.W.2d 502, 506 (1996), *overruled on other grounds*, *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2007); *Blackbird v. SDB Invs.*, 249 Neb. 13, 19, 541 N.W.2d 25, 30 (1995); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 414-15, 513 N.W.2d 495, 501-02 (1994); *Wiles v. Metzger*, 238 Neb. 943, 956, 473 N.W.2d 113, 122 (1991); *Kliwer v. Wall Constr. Co.*, 229 Neb. 867, 872, 429 N.W.2d 373, 377 (1988); *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966); *Lindelov v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 8, 115 N.W.2d 776, 781 (1962). *See also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 60 (5th ed. 1984 & Supp. 1988); *Restatement of Torts* § 332 (1934).

Invitee: "An invitee . . . is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for their mutual advantage." *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 801, 553 N.W.2d 143, 146 (1996). *Accord*, e.g., *Lindelov v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 8, 115 N.W.2d 776, 781 (1962). "Business visitors include those who come onto the land for a purpose connected with any purpose, business or otherwise, for which the possessor uses the land." *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d

510, 524 (2001) (citing the Restatement). *Accord*, e.g., *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966). The visitor need not be on "the land for the purposes of the possessor's business at all, if the visit is for the convenience or arises out of the necessities of others who are themselves upon the land for such a purpose." *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d 510, 524 (2001). *Accord* Restatement of Torts § 332 (1934); *Reicheneker v. Reicheneker*, 264 Neb. 682, 688, 651 N.W.2d 224, 230 (2002); *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 400, 631 N.W.2d 510, 523 (2001) (discussion the "economic benefits" test); *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 540-41, 604 N.W.2d 414, 418 (2000); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 834, 572 N.W.2d 356, 359 (1998); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 801, 553 N.W.2d 143, 145 (1996) (defining invitee and licensee and discussing the difference); *McIntosh v. Omaha Pub. Schs.*, 249 Neb. 529, 535-36, 544 N.W.2d 502, 506-07, 107 Ed. Law Rep. 995 (1996), *overruled on other grounds*, *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2007) (defining invitee and licensee and discussing difference) (citing and discussing cases); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 414-15, 513 N.W.2d 495, 501-02 (1994) (discussing difference between invitee and licensee; citing Restatement (Second) of Torts § 332 (1965)); *Kliwer v. Wall Constr. Co.*, 229 Neb. 867, 872, 429 N.W.2d 373, 377 (1988) and most of the cases cited below.

Some of these cases seem to say that an invitee and a business visitor have to be on the premises on account of the business of the owner or occupant of the premises. Were that so, then invitee and business visitor would seem to be largely redundant. Whether that is so or not, other cases show that a social visitor or family member can be a lawful entrant. *See, e.g.*, some of the cases in part V of this Comment & Authorities, immediately below this part.

"[C]onsent that a person may be on another's premises does not by itself make such a person an invitee." *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 802, 553 N.W.2d 143, 146 (1996) (bank knew that after its business hours employees of nearby business parked in bank's parking lot).

On the one hand, express invitation does not by itself create the status of an invitee. *Nared v. Sch. Dist. of Omaha*, 191 Neb. 376, 380, 215 N.W.2d 115, 118 (1974) (public officers, such as police officers, invited on premises in the exercise of their official duty are licensees; *see generally* NJI2d Civ. 8.11, Comment & Authorities, part III, "Firefighters and Like Entrants"), citing Restatement (Second) of Torts § 332 comment b (1965). On the other hand, the invitation "need not be express." *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d 510, 524 (2001) ("An 'invitation,' as a lay person might use the term in ordinary affairs of life, is not required for one to be an invitee as the term is used in the law." "[A]n invitation is *inferred* where there is a common interest or mutual advantage"). Regarding whether one invited onto the premises of another is a licensee or an

invitee, *Roan v. Bruckner*, 180 Neb. 399, 404, 143 N.W.2d 108, 112 (1966), *abrogated on other grounds by Heins, supra*, quoted *Lindelow v. Peter Kiewit Sons', Inc., supra*, as follows: "The real difference is the purpose of the invitation. If the invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If it is an invitation for the convenience, pleasure, or benefit of the person enjoying the privilege it is only a license and the person enjoying the privilege it is only a license and the person receiving it is a licensee." As discussed, today this distinction between the invitee and the licensee is largely irrelevant because all invitees and almost all licensees (*see* the Firefighters Rule at NJI2d 8.11, Comment & Authorities, for exceptions) are now classified as lawful entrants.

Though the intent of the visitor surely is relevant, the intent of the visitor does not necessarily determine the visitor's status. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d 510, 524 (2001). "[T]he inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance." *Id.* at 402, 631 N.W.2d at 525. The key is whether in fact the visit inures to the mutual advantage of the possessor of the premises and the visitor onto the premises. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401-03 631 N.W.2d 510, 524-25 (2001).

V. EXAMPLES OF LAWFUL ENTRANTS

Lawful Entrants Based on Pre-Heins Status as Licensees: Most entrants who were classified as licensees are now classified as lawful entrants. Examples of licensees who now are lawful entrants include: *Alexander v. Warehouse*, 253 Neb. 153, 157, 568 N.W.2d 892, 895 (1997) (social guest visiting defendant's apartment); *Wiles v. Metzger*, 238 Neb. 943, 956, 473 N.W.2d 113, 122 (1991) (on this record, repeat visitors classified as licensees); *Olson v. SID No. 177*, 251 Neb. 380, 386, 557 N.W.2d 651, 655 (1997) (social guest); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 801, 553 N.W.2d 143, 145 (1996) (bank knew that after its business hours employees of nearby business parked in bank's parking lot and there was no evidence the bank limited this use; at the least, this was an implied invitation; consent alone does not make one an invitee and here the evidence revealed that the plaintiffs were on the premises solely for their own benefit; therefore, plaintiffs were not invitees, but licensees); *Guenther v. Allgire*, 228 Neb. 425, 428, 422 N.W.2d 782, 785 (1988) (social guest); *Moseman v. L & P Inv. Co.*, 226 Neb. 677, 679, 414 N.W.2d 254, 256 (1987) (social guest); *Casey v. Addison*, 190 Neb. 634, 636, 211 N.W.2d 410, 411 (1973) (mother visiting daughter); *Hackney v. Klintworth*, 182 Neb. 219, 221, 153 N.W.2d 852, 853 (1967) (social guest); *Johnson v. Goodier*, 182 Neb. 172, 173-74, 153 N.W.2d 445, 447 (1967) (social guest); *Presho v. J.M. McDonald Co.*, 181 Neb. 840, 843, 151 N.W.2d 451, 454 (1967) (customers who go outside the area of invitation may be licensees and they may be trespassers; *see* below); *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966); *Von Dollen v. Stulgies*, 177 Neb. 5, 11, 128 N.W.2d 115, 119 (1964) (social guest).

Lawful Entrants Based on Pre-Heins Status as Invitees: Invitees, including business visitors and except for invitees covered by the Recreation Liability Act (see NJI2d Civ. 8.61), are now classified as lawful entrants. Examples of invitees who now are lawful entrants include: *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d 510, 524 (2001) (“Business visitors include those who come onto the land for a purpose connected with any purpose, business or otherwise, for which the possessor uses the land.” The visitor need not be on “the land for the purposes of the possessor’s business at all, if the visit is for the convenience or arises out of the necessities of others who are themselves upon the land for such a purpose.”); *S.I. v. Cutler*, 246 Neb. 739, 740, 523 N.W.2d 242, 243 (1994) (employee of a tenant); *Neff v. Clark*, 219 Neb. 521, 523, 363 N.W.2d 925, 926 (1985) (mail carriers); *Bruyninga v. Nuss*, 216 Neb. 801, 803, 346 N.W.2d 245, 247 (1984) (customer of service station); *May v. Hall Cty. Livestock Imp. Ass’n*, 216 Neb. 476, 344 N.W.2d 629 (1984) (“customer” of horse racing track); *Schwartz v. Selvage*, 203 Neb. 158, 159–60, 277 N.W.2d 681, 683 (1979) (mail carriers); *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 669, 240 N.W.2d 32, 35 (1976) (a person picking up or delivering goods); *Laaker v. Hartman*, 186 Neb. 774, 777, 186 N.W.2d 494, 496 (1971) (one entering the premises as an independent contractor).

Some now-disapproved cases held that a modified duty applied to independent contractors. *E.g.*, *Anderson v. Nashua Corp.*, 246 Neb. 420, 431, 519 N.W.2d 275, 283 (1994). Our Supreme Court has disapproved of those cases and the modified duty. *Downey v. Western Cmty. Coll. Area*, 282 Neb. 970, 980, 808 N.W.2d 839 (2012) (“To the extent that *Plock* and *Anderson* hold that a modified duty applies to independent contractors, we disapprove.”) The duty to an independent contractor is now the same as that owed to any other lawful entrant. The Comment & Authorities to NJI2d Civ. 8.26 discusses the fact that the duty of the owner or occupant cannot be delegated to an independent contractor. Regarding independent contractors, *see also* NJI2d Civ. 8.26 and 6.06, Comment & Authorities.

One may be a guest or an invitee of his or her parents. *Ginn v. Lamp*, 234 Neb. 198, 201, 450 N.W.2d 388, 390 (1990).

Invitees of a tenant derive their right to enter the leased premises from the tenant and their right to proceed against the landlord for injuries resulting from alleged defects on the premises is the same as, and no greater than, the tenant’s right to do so. *Ginn*, 234 Neb. at 202, 450 Neb. at 391.

An invitation need not be express; it may be implied. “[A]n invitation is *inferred* where there is a common interest or mutual advantage.” *Skinner v. Ogallala Public School Dist. No. 1*, 262 Neb. 387, 401, 631 N.W.2d 510, 524 (2001). “An invitation, as a lay person might use the term in ordinary affairs of life, is not required for one to be an invitee as the term is used in the law.” *Id.*

A business visitor who goes outside of the area of invitation loses

the status of business visitor and is a trespasser or a licensee. *Presho v. J.M. McDonald Co.*, *supra*. For customers, that means that they are invitees while in the portion of the store where merchandise is displayed and sold. *Id.* Outside that area, they may still be invitees and, therefore, lawful entrants; they may also be trespassers.

Young v. Eriksen Constr. Co., 250 Neb. 798, 801, 553 N.W.2d 143, 145 (1996) involved a bank that knew that, after the bank's business hours, employees of a nearby business parked in the bank's parking lot. There was no evidence that the bank did anything to limit this after-hours use. This constituted, at the least, an implied invitation to use the lot. The Court held that consent alone is not enough to make a person an invitee. In this case, the evidence revealed that the plaintiffs were on the premises solely for their own benefit. Therefore, the plaintiffs were licensees and not invitees. Either way—whether the plaintiffs were invitees or licensees—under the post-*Heins* rules regarding premises liability, they were lawful entrants. On the one hand, express invitation does not by itself create the status of an invitee. *Nared v. School Dist. of Omaha*, 191 Neb. 376, 378–79, 215 N.W.2d 115, 118 (1974) (express invitation does not by itself create the status of invitee; citing Restatement (Second) of Torts § 332 comment b (1965)).

VI. DUTY OWED TO LAWFUL ENTRANT

Within Nebraska's framework for premises liability, there are generally three categories of duties that a possessor of land owes to those lawfully on the premises. First, the possessor must take reasonable steps to protect that lawful entrant from conditions on the land. Second, the possessor must take reasonable steps to protect the lawful entrant from the possessor's dangerous activities. Finally, the possessor must take reasonable steps to protect the lawful entrant from accidental, negligent, and intentional harmful acts of third parties if those acts are foreseeable.

Richards v. Meeske, 268 Neb. 901, 906–07, 689 N.W.2d 337, 342 (2004) (citations omitted). *Accord* *Sundermann v. Hy-Vee*, 306 Neb. 749, 765, 947 N.W.2d 492, — (2020); *Tolbert v. Jamison*, 281 Neb. 206, 213–14, 794 N.W.2d 877, 883–84 (2011) (quoting *Richards v. Meeske's* statement of the three duties and stating that they are taken from the Restatement (Second) of Torts § 341A (1965)). The first of these duties is the subject of NJI2d Civ. 8.26. The second is the subject of NJI2d Civ. 8.27. The third is the subject of NJI2d Civ. 8.28.

Overall, “Businesses that are open to the public are subject to a duty of reasonable care” *Pittman v. Rivera*, 293 Neb. 569, 574, 879 N.W.2d 12, 16 (2016) (The quotation continues, “regardless of whether they serve alcoholic liquor.” *Id.* at 574–75, 879 N.W.2d at 16).

VII. CROSS REFERENCES

Use of the word “premises” is discussed at NJI2d Civ. 8.01, Comment & Authorities.

An owner's duty to those using land with the owner's permission, without charge, and for recreational purposes, is covered by NJI2d Civ. 8.61.

If there is a jury question as to whether the plaintiff was a trespasser or a lawful entrant, turn to NJI2d Civ. 8.01, Comment & Authorities, which discusses how to instruct the jury in this situation.

Also see generally NJI2d Civ. 8.11, Comment & Authorities.

NJI2d Civ. 8.26

DAMAGE TO LAWFUL ENTRANT—CONDITION OF PREMISES—EFFECT OF FINDINGS AND BURDEN OF PROOF

If you find that the plaintiff was a lawful entrant on the defendant's (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition;
2. That the defendant should have realized that the condition involved an unreasonable risk of harm to such lawful entrants;
3. That the defendant should have expected that lawful entrants such as the plaintiff either:
 - a. would not discover or realize the danger; or
 - b. would fail to protect themselves against the danger;
4. That the defendant failed to use reasonable care to protect lawful entrants against the danger;
5. That the condition was a proximate cause of some damage to the plaintiff; and
6. The nature and extent of that damage.

COMMENT & AUTHORITIES

I. INSTRUCTION APPROVED

- II. APPLICATION OF THIS INSTRUCTION
- III. THE ESSENTIAL ELEMENTS OF PLAINTIFF'S BURDEN OF PROOF STATED
- IV. ESSENTIAL ELEMENTS NO. 1 DISCUSSED
 - A. THE THREE SUBPARTS DISCUSSED
 - B. CONSTRUCTIVE NOTICE
 - C. THE MODE OF OPERATION RULE NOT ADOPTED
- V. ESSENTIAL ELEMENT NO. 2 DISCUSSED
- VI. ESSENTIAL ELEMENT NO. 3 DISCUSSED
 - A. IN GENERAL
 - B. DEFENDANT'S SUPERIOR KNOWLEDGE
 - C. PLAINTIFFS' DUTY TO PROTECT THEMSELVES.
 - D. "SHOULD HAVE EXPECTED"
- VII. ESSENTIAL ELEMENT NO. 4 DISCUSSED
- VIII. ESSENTIAL ELEMENT NO. 5 DISCUSSED
- IX. FACTS THAT, AMONG OTHERS, MAY BE CONSIDERED WHEN DECIDING REASONABLE CARE.
- X. THIS DUTY CANNOT BE DELEGATED TO AN AGENT OF INDEPENDENT CONTRACTOR
- XI. CROSS REFERENCES

I. INSTRUCTION APPROVED

NJI2d Civ. 8.26 is "a correct statement of the law regarding a plaintiff's burden of proof in premises condition liability cases . . ." Warner v. Simmons, 288 Neb. 472, 479, 849 N.W.2d 475, 480 (2014). The appellant (the plaintiff below) argued that subpart 3 of NJI2d Civ. 8.26 is not a correct statement of the law of comparative fault because it "require[s] the plaintiff to disprove her own contributory negligence." *Id.* at 476, 849 N.W.2d at 479. Rather, she argued, that element should be part of defendant's affirmative defense and, therefore, part of defendant's burden of proof. *Id.* "We disagree." *Id.* at 478, 849 N.W.2d at 480. "The third element of NJI2d Civ. 8.26 clarifies the scope of a land possessor's duty by addressing what a land possessor could reasonably expect a lawful entrant to know." *Id.* at 478-79, 849 N.W.2d at 480.).

Edwards v. Hy-Vee, Inc., 294 Neb. 237, 883 N.W.2d 40 (2016) affirms the first five paragraphs of the instruction (and the sixth and final paragraph instructs the jury that they must find the extent of the damages). *Id.* at 240, 883 N.W.2d at 43. The plaintiff in *Edwards* argued for the adoption the "mode-of-operation" rule. "Under th[at] rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise." *Id.* at 243-44, 883 N.W.2d at 45. The court declin[ed] to adopt that approach." *Id.* at 243, 883 N.W.2d 45. This is discussed further in part IV(C) of this Comment & Authorities.

II. APPLICATION OF THIS INSTRUCTION

This instruction applies to causes of action that arise after August 23, 1996. It is not appropriate for use in causes of action that arose on or before August 23, 1996—and at this point there should not be any of the latter. Historically Nebraska recognized five categories of entrants upon land: trespassers, licensees, invitees (including business visitors), children, and those using land for recreational purposes, with permission and without charge. *Heins v. Webster Cty.*, 250 Neb. 750, 552 N.W.2d 51 (1996). Prior to *Heins* there was one effect of findings and burden of proof instruction that applied all licensee cases (see NJI2d Civ. 8.11, Comment & Authorities) and there were three that applied to invitee cases (see NJI2d Civ. 8.21, Comment & Authorities). As of August 23, 1996, *Heins* prospectively “abolished the distinction between invitees and licensees” and put both into a new category: lawful entrants. *Downey v. Western Cmty. Coll. Area*, 282 Neb. 970, 979, 808 N.W.2d 839, 848 (2012). See also, e.g., *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 807, 678 N.W.2d 82, 89 (2004); *Herrera v. Fleming Cos., Inc.*, 265 Neb. 118, 655 N.W.2d 378 (2003). So, Nebraska now recognizes four categories of entrants upon land: trespassers, lawful entrants, children, and those using land for recreational purposes, with permission and without charge. (And there are a few cases regarding firefighters and other like entrants where the licensee instruction must still be used. This discussed at NJI2d Civ. 8.11, Comment & Authorities.)

This instruction applies only in cases where the plaintiff was a lawful entrant. The category of lawful entrant includes those who used to be classified as business visitors and those who used to be classified as licensees. Business visitor is defined at NJI2d Civ. 8.21 and 8.25. Licensee is defined at NJI2d Civ. 8.11 and 8.25. Those two together define lawful entrant. That definition and examples are found at NJI2d Civ. 8.25.

This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty an owner or occupant of premises owes to a lawful entrant for damage caused by a condition on the premises. More often than not, the nature of the condition involved in the litigation will not be in issue. When that is so, and perhaps even when it is not, remove the word “condition” from the instructions given to the jury and, in its place, insert a word or phrase identifying the particular condition involved.

Regarding damage to a lawful entrant caused by *activities* on the premises, see NJI2d Civ. 8.27. Regarding damage to a lawful entrant caused by *the acts of third persons*, see below in part VI(A) of this Comment & Authorities and NJI2d Civ. 8.28. See also *Sundermann v. Hy-Vee*, 306 Neb. 749, 765, 947 N.W.2d 492, — (2020) (“Generally speaking, our premises liability cases fall into one of three categories: (1) those concerning the failure to protect lawful entrant from a dangerous condition on the land, (2) those concerning the failure to protect

lawful entrants from a dangerous *activity* on the land, and (3) those concerning the failure to protect lawful entrants from the *acts of a third person on the land.*" (emphasis added; footnotes omitted)).

As always, use only those paragraphs of the instruction as are in issue.

III. THE ESSENTIAL ELEMENTS OF PLAINTIFF'S BURDEN OF PROOF STATED

The view from above of the duty the owner or occupant of the premises owes to lawful entrants is reasonable care. *E.g.*, *Herrera v. Fleming Cos.* 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003); *A.W. v. Lancaster Cnty Sch. Dist.* 0001, 280 Neb. 205, 215, 784 N.W.2d 907, 916 (2010); *Heins v. Webster Cty.*, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996); *Anderson v. Service Merch. Co.*, 240 Neb. 873, 884–85, 485 N.W.2d 170, 177–78 (1992); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 300, 411 N.W.2d 312, 316 (1987); *Neff v. Clark*, 219 Neb. 521, 523, 363 N.W.2d 925, 926 (1985). *See also, e.g.*, *Sundermann v. Hy-Vee*, 306 Neb. 749, 766, 768, 947 N.W.2d 492, —, — (2020) ("By limiting tort liability to only those conditions which pose an unreasonable risk of harm, the traditional premises liability test balances two competing policies: requiring businesses to exercise reasonable care to maintain the premises in a safe condition and protecting businesses from becoming the insurers of their patron's safety."); *Ginn v. Lamp*, 234 Neb. 198, 201, 450 N.W.2d 388, 390 (1990) (noting that the defendant was alleged to be the "custodial agent" over the land on which plaintiff was injured and holding that, "One who is in complete control over land is under the same duty to protect others from the condition of such land as is the actual possessor.")

This instruction is the view from the ground. "Reasonable care" appears in this burden of proof instruction twice, once in the first of the five essential elements and again in the fourth. This instruction does not define reasonable care. *NJI2d Civ. 8.84* does that. Although *Heins* abolished the distinction between licensees and invitees and ordered a duty of reasonable care toward all legal entrants, the Court did not eliminate the other elements necessary to establish liability of an owner or occupant for an injury caused by a condition on the property. *Herrera*, 265 Neb. at 121–22, 655 N.W.2d at 382.

Beyond reasonable care, this instruction includes the other things that the lawful-entrant plaintiff must prove. For example, the first subpart of this instruction states who can be held liable for harm caused by a condition on the premises: The plaintiff must prove that the defendant is an "owner or occupier" of the premises who either "created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition." Under this premises-liability tort no other party owes the plaintiff a duty. But, of course, "[n]ot every negligence action involving an injury suffered on someone's land

is properly considered a premises liability case.’” *Sundermann v. Hy-Vee*, 306 Neb. 749, 765, 947 N.W.2d 492, — (2020).¹

Under this premises-liability instruction, to prove that the owner or occupant of a premises is liable to a lawful entrant for harm caused by a condition on the premises a plaintiff must prove the following—these are the essential elements of, the prima facie case for, this tort.

- (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.

Hodson v. Taylor, 290 Neb. 348, 363, 860 N.W.2d. 162, 176 (2015) (defining “owner” and “occupier” *id.* at 359, 860 N.W.2d at 173–74; discussing the liability of, among others, a homeowners association, *id.* at 365–66, 860 N.W.2d at 177–78). *Accord* *Sundermann v. Hy-Vee*, 306 Neb. 749, 766, 947 N.W.2d 492, — (2020) (noting that the court has applied this same five-factor rule for over 30 years; stating that “the first three [elements] clarify the scope of the land possessor’s duty to lawful entrants” and that “[t]he first element of the premises liability test may be met by proving any one of its three subparts namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care[,]” *id.* at 767, 947 N.W.2d at —; and, like *Williamson*, immediately below, using the word “possessor” in place of the words “owner or occupier”); *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 319–21, 934 N.W.2d 186, — (2019)); *Edwards v. Hy-Vee*, 294 Neb. 237, 243–44, 883 N.W.2d 43–44, 45 (2016) (affirming the first four essential-elements of this instruction; the fifth and final element is the familiar call for “[t]he nature and extent of that damage,” *id.* at 240, 883 N.W.2d at 45.); *Downey v. Western Cmty. Coll. Area*, 282 Neb. 970, 978, 808 N.W.2d 839 (2012); *Connelly v. City of Omaha*, 284 Neb. 131, 140–41, 816 N.W.2d 742, 753–54 (2012); *Hofferber v. City of Hastings*, 275 Neb. 503,

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¹For example, if someone built a deck on the premises and negligently anchored the railing and a lawful entrant leaned on the railing, it collapsed, and the lawful entrant, was injured, then the owner or occupant

would only be liable if the he or she had built the deck or had actual or constructive knowledge of the condition. Absent at least one of those three things, a negligence action might lie against the contractor. That would be a pure negligence case, and not a premises liability case.

516, 747 N.W.2d 389, 399 (2008); *Range v. Abbott Sports Complex*, 269 Neb. 281, 285–86, 691 N.W.2d 525, 529 (2005); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 807, 678 N.W.2d 82, 89 (2004); *Herrera* 265 Neb. at 122, 655 N.W.2d at 382; *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 307–08, 5236 N.W.2d 436, 438 (1995) (approving N.J.I.2d Civ. 8.82, the predecessor to this instruction). *See also* N.J.I.2d Civ. 8.21 (discussing lawful entrants).

See also the Restatement of Torts. “Nebraska law in this area is in accord with the Restatement (Second) of Torts § 343A (1965).” *Bruyninga v. Nuss*, 216 Neb. 801, 803, 346 N.W.2d 245, 248 (1984) (referencing N.J.I.2d Civ. 8.22, which is the predecessor to this instruction; citing cases). It is also in accord with the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012). *Warner v. Simmons*, 288 Neb. 472, 479, 849 N.W.2d 475, 480 (2014) (referencing N.J.I.2d Civ. 8.22, the predecessor to this instruction, and stating that the instruction “follows the Restatement (Second) . . . [and] is consistent with the Restatement (Third)” *See generally*, W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 61 (5th ed. 1984).

And see many of the cases cited below in the discussion of each of the individual elements.

IV. ESSENTIAL ELEMENT NO. 1 DISCUSSED

A. THE THREE SUBPARTS DISCUSSED

The first essential element of the plaintiff’s burden of proof begins by stating the class of potential defendants: This premises liability tort applies only when the defendant is an owner or occupier of the premises. Other potential parties may be liable under some other tort. As noted and footnoted, above, “[n]ot every negligence action involving an injury suffered on someone’s land is properly considered a premises liability case.” *Sundermann v. Hy-Vee*, 306 Neb. 749, 765, 947 N.W.2d 492, — (2020).

This element of the burden of proof states is that it “may be met by proving any one of its three subparts namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care[.]” *Sundermann v. Hy-Vee*, 306 Neb. 749, 767, 947 N.W.2d 492, — (2020). This part of the burden is self-explanatory.

The first of the three disjunctive subparts—“(1) that the owner or occupant created the condition”—is just another fact like so many others that requires evidence of what the defendant did or failed to do. In *Havlicek v. Desai*, for example, the Court found a hazardous condition created by a failure to act.

The defendant in this case was under an affirmative obliga-

tion to light his business premises in such a manner as to make the stairway visible to the plaintiff Thus, when the defendant failed to provide adequate lighting, he created the hazardous condition that proximately caused the plaintiff's injuries. Because the defendant created the hazardous condition, the plaintiff did not have to bring forth evidence as to the defendant's actual or constructive knowledge of the hazardous condition. If there were some reasonable explanation as to why there were no lights on that night, it was incumbent upon the defendant to produce that evidence as part of his defense.

Havlicek v. Desai, 225 Neb. 222, 228, 403 N.W.2d 386, 390 (1987). *See also* Edwards v. Hy-Vee, 294 Neb. 237, 240–42 883 N.W.2d 40, 43–44 (2016).

The second subpart of this first element of the burden of proof—that the owner or occupant “knew of the condition”—again requires evidence of a fact, the fact that the owner or occupant had knowledge of a different particular fact (*i.e.*, the condition).

And the third—“by exercise of reasonable care [the owner or occupant] would have discovered the condition” is self-evident but for the definition of reasonable care. Reasonable care is defined at NJI2d Civ. 8.82, which is a companion to this instruction and should be given along with it.

B. CONSTRUCTIVE NOTICE

“In order for a defendant to have constructive notice of a condition [see subparts 1 and 4 of these essential elements] the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it.” Same quotation: Edwards v. Hy-Vee, 294 Neb. 237, 242–43, 883 N.W.2d 40, 45 (2016) (“Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have.” *Id.* at 242, 883 N.W.2d at 45.); Range v. Abbott Sports Complex, 269 Neb. 281, 286, 691 N.W.2d 525, 529 (2005); Cloonan v. Food-4-Less of 30th and Weber, Inc., 247 Neb. 677, 682, 529 N.W.2d 759, 763 (1995). *Accord, e.g.*, Chelberg v. Guitars & Cadillacs, 253 Neb. 830, 835–36, 572 N.W.2d 356, 360–61 (1998) (containing a fact-based discussion of actual knowledge, constructive knowledge, and creation of condition).

C. THE MODE OF OPERATION RULE NOT ADOPTED

In *Edwards v. Hy-Vee* the plaintiff argued for the application of the mode-of-operation rule, under which “the plaintiff is not required to prove that the owner or occupant had actual or constructive notice if the proprietor could reasonable anticipate the hazardous condition would regularly arise.” Edwards v. Hy-Vee, 294 Neb. 237, 243–44, 883

N.W.2d 43–44, 45 (2016). Plaintiff argued that the regularity with which the condition occurs substitutes for the need to prove “the existence of a dangerous condition and notice of a dangerous condition.” In other words, a plaintiff who could prove that the condition regularly occurred on the premises would no longer have to prove these two things about the condition at the time of the event under litigation: that it existed and that the owner or occupant had actual or constructive knowledge it existed. The court “decline[d] to adopt the approach.” *Id.* at 243, 883 N.W.2d at 45. “[T]he owner of a business is not an insurer of a patron’s safety. [And that] rule tends to make the owner just that.” *Id.*

V. ESSENTIAL ELEMENT NO. 2 DISCUSSED

The second essential element is, “(2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor.” Regarding this element the court

ha[s] generally drawn a distinction between conditions which present ordinary or common risks, and those which present unreasonable risks. By limiting tort liability to only those conditions which pose an unreasonable risk of harm, the traditional premises liability test balances two competing policies: requiring businesses to exercise reasonable care to maintain the premises in a safe condition and protecting businesses from becoming the insurers of their patrons’ safety.

Sundermann v. Hy-Vee, 306 Neb. 749, 768, 947 N.W.2d 492, — (2020) (footnotes omitted).

So, what is an “unreasonable” versus an “ordinary or common” risk?

There is no fixed rule for determining when a risk of harm is unreasonable. But the plain meaning of the term suggests a uniquely or unacceptably high risk of harm—something more than the usual risks commonly encountered. In some premises liability cases, we have approved of defining the phrase “unreasonable risk of harm” to mean “a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.” This is an appropriate definition

Sundermann, 306 Neb. at 768, 947 N.W.2d at — ‘[T]he term “unreasonable risk of harm” means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.’ This instruction was approved in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964).” *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 105–06, 306 N.W.2d 580, 582 (1981) (paragraph break omitted).

The distinction between proof that the defendant did not exercise reasonable care, on the one hand, and that the care the defendant did

exercise was unreasonable, on the other hand, is difficult to find. The difference is not in the burden of proof. In the first case, the defendant can rebut the plaintiff's evidence that the defendant did not exercise reasonable care and in the second case the defendant can rebut plaintiff's evidence that the care the defendant did use was unreasonable. Both seem to be the traditional reasonable-person standard: Considering all of the circumstances of the case, what would a reasonable person do (or not do)? And this is the definition from this instruction's companion instruction at NJI2d Civ. 8.83: "The term 'unreasonable risk of harm' means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue." NJI2d Civ. 8.83 should be given along with this. (*See also* Sundermann, *id.*, (stating that "an unreasonable risk of harm [is] a risk that was unacceptably high and which a reasonable person would not allow to continue.")).

VI. ESSENTIAL ELEMENT NO. 3 DISCUSSED

A. IN GENERAL

1. The Open and Obvious Rule's General Application

The third essential element—"(3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger"—"clarifies the scope of what a land possessor could reasonably expect a lawful entrant to know." *Warner v. Simmons*, 288 Neb. 472, 478–79, 849 N.W.2d 475, 480 (2014).

Generally speaking, a land possessor is not liable to a lawful entrant on the land unless the possessor has or should have had superior knowledge of the dangerous condition. Consequently, even where a dangerous condition exists, a premises owner will not be liable unless the premises owner should have expected that a lawful visitor such as the plaintiff either would not discover or realize the danger or would fail to protect himself or herself against the danger.

Generally, when a dangerous condition is open and obvious, the owner or occupier is not liable in negligence for harm caused by the condition. The rationale behind this general rule is that the open and obvious nature of the condition gives caution so that the risk of harm is considered slight, since reasonable people will avoid open and obvious risks.

Under the open and obvious doctrine, a possessor of land is not liable to invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to the invitee, *unless* the possessor should anticipate the harm despite such knowledge or obviousness. A condition on the land is considered open and obvious when the risk is apparent to and

of the type that would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment.

Sundermann v. Hy-Vee, 306 Neb. 749, 770–71, 947 N.W.2d 492, — (2020) (emphasis added; footnotes omitted). *Accord*, various parts, e.g., *Hodson v. Taylor*, 290 Neb. 348, 366–67, 860 N.W.2d. 162, 178 (2015); *Connelly v. City of Omaha*, 284 Neb. 131, 142, 816 N.W.2d 742, 744 (2012); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 814, 678 N.W.2d 82, 93 (2004) (quoting *Tichenor v. Lohaus*, 212 Neb. 218, 222, 322 N.W.2d 629, 632 (1982) and citing Restatement (Second) of Torts § 343A (1965)); *Topil v. Hub Hall Co.*, 230 Neb. 151, 155, 430 N.W.2d 306, 309 (1988); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 300, 411 N.W.2d 312, 316 (1987); *Bruyninga v. Nuss*, 216 Neb. 801, 803, 346 N.W.2d 245, 248 (1984); *Heck v. American Comty. Stores*, 198 Neb. 619, 623, 254 N.W.2d 410, 412 (1977); *Hansen v. First Westside Bank*, 182 Neb. 664, 666, 156 N.W.2d 790, 792 (1968) (citing cases); *Zrust v. Spencer Foods, Inc.*, 667 F.2d 760, 764–65 (8th Cir.1982). *See also Bruyninga*, above (“Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law, if he fails to use reasonable care to avoid injury.”) (citing *Tichenor*, above (same quotation)).

As noted above, “reasonable care on the part of the possessor does not ordinarily require precautions, or even warning, against dangers which are known or obvious to the invitee.” *Bruyninga*, 216 Neb. at, 803, 346 N.W.2d at 248 (citing Restatement (Second) of Torts § 343A Cmt. e (Am. Law Inst. 1965)). “The open or obvious nature of a dangerous condition in or on a possessor’s land does not automatically relieve the possessor from liability for injury resulting from the dangerous condition.” *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 853, 438 N.W.2d 485, 491 (1989). *Accord*, e.g., *Sundermann v. Hy-Vee*, 306 Neb. 749, 772, 947 N.W.2d 492, — (2020). There are two related caveats to this general rule, which are stated in this third element of the burden of proof.

2. A Danger Known to the Lawful Entrant where the Owner or Occupant should Anticipate the Harm Despite such Knowledge

First, “Under the open and obvious doctrine, a possessor of land is not liable to his or her invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless* the possessor should anticipate the harm despite such knowledge or obviousness.” *Hodson v. Taylor*, 290 Neb. 348, 367, 860 N.W.2d 162, 178 (2015) (emphasis added) (“[R]eason to expect harm to the visitor from known or obvious dangers may arise.” “*Id.* at 855, 438 N.W.2d at 492 (quoting Restatement (Second) of Torts § 343A cmt f (Am. Law Inst. 1965)). *Accord* *John v. OO (Infinity) S Dev. Co.*, 234 Neb. 190, 196, 450 N.W.2d 199, 203 (1990) (holding that the landlord “should have expected that its tenants would fail to protect themselves from the danger of the steps”).

3. Conditions Created by Third Parties

Second, this same “unless” exception applies when the open and obvious condition was created by a third party. “It is true that it is not necessary to prove that an owner or operator of premises who created a hazardous condition had actual or constructive knowledge of its existence. However, such proof, as well as proof that the owner or operator of the premises had a reasonable opportunity to correct the condition, is necessary where the hazard was created by a third person.” *Johannes v. McNeil Real Estate Fund VIII, Ltd.*, 225 Neb. 283, 287–88, 404 N.W.2d 424, 428 (1987)).

This is so even with regard to intentional acts of a third party. *Knoll v. Bd. of Regent*, 258 Neb. 1, 5, 601 N.W.2d 757, 762 (1999) (stating that if a lawful entrant foresees intentionally harmful acts by a third party, that “does not obviate the [lawful entrant’s] expectation that the landowner will exercise reasonable care in providing protection.” *Ellis v. Far-Mar-Co, Inc.*, 215 Neb. 736, 740–41, 340 N.W.2d 423, 426–27 (1983) (citing, among other authorities, Restatement (Second) of Torts § 343A comment f (1965)); *Corbin v. Mann’s Int’l Meat Specialties, Inc.*, 214 Neb. 222, 223–26, 333 N.W.2d 668, 669–70 (1983). *Accord in part Hodson*, 290 Neb. at 367, 368–69, 860 N.W.2d at 178, 179–80.

And it is true for criminal acts. *See* NJI2d Civ. 8.28 and 8.31.

On a related point, *Ellis v. Far-Mar-Co, Inc.*, is a case where the plaintiff was aware of certain risks and dangers, but unaware of others.

In the instant case the appellant [plaintiff] was an acknowledged expert in the operation of the industrial device which was the instrument of his injuries. However, it was not a malfunction or a defect in the machine which caused his injuries; it was a failure on the part of the operator of that machine to look before he began his enterprise. Appellant was well aware of the dangers inherent in the instrumentality, but not necessarily aware of the dangers inherent in [the instrumentality’s] agents.”

....

... Comment f to § 343A [of the Restatement (Second) of Torts] states: “There are, however, cases in which the possessor of land can and should anticipate that the dangerous conditions will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the pos-

essor has reason to expect that the invitee will nevertheless suffer physical harm.”

.....

The issue of plaintiff's knowledge of existing dangers and his duty to protect himself are covered by other instructions on proximate cause, assumption of risk, and contributory negligence.

Ellis v. Far-Mar-Co, Inc., 215 Neb. 736, 740–41, 340 N.W.2d 423, 426–27 (1983) (first quoting *Crotty v. Reading Industries, Inc.*, 237 Pa. Super. 1, 345 A.2d 259 (1975); second quoting Restatement (Second) of Torts § 343A comment f (1965)). *Accord* *Carnes v. Weesner*, 229 Neb. 641, 649, 428 N.W.2d 493, 498–99 (1988); *Corbin v. Mann's Intern. Meat Specialties, Inc.*, 214 Neb. 222, 223–26, 333 N.W.2d 668, 669–70 (1983). *Accord in part* *Hodson*, 290 Neb. at 367, 368–69, 860 N.W.2d at 178, 179–80.

Aguallo held that “[a]lthough [the trial court] determined that the danger was open and obvious, it did not decide whether the City should have anticipated that persons, such as [plaintiff], would fail to protect themselves despite the open and obvious risk. Our case law requires this analysis.” *Aguallo*, 267 Neb. at 814, 678 N.W.2d at 94.

B. DEFENDANTS' SUPERIOR KNOWLEDGE

In a number of cases, including *Sundermann* in the lengthy quotation in part VI(A)(1), above, the Court has said that defendant's liability is predicated on the defendant's *superior knowledge* of the danger to which the plaintiff is subjected. They also state, however, that the owner or occupant must have had knowledge *or* should have realized that the lawful entrants would not protect himself or herself from the danger. In other words, even if the plaintiff and the defendant had equal knowledge of the danger, the defendant can still be liable if the defendant, in the exercise of reasonable care, should have realized that the plaintiff would fail to protect himself or herself from the danger. In addition to *Sundermann*, which states in the first paragraph quoted above that the land possessor is not liable to a lawful entrant unless the possessor had or should have had “superior knowledge” of the condition and states in the third paragraph that the possessor can be liable if he or should have anticipated that the lawful entrant, with knowledge of the condition still would not protect himself or herself from the condition, *see also, e.g.*, *Hodson v. Taylor*, 290 Neb. 348, 363, 860 N.W.2d 162, 176 (2015) (stating in one paragraph “that a land possessor is not liable to a lawful entrant unless the land possessor had or should have had “superior knowledge” of the dangerous condition on the land,” after having said in the preceding paragraph that “owners or occupiers have breached their duty if they know, or by exercise of reasonable care should have realized, that a condition on their land would create a risk

from which visitors would fail to protect themselves.”) (quoting, in the first quotation, *Warner v. Simmons*, 288 Neb. 472, 478, 849 N.W.2d 475, 480 (2014)); *Blose v. Mactier*, 252 Neb. 333, 339–40, 562 N.W.2d 363, 368–369 (1997).

More to the point, *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995) states that “a plaintiff may recover even where the plaintiff has *knowledge comparable* to that of the defendant, where the dangerous condition is of an open and obvious nature, and where the possessor should expect that the invitee will fail to protect herself from the hazard.” *Id.* at 396, 247 N.W.2d at 199 (emphasis added).

Hamernick also makes it clear that the disjunctive “or” is the appropriate conjunction for separating part 3(a) from part 3(b) of this pattern instruction. *Richardson v. Ames Ave. Corp.*, 247 Neb. 128, 132, 525 N.W.2d 212, 216 (1995); *Widga v. Sandell*, 236 Neb. 798, 802, 464 N.W.2d 155, 158 (1991); *Kliewer v. Wall Const. Co.*, 229 Neb. 867, 875, 429 N.W.2d 373, 378 (1988).

C. PLAINTIFFS’ DUTY TO PROTECT THEMSELVES

“The issues of plaintiff’s knowledge of existing dangers and his duty to protect himself are covered by other instructions on proximate cause, assumption of risk, and contributory negligence.” *Ellis v. Far-Mar-Co, Inc.*, 215 Neb. 736, 742, 340 N.W.2d 423, 427 (1983). *See also* Restatement (Second) of Torts § 343A cmt. f at 220 (Am. Law Inst. 1965).

D. “SHOULD HAVE EXPECTED”

NJI2d Civ. 8.84 defines “should have expected” and various synonyms. It is a companion to this instruction and should be given along with it.

VII. ESSENTIAL ELEMENT NO. 4 DISCUSSED

The fourth essential element of the plaintiff’s burden of proof—“(4) that the owner or occupier failed to use reasonable care to protect the lawful entrant against the danger”—again, as in element number 1, calls for reasonable care. And, again, reasonable care is defined in NJI2d Civ. 8.82, which is a companion to this instruction and should be given along with it.

VIII. ESSENTIAL ELEMENT NO. 5 DISCUSSED

The fifth essential element is the familiar instruction that the jury must find proximate cause and damage. Regarding plaintiff’s damages, *see generally* chapter 4 and, regarding personal-injury damages, *see particularly* NJI2d Civ. 4.00-4.13.

IX. FACTS THAT, AMONG OTHERS, MAY BE CONSIDERED WHEN DECIDING REASONABLE CARE

Our Supreme Court has listed seven factors that are among those

that may be considered when evaluating reasonable care on the part of the owner or occupant of the premises, regarding conditions on the premises.

We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. *Among the factors to be considered* in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

Heins v. Webster Cty., 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996) (emphasis added). *Accord Downey v. Western Cmty. Coll. Area*, 282 Neb. 970, 978, 982, 808 N.W.2d 839, 847–48 (2012); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 807, 811–12, 678 N.W.2d 82, 89 (2004); *Herrera v. Fleming Cos.* 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003).

Note that this list is not exclusive. *Heins* listed these seven as “[a]mong the factors to be considered.” *Heins*, 250 Neb. at 761, 552 N.W.2d at 57. *Accord Herrera*, 265 Neb. at 122, 655 N.W.2d at 382 (“[a]mong the factors to be considered”).

The relevant factors are to be weighed by the trier of fact, not the trier of law. That is, “it is for the fact finder to determine, on the facts of each individual case, whether or not such factors establish a breach of the duty of reasonable care.” *Heins*, 250 Neb. at 761, 552 N.W.2d at 57. *See also Sundermann v. Hy-Vee*, 306 Neb. 749, 766, 947 N.W.2d 492, — (2020); *Herrera v. Fleming Cos.* 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003).

While these factors are not to be part of the instructions to the jury, they are among factors that can be argued to the jury.

X. THIS DUTY CANNOT BE DELEGATED TO AN AGENT OR INDEPENDENT CONTRACTOR

This duty is nondelegable. “A business possessor’s duty to use reasonable care for invitees on the premises is a nondelegable duty. A business possessor of real estate cannot shift the duty of reasonable care for the premises to an agent or independent contractor employed to maintain all or part of the premises under the possessor’s control.”

Prochaska v. Douglas Cty., 260 Neb. 642, 646, 619 N.W.2d 437, 441 (2000). *Accord* Anderson v. Service Merch. Co., 240 Neb. 873, 884–85, 485 N.W.2d 170, 177–78 (1992).

This is sometimes called “the safe place to work exception.” It “relates to the physical condition of the premises, not the manner in which the [independent contractor’s] work is done.” *Gaytan v. Wal-Mart*, 289 Neb. 49, 65, 853 N.W.2d 181, 197 (2014). “[T]he fact that the owner does not retain sufficient control of the work so as to become liable for injuries to employees of an independent contractor does not mean that the owner is relieved of its nondelegable duty to provide a safe place to work for employees of independent contractors.” *Gaytan*, 289 Neb. at 66; 853 N.W.2d at 197. The owner of the premises only has a duty to provide a safe place for an independent contractor to work “when the owner maintains possession and control of the premises,” and that duty “is to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance.” *Gaytan*, 289 Neb. at 66–67, 853 N.W.2d at 198 (paragraph break and internal quotation marks omitted; citing cases). Regarding the manner in which the work is done, rather than the condition of the premises, *see* NJI2d Civ. 6.06, Comment & Authorities, above.

Heins changed the rules regarding invitees who are independent contractors. “After *Heins*, [decided in 1996,] whether a possessor of land has breached a duty to use reasonable care to protect lawful visitors is determined under the same test for both licensees and invitees, which includes independent contractors.” *Downey v. Western Cmty. Coll. Area*, 282 Neb. 970, 979, 808 N.W.2d 839, 848 (2012). In other words, an independent contractor is a lawful entrant.

However, as a general rule “a possessor of property is not liable for injury to an independent contractor’s employee caused by a dangerous condition that arose out of the contractor’s work, as distinguished from a condition of the property or a structure on the property.” *Downey*, *supra*. This general rule and its exceptions are discussed, and additional authorities are cited, above at NJI2d Civ. 6.06, Comment & Authorities. *See also* NJI2d Civ. 8.24, Definition of Lawful Entrant.

“To the extent that [prior cases] hold that a modified duty applies to independent contractors, we disapprove.” *Downey*, 282 Neb. at 980, 808 N.W.2d at 848.

XI. CROSS REFERENCES

Issues and Effect of Findings: This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty one in possession of premises owes to a lawful entrant upon the land, for damage caused by a condition on the premises. For the Issues and the rest of the Effect of Findings parts, use NJI2d Civ. 2.01 as a model. Where the possessor’s li-

ability is based on activities on the premises, *see* NJI2d Civ. 8.27. Where the possessor's liability is based on acts committed by third persons, *see* NJI2d Civ. 8.28.

Status of Defendant: Regarding the status of the defendant, that is, must the defendant be in possession of or occupying the premises, *see* NJI2d Civ. 8.02.

Discovered or Realized: Regarding the use of the words "would have discovered" and "should have realized," "would discover" and "should realize" are the words used in the Restatement, Restatement (Second) of Torts § 343(b) (1965) and quoted in *May v. Hall Cty. Livestock Imp. Ass'n*, 216 Neb. 476, 344 N.W.2d 629 (1984); *Syas v. Nebraska Methodist Hosp. Found.*, 209 Neb. 201, 307 N.W.2d 112 (1981). The Committee considers them to be the equivalent of "should have known," the use of which is explained in NJI2d Civ. 8.84. Regarding substituting "should have known" in their place, *see* the Authorities to NJI2d Civ. 8.32.

Condition: Regarding this instruction's use of the word "condition," *see* NJI2d Civ. 8.01, Comment & Authorities, under the heading Organization of this Chapter.

Damage or Bodily Injury: Regarding using the words "damage" or "bodily injury," *see* NJI2d Civ. 8.01, Comment & Authorities.

Firefighters Rule: The licensee instruction still applies to firefighters and like entrants who enter the premises on official business. *See* NJI2d Civ. 8.11.

Homeowners Association: Regarding the liability of a homeowners association, *see* *Hodson v. Taylor*, 290 Neb. 348, 365–66, 860 N.W.2d. 162, 177 (2015).

Premises: Regarding this instruction's use of the word "premises," *see* NJI2d Civ. 8.01, Comment & Authorities, under the heading Organization of this Chapter.

Reasonable Care: As noted above, reasonable care is defined at NJI2d Civ. 8.82, which is a companion to this instruction and should be given along with it.

Should have Expected: As noted above, NJI2d Civ. 8.84 defines "should have expected" and various synonyms. It is a companion to this instruction and should be given along with it.

Unreasonable Risk of Harm: "Unreasonable risk of harm" is defined at part V of this Comment & Authorities and the instruction is at NJI2d Civ. 8.83, which is a companion to this instruction and should be given along with it.

NJ12d Civ. 8.27

DAMAGE TO LAWFUL ENTRANT—ACTIVITIES ON PREMISES—EFFECT OF FINDINGS AND BURDEN OF PROOF

If you find that the plaintiff was a lawful entrant on the defendant's (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

That the defendant, in carrying on an activity on (his, her, its) (premises), failed to use reasonable care for the safety of business visitors;

That the defendant should have expected that lawful entrants such as the plaintiff either:

- a. would not discover or realize the danger; or
- b. would fail to protect themselves against danger;

That this failure to use reasonable care was a proximate cause of some damage to the plaintiff; and

The nature and extent of that damage.

COMMENT & AUTHORITIES

This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty a possessor of premises owes to a lawful entrant as regards damage caused by activities on the premises. Regarding the history, application, supporting authorities for, and use of this instruction, *see* NJ12d Civ. 8.26. In addition to the authorities cited there, *see particularly* Restatement (Second) of Torts § 341 A (1965). "Lawful entrant" is defined at NJ12d Civ. 8.25. Where the possessor's liability is based on conditions on the premises or on the acts of third persons, *see* NJ12d Civ. 8.26 and 8.28, respectively.

Regarding the use of the words "should have expected," the Committee considers that to be the equivalent of "should have known," the use of which is explained in NJ12d Civ. 8.84 and the Comment & Authorities thereto. "Should expect" are the words used in this instruction because they are the words used in the Restatement section cited above. Regarding substituting "should have known" in its place, *see* the Authorities to NJ12d Civ. 8.32.

NJI2d Civ. 8.28**DAMAGE TO LAWFUL ENTRANT—ACTS OF THIRD PERSONS—EFFECT OF FINDINGS AND BURDEN OF PROOF**

If you find that the plaintiff was a lawful entrant on the defendant's (premises), then before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant knew or, by the exercise of reasonable care, could have discovered that a third person was engaging in, or was about to engage in an accidental, a negligent, or an intentionally harmful act;
2. That the defendant failed to use reasonable care to protect lawful entrants against the danger;
3. That this failure to discover the act or to protect the lawful entrants was a proximate cause of some damage to the plaintiff; and
4. The nature and extent of that damage.

COMMENT & AUTHORITIES

This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty a possessor of premises owes to a lawful entrant as regards damage caused by the accidental, negligent, or intentionally harmful acts of third persons. For the Issues and the rest of the Effect of Findings parts, use NJI2d Civ. 2.01 as a model. Where the possessor's liability is based on conditions on the premises or on activities carried on the premises, *see* NJI2d Civ. 8.26 and 8.27, respectively.

Superseding or intervening cause is discussed at NJI2d Civ. 3.43. The subject of acts of nonparty third persons as a proximate cause of the damages under litigation is discussed at NJI2d Civ. 3.44.

Regarding the words "by the exercise of reasonable care, could have discovered," *see* NJI2d Civ. 8.84.

Regarding a lawful entrant's knowledge of the acts of the third persons, *see* the Comment to NJI2d Civ. 8.22.

"The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it

out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm."

Pittman v. Rivera, 293 Neb. 569, 574, 879 N.W.2d 12, 16 (2016) (quoting *Schroer v. Synowiedki*, 231 Neb. 168, 173–74, 435 N.W.2d 875, 879 (1989) (emphasis omitted)).

For comment on this instruction and authorities supporting this instruction, see Restatement (Second) of Torts § 341A (1965); NJI2d Civ. 8.26, Comment & Authorities; *Pittman*, *supra* (regarding a patron of a bar who intentionally ran over another in the parking lot; particularly discussing duty and foreseeability); *Richards v. Meeske*, 268 Neb. 901, 911, 689 N.W.2d 337, 345 (2004); *Knoll v. Bd. of Regent*, 258 Neb. 1, 4–5, 601 N.W.2d 757, 761 (1999) (third-party acts may be accidental and need not be criminal); *Gans v. Parkview Plaza P'ship*, 253 Neb. 373, 378, 571 N.W.2d 261, 265 (1997) (landlord's duty to protect those allowed to be on property—here a tenant—against foreseeable criminal acts of third persons), *overruled in part, on other grounds, by Knoll, supra*; *Mahlin v. Goc*, 252 Neb. 238, 242–43, 561 N.W.2d 220, 223–24 (1997) (liable for criminal acts of third persons only if knew or should have known such acts "going to occur"); *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 193–96, 556 N.W.2d 23, 27–28 (1996) (third-party acts may be accidental, negligent, or intentionally harmful), *overruled in part, on other grounds, by Knoll, supra*; *S.I. v. Cutler*, 246 Neb. 739, 742–43, 523 N.W.2d 242, 244–45 (1994) (criminal acts of third persons); *Erichsen v. No-Frills Supermks. of Omaha, Inc.*, 246 Neb. 238, 518 N.W.2d 116 (1994) (criminal acts of third persons); *Schroer v. Synowiedki, supra*; *Johannes v. McNeil Real Estate Fund VIII, Ltd.*, 225 Neb. 283, 287–88, 404 N.W.2d 424, 428 (1987); *Vice v. Darm Corp.*, 224 Neb. 1, 4, 395 N.W.2d 524, 526 (1986) (citing cases); Restatement (Second) of Torts § 344 (1965). And see NJI2d Civ. 8.25, Comment & Authorities.

The *Vice* case deals with the liability of "the proprietor of a place of business" for injuries suffered by business visitors "caused to them by the accidental, negligent, or intentionally harmful acts of third persons." *Vice, supra* (quoting *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982), and citing the Restatement (Second) of Torts § 344 (1965) and *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946)). The proprietor is liable if "by the exercise of reasonable care [the proprietor] could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm." *Vice, supra* (quoting *Harvey, supra*).

A plaintiff suing the owner or operator of premises regarding a hazard created by a third person must prove that the owner or operator had actual or constructive knowledge of the existence of the hazard and a reasonable opportunity to correct it. *Johannes*, 225 Neb. at 287–88, 404 N.W.2d at 428.

“Whether a business proprietor is liable for the adverse actions of a third party against an invitee depends primarily upon whether those actions were reasonably foreseeable to the proprietor.” *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 650, 573 N.W.2d 739, 745 (1998), *overruled in part, on other grounds, by Knoll, supra*.

The *Vice* case says that the defendant’s duty is to protect “‘members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.’” *Vice v. Darm Corp.*, 224 Neb. at 4, 395 N.W.2d at 526 (quoted more fully above). Section 344 of the Restatement (Second) of Torts, *supra*, says that the defendant’s duty is to give an “adequate warning” to business visitors or “otherwise to protect them.” This instruction says only that the defendant must “use reasonable care to protect business visitors against the danger”: it does not use the word “warning.” Failure to use reasonable care to protect a business visitor is inclusive of the concept of warning: warning is one way of exercising reasonable care to protect such a person.

The owner of the property is liable for the criminal acts of a third person only when the owner knew or should have known such acts were going to occur. *Doe v. Gunny’s Ltd. P’ship*, 256 Neb. 653, 659, 593 N.W.2d 284, 289–90 (1999); *Gans v. Parkview Plaza P’ship*, 253 Neb. 373, 378, 571 N.W.2d 261, 265 (1997) (landlord’s liability to tenant), *overruled in part, on other grounds, by Knoll, supra*; *Mahlin v. Goc*, 252 Neb. 238, 242–43, 561 N.W.2d 220, 223–24 (1997). The owner or occupant’s liability for the criminal acts of third persons is also discussed at N.J.2d Civ. 8.26, Comment & Authorities and 8.31, Comment.

The prior act need not involve the same suspect, need not involve the same type of crime, and need not have occurred on the same premises, and one prior incident may be enough. *Knoll*, 258 Neb. at 8, 601 N.W.2d at 764 (citing cases); *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 652, 573 N.W.2d 739, 746 (1998), *overruled in part, on other grounds, by Knoll, supra*; *Gans v. Parkview Plaza P’ship*, 253 Neb. 373, 382–83, 571 N.W.2d 261, 268 (1997), *overruled in part, on other grounds, by Knoll, supra*.

“[I]t is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability. . . . [T]he circumstances to be considered must have a direct relationship to the harm incurred.” *Gans v. Parkview Plaza P’ship*, 253 Neb. 373, 382–83, 571 N.W.2d 261, 268 (1997), *overruled in part, on other grounds, by Knoll, supra*. Accord *Knoll*, 258 Neb. at 8, 601 N.W.2d at 764.

“[T]he law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen.” *Gans*, 253 Neb. at 384, 571 N.W.2d at 269, *overruled in part, on other grounds, by Knoll, supra*. Was this crime “foreseeable” at this location?

The Court has “never decided whether this duty extends to protecting a child lawfully on the possessor’s land from the negligent parenting decisions of the child’s parents.” *Richards v. Meeske*, 268 Neb. 901, 911, 689 N.W.2d 337, 345 (2004). In *Richards*, the Court discusses this idea a bit, but finds it imprudent to answer the question at that stage of the litigation.

Note that as to both duty and proximate cause foreseeability is a question of fact. NJI2d Civ. 3.02, Comment.

See also NJI2d Civ. 8.31, Comment & Authorities.

D. LEASED PREMISES

NJI2d Civ. 8.31

LIABILITY OF LESSOR OF REAL PROPERTY— CONCEALMENT OF OR FAILURE TO DISCLOSE CONDITION OF PREMISES—EFFECT OF FINDINGS AND BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify the claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That there was a condition on the (premises) that involved an unreasonable risk of harm to persons on the (premises);
2. That the plaintiff was the lessee or someone on the (premises) with the consent of the lessee [or a sublessee];
3. That the defendant knew or had reason to know of this condition and realized or should have realized the risk involved;
4. That the defendant concealed or failed to disclose the condition to the lessee;
5. That the lessee did not know or have reason to know of the condition or the risk involved;
6. That the defendant had reason to expect that the lessee would not discover the condition or realize the risk;

7. That the condition was a proximate cause of some damage to the plaintiff [after the lessee had taken possession of the (premises)]; and

8. The nature and extent of that damage.

COMMENT

I. IN GENERAL

With reference to a single-family unit, the law may be summarized as follows: "As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property." It is well settled in Nebraska common law that to hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover.

Tolbert v. Jamison, 281 Neb. 206, 215, 794 N.W.2d 877, 885 (2011) (citations omitted). *Accord Benard v. McCowall, LLC*, 298 Neb. 398, 407, 904 N.W.2d 679, 687 (2017).

It is also true "that '[i]n the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them.'" *Benard*, 298 Neb. at 407, 904 N.W.2d at 687. In such a case, liability of the landlord "is dependent on the terms of the agreement." *Benard*, 298 Neb. at 408, 904 N.W.2d at 688 ("'Since the duty arises out of the existence of the contract . . . , the contract defines the duty.'" *Id.*, quoting Restatement (Second) of Torts § 357, comment d at 242 (1965).

With that general rule in mind, this is the Burden of Proof instruction regarding the duty owed by the lessor of a premises to a lessee, someone on the premises with the consent of the lessee, or a sublessee. This is discussed below in this part of this Comment & Authorities. For the Issues and Effect of Findings parts, use NJI2d Civ. 2.01 as a model. This instruction is not appropriate where the damage in question happened on a part of the leasehold reserved for the common use of the tenants. In that case, see NJI2d Civ. 8.32. If the property leased is to be used for recreational purposes, see NJI2d Civ. 8.61. And if the property leased is personal property, rather than real property, see NJI2d Civ. 11.01.

Use only those paragraphs of the instruction as are in issue. See the Comment to NJI2d Civ. 8.02 for examples of how this instruction

can be rewritten when it is necessary to drop various of its subparagraphs.

Regarding the word "condition," *see* NJI2d Civ. 8.01, Comment & Authorities. *See also* NJI2d Civ. 8.26, Comment & Authorities. Regarding the word "premises," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the words "had reason to know," "should have realized," and "had reason to expect," *see* the Authorities, below, *and see* NJI2d Civ. 8.84. Regarding the words "unreasonable risk of harm," *see* NJI2d Civ. 8.83. Regarding the word "damage," *see* NJI2d Civ. 8.01, Comment & Authorities.

In order for the rule stated in this Section [of the Restatement] to apply, it is not enough that the dangerous condition of the land is one which might be discovered by a reasonable inspection of the premises. The lessor is under no duty to his lessee, or to any other person entering the land, to make such an inspection, except where the premises are leased for a purpose involving the admission of the public, as stated in § 359 [*see* NJI2d Civ. 8.33], and as stated in § 360, [*see* NJI2d Civ. 8.32.]

Restatement (Second) of Torts § 358 comment b (1965).

This instruction applies to the lessor's liability for damage caused by his or her concealment or failure to disclose a condition that is on the leased premises and that involves an unreasonable risk of harm to those on the premises. As a general statement, the duty expressed in this instruction runs to lessees and their guests, *see, e.g.* *Ginn v. Lamp*, 234 Neb. 198, 202, 450 Neb. 388, 391 (1990) (" '[G]uests and invitees of the tenant derive their right to enter upon the premises leased through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.' " *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966)) (quoting *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 275 N.W. 288 (1937)), *id.* at 202, 450 N.W.2d at 391; stating that one may be a guest or an invitee of his or her parents. *Ginn*, 234 Neb. at 201, 450 N.W.2d at 390), except when the part of the premises involved is reserved for the common use of lessees and their guests (in which case, *see* NJI2d Civ. 8.32) and except when the premises are leased for a purpose involving admission of the public. If the purpose of the lease involved the admission of the public, then the lessor owes one of two different duties: one applies on premises leased for a purpose involving admission of the public for recreational purposes, free of charge (in which case, *see* NJI2d Civ. 8.61); and the other applies on premises leased for all other purposes involving admission of the public (in which case, *see* NJI2d Civ. 8.33).

This instruction and NJI2d Civ. 8.32, NJI2d Civ. 8.33, and NJI2d Civ. 8.61 are written to be used singly and when there is no question as to whether the area involved was reserved for common use or the

premises were leased for a purpose involving the admission of the public. If there is such a fact question, then the instructions will have to be adapted accordingly. Adaptation of these instructions will require adding an introductory "If you find" clause. For example, if NJI2d Civ. 8.33 is to be given, but not NJI2d Civ. 8.61, then the following may be added to the beginning of NJI2d Civ. 8.33:

If NJI2d Civ. 8.33 and NJI2d Civ. 8.61 are to be given, a situation that, in the opinion of the Committee, rarely, if ever, will arise because of the frequency with which this issue will be admitted or decided as a matter of law, then the following may be added to the beginning of NJI2d Civ. 8.33:

"If you find that the purpose of the lease involved the admission of the public, then you must decide whether or not the public was to be admitted both free of charge and for recreational purposes. If the public was to be admitted other than free of charge for recreational purposes, then before the plaintiff can recover. . . ."

And then delete the first paragraph of NJI2d Civ. 8.61 and delete the first part of the second paragraph (up to "by the greater weight of the evidence") and substitute the following:

"On the other hand, if you find that the purpose of the lease involved the admission of the public both free of charge and for recreational purposes, then before the plaintiff can recover (he, she) must prove. . . ."

The rule of NJI2d Civ. 8.31 applies when the defendant is the landlord and the plaintiff is the lessee, someone on the premises with the consent of the lessee, or a sublessee. Restatement (Second) of Torts § 358 (1965). " '[G]uests and invitees of the tenant derive their right to enter upon the premises leased, through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.' " *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966), *abrogated on other grounds by Heins v. Webster Cnty*, 250 Neb. 750, 552 N.W.2d 51 (1996) (quoting *Van Avery v. Platte Valley Land & Inv. Co.*, 133 Neb. 314, 321, 275 N.W. 288, 292 (1937)).

In some places, this instruction uses the word "plaintiff" and, in others, it uses the word "lessee." This instruction is drafted to be used where the plaintiff and the lessee are not the same person. In a case where the plaintiff and the lessee are the same person, then just use one or the other of these words or substitute some other designation, such as the name of the person involved.

This instruction also assumes that the defendant is the lessor and that the "lessee" is in fact the lessee. If the status of either one is in question, then the beginning of the instruction will have to be rewritten.

For example, if the emphasis is on the status of the "lessee," an introductory clause such as the following may be added:

"If you find that (lessee) (leased, rented, et cetera) the (premises) from the defendant, then"

If the emphasis is on the defendant's status, an introductory clause such as the following may be added:

"If you find that the defendant (leased, rented, et cetera) the (premises) to (lessee), then"

Alternatively, it might be better to add the issue as a new subparagraph number 1, as follows:

"1. That the defendant (leased, rented, et cetera) the (premises) to (lessee);"

Or the answer may lie in variations of these approaches.

An owner's duty to those using land with the owner's permission, without charge, and for recreational purposes, is discussed at NJI2d Civ. 8.61.

See the Comment & Authorities to NJI2d Civ. 8.01, 8.02, 8.11, 8.21, and 8.25.

See NJI2d Civ. 4.40 for a discussion of the damages recoverable by a lessor when a tenant abandons the leased property. See NJI2d Civ. 4.70 for a discussion of the landlord's duty to mitigate damages following a tenant's abandonment of the leased property.

II. OPEN AND OBVIOUS DEFECTS

In the opinion of the Committee, the problem of the open and obvious defect is an aspect of either contributory negligence, in which case NJI2d Civ. 2.02A applies, or assumption of the risk, in which case NJI2d Civ. 2.02B applies. *Roan v. Bruckner*, 180 Neb. 399, 402-03, 143 N.W.2d 108, 111 (1966) (tenant assumes risk of obvious dangers), *abrogated on other grounds by Heins v. Webster Cnty*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 304, 298 N.W.2d 773, 775 (1980); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 63, at 436 (5th ed. 1984) (landlord has no duty to disclose conditions open and obvious to tenant). For cross references to similar situations, see the Comment to NJI2d Civ. 11.01.

III. A LANDLORD'S DUTY TO PROTECT A TENANT AGAINST THE CRIMINAL ACTS OF THIRD PERSONS

"[A] landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person." *Gans v. Parkview Plaza P'ship*, 253

Neb. 373, 378, 571 N.W.2d 261, 265 (1997) (citing cases), *overruled in part, on other grounds*, by Knoll v. Bd. of Regent, 258 Neb. 1, 601 N.W.2d 757 (1999). *Accord* Doe v. Gunny's Ltd. P'ship, 256 Neb. 653, 659, 593 N.W.2d 284, 289 (1999). The key here is whether the criminal acts in question were foreseeable, that is, whether the landlord knew or should have known such acts were going to occur. *Doe v. Gunny's Ltd. P'ship*, 256 Neb. at 659, 593 N.W.2d at 289–90; *Gans*, 253 Neb. at 378, 571 N.W.2d at 265, *overruled in part, on other grounds*, by Knoll, *supra*. See also K.S.R. v. Novak and Sons, Inc., 225 Neb. 498, 500–01, 406 N.W.2d 636, 638–39 (1987), *overruled in part, on other grounds*, by Knoll, *supra*.

In this regard, see also the discussion of a landowner's liability for the criminal acts of third parties, which is found at NJI2d Civ. 8.28, Comment & Authorities.

IV. THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT

The user of this work should be aware of the Uniform Residential Landlord and Tenant Act, enacted in Nebraska in 1974. Neb. Rev. Stat. § 76-1401, *et seq.* (Reissue 2009). For discussions of this Act's effect on Nebraska landlord-tenant law, see Connquist & Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 Creighton L.Rev. 336 (1975); Uniform Landlord and Tenant Act, 7 B.U.L.A. 430 (1985). See also Mason v. Schumacher, 231 Neb. 929, 439 N.W.2d 61 (1989) (stating that the Act does not alter common law except where expressly does so; strict construction of statutes altering common-law rights; discussing remedies, particularly in context of tenant's abandonment and landlord's conversion of tenant's personal property); Tighe v. Cedar Lawn, Inc., 11 Neb. App. 250, 255–258, 649 N.W.2d 520, 527 (2002) (stating that the Act is designed to ensure that premises are habitable; it does not create any new tort action for damages, it does not change existing tort law in the State).

V. LIABILITY OF ONE WHO LEASES A CHATTEL FOR USE BY ANOTHER

The liability of one who leases a chattel for use by another is discussed in Riggs v. Nickel, 281 Neb. 249, 796 N.W.2d 181 (2011).

AUTHORITIES

This instruction is based on the Restatement (Second) of Torts § 358 (1965). Benard v. McCowall, LLC, 298 Neb. 398, 405, 904 N.W.2d 679, 686 (2018); Krance v. Faeh, 215 Neb. 242, 247, 338 N.W.2d 55, 59 (1983).

[A] landlord has no liability for injuries sustained as a result of dangers existing prior to the lease and which were obvious or which should have been discovered upon reasonable investigation by the tenant. A recognized exception to this rule involved "latent defects," that is, one "which reasonably care-

ful inspection will not reveal; one which could not have been discovered by inspection.' " *Roberts v. Rogers*, [129 Neb. 298, 303, 261 N.W. 354, 357 (1935).] "A lessor's duty with respect to latent defects is only to advise the prospective lessee of any such *known* defects, not to repair them". (Emphasis supplied [in *Krance v. Faeh*].) *Gehrke v. General Theatre Corp.*, [207 Neb. 301, 304-05, 298 N.W.2d 773, 775 (1980)].

This exception is set forth in Restatement (Second) of Torts § 358 at 243 (1965).

Krance, 215 Neb. at 247, 338 N.W.2d at 58-59. "[A] 'should have known' standard with regard to [the landlord's] duty to disclose was erroneous, and the instruction should have been phrased in accordance with the language of the Restatement." *Id.* at 249, 338 N.W.2d at 59.

The landlord does not have a duty to warn tenants of known dangers. *C.S. v. Sophir*, 220 Neb. 51, 53, 368 N.W.2d 444, 446 (1985).

Regarding the foreseeability requirement, *see C.S. v. Sophir*, 220 Neb. at 53-54, 368 N.W.2d at 446-47.

NJI2d Civ. 8.84 and the Authorities thereto discuss the differences among these three standards: "should know," "from facts within (his, her) knowledge should know," and "had reason to know." That discussion is relevant to the second, third, and fourth numbered subparagraphs of this instruction. *Krance v. Faeh*, 215 Neb. 242, 248, 338 N.W.2d 55, 59 (1983) specifically noted and enforced both the fact of the differences and the importance that the jury instructions contain the correct standard. Regarding subparagraph 3's use of the words "should have realized," "realize" is the word used in the Restatement. Restatement (Second) of Torts § 358(1)(b) (1965). The Committee considers this phrase to be the equivalent of "should have known," which is defined in NJI2d Civ. 8.84. (In this regard, however, *see* Restatement (Second) of Torts § 339(b) and comment h (1965); this comment seems to say that, as used in § 339(b), "should realize" is the equivalent of "has reason to know," and is different from "should know.") Regarding subparagraph 5's use of the words "have reason to know," *see* NJI2d Civ. 8.84. Regarding subparagraph 6's use of the words "had reason to expect," "expect" is the word used in the Restatement. Restatement (Second) of Torts § 358(1)(b) (1965). The Committee considers this phrase to be the equivalent of "had reason to know," which is defined in NJI2d Civ. 8.84.

In subparagraph seven of this instruction, the phrase "after the lessee had taken possession of the (premises)" appears in brackets. Subparagraph seven is in the instruction because it is in the Restatement (Second) of Torts § 358 (1965). It is in brackets because it seems that this point will not often be in issue and, when it is not, it will be best to leave this phrase out of the instruction.

NJI2d Civ. 8.32**LIABILITY OF LESSOR OF REAL PROPERTY—
CONDITION OF PART OF PREMISES RESERVED
FOR COMMON USE—EFFECT OF FINDINGS AND
BURDEN OF PROOF**

Before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify the claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff was the lessee or someone on the (premises) with the consent of the lessee [or a sublessee];
2. That the (incident, event, fall, occurrence, et cetera) occurred on part of the (premises) that was retained in the defendant's control and that the lessee was entitled to use;
3. That, at that time and place, there was a condition that involved an unreasonable risk of harm to persons on the (premises);
4. That the defendant knew or, in the exercise of reasonable care, should have known of this condition and the unreasonable risk involved;
5. That the defendant, in the exercise of reasonable care, could have made the condition safe or provided adequate warning;
6. That the defendant failed to use reasonable care to make the condition safe or to provide adequate warning;
7. That the condition was a proximate cause of some damage to the plaintiff; and
8. The nature and extent of that damage.

COMMENT

This is the Burden of Proof instruction regarding the duty owed by the lessor of a premises to either a lessee, someone on the premises with the consent of the lessee, or a sublessee, and for the condition of "common areas," *i.e.*, parts of the premises reserved for use by the tenants generally and their guests. For the Issues and Effect of Findings parts, use NJI2d Civ. 2.01 as a model. Regarding an owner's duty to those using land with the owner's permission, without charge, and for recreational purposes, *see* NJI2d Civ. 8.61. Regarding a landlord's general liability for the condition of the leased premises, *see* NJI2d Civ. 8.31.

This instruction is drafted for the case where neither the status of the defendant, as the landlord, nor the status of the plaintiff, as a lessee, someone on the premises with the consent of the lessee, or a sublessee, is in question. If the status of one or the other is in question, then the beginning of the instruction will have to be rewritten. *See* the Comment to NJI2d Civ. 8.31 for examples of how this may be done.

Regarding situations where more than one of NJI2d Civ. 8.31, NJI2d Civ. 8.32, NJI2d Civ. 8.33, or NJI2d Civ. 8.61 must be given, *see* the Comment to NJI2d Civ. 8.31.

Use only those parts of the instruction as are appropriate under the pleadings and the evidence. *See* the Comment to NJI2d Civ. 8.02. For example, regarding "made the condition safe" or "provided adequate warning," if one of those is in issue, and not the other, change the instruction accordingly.

Defendant contends that in any event it was entitled to a directed verdict in its favor . . . , in that the plaintiff had knowledge or should have had knowledge of the condition comparable to that of the defendant, and thus the defendant could not be guilty of negligence. [The case defendant cites] is distinguishable. Here, plaintiff had no choice but to use the only means available to leave the apartment. As [the tenant's] guest, plaintiff had the right to assume that the landlord would fulfill his contractual duty.

Danner v. Myott Park, Ltd., 209 Neb. 103, 108, 306 N.W.2d 580, 583-84 (1981).

Regarding the word "premises," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the word "condition," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the words "unreasonable risk of harm," *see* NJI2d Civ. 8.83. Regarding the words "should have known," *see* the Authorities, below, and *see* NJI2d Civ. 8.84. Regarding the word "damage," *see* NJI2d Civ. 8.01, Comment & Authorities.

The landlord is not liable to a tenant for injuries sustained in a common area where the danger is inherent and the conditions complained of are open, obvious, and apparent to the injured party. *Esbenshade v. National Life Ins. Co.*, 208 Neb. 216, 222, 303 N.W.2d 272, 275 (1981); *Whitcomb v. State Fed. Sav. and Loan Ass'n*, 190 Neb. 26, 29, 205 N.W.2d 652, 654 (1973); *Good v. Jones*, 184 Neb. 454, 455-56, 168 N.W.2d 520, 522 (1969). In the opinion of the Committee, the problem of the open and obvious defect is an aspect of either contributory negligence, in which NJI2d Civ. 2.02A applies, or assumption of the risk, in which case NJI2d Civ. 2.02B applies. For cross references to similar situations, *see* the Comment to NJI2d Civ. 11.01.

Schwab v. Allou Corp., 177 Neb. 342, 128 N.W.2d 835 (1964) approved an instruction that included the following two paragraphs:

3. The landlord was afforded a reasonable time within which to make the condition safe or to give to its tenants and their visitors adequate warning to enable such persons to avoid harm; and

4. The landlord in the exercise of reasonable care could have made the condition safe. *See also Danner v. Myott Park, Ltd., supra.* Instead of those two separate paragraphs, the above pattern instruction says this: "That the defendant, in the exercise of reasonable care, could have made the condition safe or provided adequate warning." In the opinion of the Committee, this paragraph adequately covers both of the paragraphs from *Schwab v. Allou Corp.* Timing is but one aspect of reasonable care: one of the things that determines what amount of care is reasonable is the amount of time available. As just one aspect of reasonable care, it is not appropriate to single it out and instruct upon it as opposed to other aspects.

Regarding negligent repairs by a lessor or a lessor's liability for physical harm where the he or she has contracted to keep the premises in repair, *see* the Comment to NJI2d Civ. 8.31.

See also the Comment & Authorities to NJI2d Civ. 8.01, 8.02, 8.11, 8.21, and 8.25.

AUTHORITIES

Ginn v. Lamp, 234 Neb. 198, 202, 450 N.W.2d 388, 391 (1990) (citing NJI2d Civ. 8.32); *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 105, 306 N.W.2d 580, 582 (1981); Restatement (Second) of Torts § 360 (1965). *See also* *Esbenshade v. National Life Ins. Co.*, 208 Neb. 216, 303 N.W.2d 272 (1981); *Good v. Jones*, 184 Neb. 454, 168 N.W.2d 520 (1969). This instruction is consistent with the Nebraska statute requiring a landlord to "[k]eep all common areas of the premises in a clean and safe condition." Neb. Rev. Stat. § 76-1419(c) (Reissue 2009). *Accord* *Tolbert v. Jamison*, 281 Neb. 206, 215-15, 794 N.W.2d 877, 885-86 (2011).

The Restatement (Second) of Torts § 360 (1965) reads as follows:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

Regarding the use of the words "should have known" in subparagraph number 4 of this instruction, the Restatement (Second) of Torts § 360 (1965) uses the words "could have discovered." In *Danner*, 209

Neb. at 105, 306 N.W.2d at 582 and Schwab v. Allou Corp., 177 Neb. 342, 350, 128 N.W.2d 835, 842 (1964), the Nebraska Supreme Court approved of the use of the words "should have known." The Committee offers these two comments:

(1) The Committee sees no difference between "known" and "discovered;" even if the court had not used the word "known," the Committee would prefer it for reasons of consistency in instruction.

(2) Nebraska's statement of the law on this point was originally based on the First Restatement of Torts, which used the word "should." The Second Restatement uses the word "could," without any explanation of the change. The Committee is not certain that the drafters of the Second Restatement intended anything by this change, or even that they intended the change.

See also NJI2d Civ. 8.84.

NJI2d Civ. 8.33

LIABILITY OF LESSOR OF REAL PROPERTY— GENERAL INSTRUCTION ON CONDITION OF PREMISES LEASED FOR PURPOSE INVOLVING ADMISSION OF PUBLIC

Before the plaintiff can recover against the defendant [on (his, her, its) claim of (here identify the claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant knew that (tenant) was leasing the (premises) for a purpose that involved the admission of the public;
2. That the plaintiff entered the (premises) for that purpose;
3. That, when (tenant) took possession, there was a condition on the (premises) that involved an unreasonable risk of harm to members of the public;
4. That the defendant knew or in the exercise of reasonable care should have known of this condition and the unreasonable risk involved;
5. That the defendant had reason to expect that (tenant) would admit members of the public (onto, into) the (premises) before (the (premises), it, they) were made safe for the public;
6. That the defendant failed to use reasonable care either to discover the condition or to protect the public from it;

7. That the condition was a proximate cause of some damage to the plaintiff; and

8. The nature and extent of that damage.

COMMENT

This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty a landlord owes when the premises were leased for a purpose that involved the admission of the public, but not when the public is to be admitted free of charge for recreational purposes. Use only those parts of this instruction as are put into issue by the pleadings and the evidence. For the Issues and the rest of the Effect of Findings parts, use NJI2d Civ. 2.01 as a model. Regarding an owner's duty to those using land with the owner's permission, without charge, and for recreational purposes (under the terms of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-729, *et seq.* (Reissue 2016)), *see* NJI2d Civ. 8.61.

Use only those paragraphs of the instruction as are in issue. *See* the Comment to NJI2d Civ. 8.02 for examples of how this instruction can be rewritten when it is necessary to drop various subparagraphs.

This instruction is drafted for the case where neither the status of the defendant as the landlord nor the status of the plaintiff as a lessee, someone on the premises with the consent of the lessee, or a sublessee, is in question. If the status of one or the other is in question, then the beginning of the instruction will have to be rewritten. *See* the Comment to NJI2d Civ. 8.31 for examples of how this may be done.

Regarding the word "premises," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the word "condition," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the words "unreasonable risk of harm," *see* NJI2d Civ. 8.83. Regarding the words "should have known" and "had reason to expect," *see* the Authorities, below, and *see* NJI2d Civ. 8.84. Regarding the word "damage," *see* NJI2d Civ. 8.01, Comment & Authorities.

Where more than one of NJI2d Civ. 8.31, NJI2d Civ. 8.32, NJI2d Civ. 8.33, and NJI2d Civ. 8.61 must be given, *see* the Comment to NJI2d Civ. 8.31.

The Comment to NJI2d Civ. 8.31 discusses the differences among this instruction and NJI2d Civ. 8.31, NJI2d Civ. 8.32, and NJI2d Civ. 8.61. The basic difference in the rule of law expressed here and that expressed in NJI2d Civ. 8.32 is that the condition that is the subject of this instruction must have existed at the time the tenant took possession of the premises.

This instruction applies when the tenant was opening the premises

to large numbers of members of the public. Small numbers will not do. Large numbers need only be contemplated, not realized. Large numbers need not be expected to enter at the same time; two or three at a time is enough.

b. The rule . . . applies to natural conditions of the land, as well as to artificial conditions.

c. The rule applies to any case in which land is leased for a purpose involving the admission of the public. It is not necessary that the members of the public enter, or be expected to enter as paying customers, or that they come on any business purpose of either the lessor or the lessee. The lessor's duty arises when the land is leased for a free public lecture or piano recital, or a free public social gathering. [It is for that reason that the instruction refers to "the public." If it was not contemplated that the tenant would open the premises to a large number of people, then NJI2d Civ. 8.31 should be used. If this is a question of fact, see below.]

d. It is not necessary that the public shall enter, or be expected to enter, in large numbers *at one time*. The rule applies equally where the purpose of the lease involves the admission of the public two or three at a time, as in the case of a . . . doctor's office.

Restatement (Second) of Torts § 359, comments b, c, and d (1965) (emphasis added).

The lessor's liability is limited to those parts of the premises which, under the express or implied terms of the lease, are to be thrown open for the admission of the public. Thus the lessor has no liability under this Section to a customer in a leased restaurant who is injured when he wanders into the kitchen.

Restatement (Second) of Torts § 359, comment f (1965). If this is in issue, then a new subparagraph will have to be inserted, between subparagraphs 7 and 8. That new paragraph can be based on the following:

"8. That, at the time (he, she) suffered this damage, the plaintiff was (on, in) a part of the (premises) that was open to the public."

Regarding negligent repairs by a lessor or a lessor's liability for physical harm where he or she has contracted to keep the premises in repair, see the Comment to NJI2d Civ. 8.31.

The responsibility of the landlord may be affected by the terms of the contract, that is, by the terms of the lease. See the discussion of

Reicheneker v. Seward in the Authorities, below. *See also* *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 304, 298 N.W.2d 773, 775 (1980).

See also the Comment & Authorities to NJI2d Civ. 8.01, 8.02, 8.11, 8.21, 8.25 and 8.31.

For more extensive comments on the subject of this instruction, *see* the comments to Restatement (Second) of Torts § 359 (1965).

AUTHORITIES

Restatement (Second) of Torts § 359 (1965). *Anderson v. Valley Feed Yards, Inc.*, 175 Neb. 719, 725, 123 N.W.2d 839, 843 (1963) cites with approval this same section of the first Restatement. *See also* *Reicheneker v. Seward*, 203 Neb. 68, 71, 277 N.W.2d 539, 542 (1979); *Van Avery v. Platte Valley Land & Inv. Co.*, 133 Neb. 314, 322, 275 N.W. 288, 295-96 (1937).

“Subject to limited exceptions, the general rule is that guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.” The exceptions are: First, whenever the premises are leased for a public purpose and the lessor knows at the time of leasing that a dangerous condition exists which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of the lessee; secondly, whenever the lessor has contracted to keep the premises in good repair and retains control for that purpose.

Reicheneker, 203 Neb. at 71, 277 N.W.2d at 542 (quoting *Sipprell v. Merner Motors*, 164 Neb. 447, 451-52, 82 N.W.2d 648, 652 (1957)).

Regarding the use of the words “should have known” in subparagraph number 4 of this instruction, the Restatement (Second) of Torts § 359 (1965) uses the words “could have discovered.” In *Anderson v. Valley Feed Yards, Inc.*, 175 Neb. 719, 725, 123 N.W.2d 839, 843 (1963), the Nebraska Supreme Court approved the use of the words “should have known.” For comment on this point, *see* the Authorities to NJI2d Civ. 8.32. For the definition of “should have known,” *see* NJI2d Civ. 8.84.

See also the above Comment.

E. ULTRAHAZARDOUS ACTIVITIES**NJI2d Civ. 8.41****ULTRAHAZARDOUS ACTIVITIES—STRICT
LIABILITY**

(Here describe the ultrahazardous activity) is an ultrahazardous activity. Before the plaintiff can recover against the defendant for damages caused by this ultrahazardous activity, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant (describe activity involved);
2. That this (describe activity involved) was a proximate cause of some damage to the plaintiff; and
3. The nature and extent of that damage.

If the plaintiff proves these things by the greater weight of the evidence, then the defendant is liable to the plaintiff no matter how careful (he, she, it) was while (he, she, it) was (describe activity involved).

SPECIAL NOTE

As to whether this instruction is a correct statement of the law in the State of Nebraska, and before giving the instruction, consider this: "[T]he doctrine of strict liability for ultrahazardous activities has not been adopted in Nebraska, but neither has it been repudiated. [And] we decline . . . to rule on [it in this case]." *Anderson v. Nashua Corp.*, 246 Neb. 420, 427, 519 N.W.2d 275, 281 (1994) (insufficient evidence of ultrahazardousness of activity involved herein).

Regarding the doctrine of strict liability, not as applied to ultrahazardous activities in general, but as applied to certain specific kinds of activities, see the Authorities, below.

COMMENT

This is the Burden of Proof part of the Statement of the Case instruction for damages allegedly caused by ultrahazardous activities and suffered by all but certain kinds of trespassers. (Regarding trespassers, see the quotation from the Restatement, below.)

Use only those parts of this instruction as are put in issue by the pleadings and the evidence. For the Issues and Effects of Findings parts of this instruction, use NJI2d Civ. 2.01 as a model. Regarding assump-

tion of the risk and contributory negligence, *see* NJI2d Civ. 8.42 and its Comment.

Restatement (Second) of Torts § 520B (1965) states the following:

A possessor of land is not subject to strict liability to one who intentionally or negligently trespasses on the land for harm done to him by an abnormally dangerous activity that the possessor carries on upon the land, even though the trespasser has no reason to know that the activity is conducted there.

Caveat:

The Institute expresses no opinion as to whether there may not be strict liability to those who trespass accidentally, inadvertently or by an innocent mistake.

In a case where this is an issue, appropriate alterations or new instructions will be necessary.

“There is no strict liability for harm caused by an abnormally dangerous activity if the harm would not have resulted but for the abnormally sensitive character of the plaintiff’s activity.” Restatement (Second) of Torts § 524A (1965).

When is “abnormally dangerous” not “abnormally dangerous?” When it is used not as a term of art (in which case it would be interchangeable with “ultrahazardous”) but as a synonym for “inherently dangerous.” *Anderson v. Nashua Corp.*, 246 Neb. 420, 425–26, 519 N.W.2d 275, 280 (1994).

Prior to February 8, 1992, contributory negligence was by statute a defense to a strict liability action. Neb. Rev. Stat. § 25-1151 (Reissue 1979); *Shipler v. General Motors Corp.*, 271 Neb. 194, 212, 710 N.W.2d 807, 826 (2006). Again by statute, that rule has been changed. For causes of action accruing on or after February 8, 1992, neither contributory nor comparative negligence is a defense to an action in strict liability. *Shipler*, 271 Neb. at 209-20, 710 N.W.2d at 824-31 (interpreting and applying Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 2016)). Therefore, Nebraska’s version of comparative negligence—*see generally*, NJI2d Civ. 5.02-5.05—does not apply to a cause of action in strict liability.

AUTHORITIES

Before using this instruction, *see* the Special Note, above.

For a good general discussion of ultrahazardous activity liability, *see* W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 78, at 550–56 (5th ed. 1984 & Supp. 1988). *See also* Restatement (Second)

of Torts ch. 21 (1965). These authorities have substituted "abnormally dangerous" for "ultrahazardous." ("The choice between these [two] labels is not too important." W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 78, at 555-56 (5th ed. 1984 & Supp. 1988).)

Regarding what constitutes an ultrahazardous activity, see Prosser and Keeton, as cited above, and Restatement (Second) of Torts § 520 (1965). The Restatement says:

Whether the activity is an abnormally dangerous one is to be determined by the court The imposition of strict liability . . . involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury

Id. at comment 1. This is why the instruction states that the defendant's activity was ultrahazardous, giving the jury no choice in the matter.

The factors the court is to consider in determining whether an activity is abnormally dangerous are the following:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1965). See also W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 78 (5th ed. 1984 & Supp. 1988).

The doctrine of strict liability for ultrahazardous activities has . . . been adopted with respect to the use of explosives for blasting, whether the damage is caused by the falling of debris on the plaintiff or the plaintiff's land or by concussion. *Wendt v. Yant Const. Co.*, 125 Neb. 277, 249 N.W. 599 (1933). See also *Bianki v. Greater American Exposition*, 3 Neb. (Unof.) 656, 92 N.W. 615 (1902), where the defendant was held liable under

the theory of negligence per se for casting fireworks about that did not explode in the air, but did later to the plaintiff's damage.

Authorities, NJI 8.41 (1969).

The strict liability instruction was given at the trial of *Krance v. Faeh*, 215 Neb. 242, 249, 338 N.W.2d 55, 59 (1983). The Supreme Court held that giving this instruction in that case was erroneous because "[t]he relationship between the parties was that of lessor-lessee."

The Authorities to NJI 8.41 (1969) included the following:

[Strict liability] has not been accepted as a general proposition in Nebraska for damages resulting from the impounding and release of water, although a similar rule is stated by statute[,] making public power and irrigation districts liable for "breaks, overflow, and seepage." [Neb. Rev. Stat.] § 70-671 [(Reissue 2009)]; *Asche v. Loup River Pub. Power Dist.*, 138 Neb. 890, 296 N.W. 439 (1941); *Schomberg v. Kuther*, 153 Neb. 413, 45 N.W.2d 129 (1950). Since the problems involving water have always received special treatment in Nebraska, separate instructions for them are recommended. *See also* Yeuter, "Diffused Surface Water Law in Nebraska," 41 Neb.L.Rev. 765, and *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

.....

In many jurisdictions a defendant is held liable for damages caused to persons who have been injured by wild animals harbored by the defendant. [W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 76 (5th ed. 1984). Restatement (Second) of Torts §§ 506, et seq. (1965).] To date the Nebraska court has not been presented with the question, since the cases have been pleaded on theories of negligence in the place or manner of keeping the animal. *Crunk v. Glover*, 167 Neb. 816, 95 N.W.2d 135 (1959). In the *Crunk* case a number of cases from other jurisdictions were cited which did hold defendants strictly liable, though they were cited for the proposition that the defendant did not have to be the owner. There is, however, a statute making the owner of a dog liable to any person, other than a trespasser, who is bitten by the dog, or for the loss of domestic animals caused by the dog. [Neb. Rev. Stat. § 54-601 (Reissue 2010).] It does not seem unlikely that the doctrine of strict liability will be applied to the harbinger of wild animals. It would seem strange that a man is strictly liable for his dog's bites but not his bear's.

Authorities, NJI 8.41 (1969) (bracketed materials update original citations to Nebraska Revised Statutes, Prosser, and the Restatement).

"One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting

from the activity, although he has exercised the utmost care to prevent the harm.” Restatement (Second) of Torts § 519(1) (1965). The exceptions and qualifications to this rule are stated *id.* at §§ 520 through 524A.

As noted above, by Nebraska statute, a dog’s owner is strictly liable for certain injuries inflicted by the dog. This strict liability and the relevant statute and discussed in some detail in *Smith v. Meyring Cattle Co.*, 302 Neb. 116, 120–26, 921 N.W.2d 820, 825–28 (2019). This statute does not abrogate the common-law tort action for dog bites. *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996).

In addition, the keeper of a dog can be liable. *Van Kleek v. Farmers Ins. Exch.*, 289 Neb. 730, 738–39, 857 N.W.2d 297, 303–04 (2014) (“In addition to an owner’s liability under [statute] and common-law liability for known vicious propensities, the keeper of a dog can be liable to injured third parties on a negligence theory. Once a person has possession or control of a dog, that person owes a duty of care to prevent unreasonable risks of harm posed by the foreseeable actions of the dog.” (footnote omitted)).

The dog-owner’s landlord, on the other hand, is not strictly liable for injuries inflicted by the dog. *Plowman v. Pratt*, 268 Neb. 466, 469–70, 684 N.W.2d 28, 29–31 (2004) (the landlord must have either leased the premises with actual knowledge of the dangerous propensities of the dog “‘or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power’ ”); *McCullough v. Bozarth*, 232 Neb. 714, 718, 724, 442 N.W.2d 201, 205, 208 (1989).

On the subject of this statute and injuries inflicted by dogs, *see generally* *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993), which discusses the statute, its history, its meaning, and its application.

The liability of the owner of a domestic animal, for injuries caused by his or her animal, but outside the arena of ultrahazardous activities, is discussed in *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997) (citing cases).

In addition to the above, *see* *Fitzpatrick v. US West, Inc.*, 246 Neb. 225, 235–37, 518 N.W.2d 107, 114–15 (1994).

Regarding a plaintiff who was or may have been a trespasser, *see* the Comment, above.

NJI2d Civ. 8.42

ULTRAHAZARDOUS ACTIVITIES—STRICT LIABILITY—ASSUMPTION OF RISK

In connection with the defense of “assumption of risk” the burden

is upon the defendant to prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff knew the defendant was (here describe the ultrahazardous activity and, perhaps, state the place) and that the plaintiff understood the danger;

2. That the plaintiff voluntarily exposed (himself, herself, itself) to that danger[, either by voluntarily or deliberately taking part in the activity or by voluntarily or deliberately bringing (himself, herself, itself) within the area made dangerous by the activity or by intentionally or negligently causing the activity to miscarry]; and

3. That the plaintiff's (injury, damage) occurred as a result of (his, her, its) exposure to that danger.

COMMENT

This instruction is the Burden of Proof part of the assumption of the risk instruction. For the Issues and Effects of Findings parts, use NJI2d Civ. 2.02B as a model.

Regarding the parenthetical offering of a choice between the words "injury" and "damage," see part 4 of the Introduction to Chapter 8.

Use only those parts of this instruction as are put in issue by the pleadings and the evidence.

Prior to February 8, 1992, contributory negligence was by statute a defense to a strict liability action. Neb. Rev. Stat. § 25-1151 (Reissue 1979); *Shipler v. General Motors Corp.*, 271 Neb. 194, 209-20, 710 N.W.2d 807, 824-31 (2006). This rule seemed to apply these defenses of contributory and comparative negligence to cases involving ultrahazardous or abnormally dangerous activities. It seemed to apply even though that is contrary to the theory behind the doctrine of strict liability for such activities.

Since the strict liability of one who carries on an abnormally dangerous activity is not founded on his negligence, the ordinary contributory negligence of the plaintiff is not a defense to an action based on strict liability. The reason is the policy of the law that places the full responsibility for preventing the harm resulting from abnormally dangerous activities upon the person who has subjected others to the abnormal risk.

Restatement (Second) of Torts § 524 comment a (1965). Regarding contributory and comparative negligence, see NJI2d Civ. 2.02A.

Whatever the rule was prior to February 8, 1992, it is clear that for

causes of action accruing on or after February 8, 1992, neither contributory nor comparative negligence is a defense to an action in strict liability. *Shipler v. General Motors Corp.*, 271 Neb. 194, 209-20, 710 N.W.2d 807, 824-31 (2006) (interpreting and applying Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 2016)). Therefore, Nebraska's version of comparative negligence—*see generally*, NJI2d Civ. 5.02-5.05—does not apply to a cause of action in strict liability.

Regarding assumption of risk and causes of action accruing on or after February 8, 1992, Neb. Rev. Stat. § 25-21,185.12 (Reissue 2016) provides:

Assumption of risk is an affirmative defense. Assumption of risk shall mean that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.

In addition, to this statute, *see generally* NJI2d Civ. 2.02B.

AUTHORITIES

"The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm." Restatement (Second) of Torts § 523 (1965). *See also id.* at §§ 496A through 496B. Regarding contributory and comparative negligence, *see* the Comment, above.

The statements in the bracketed part of subparagraph number 2 are taken from NJI 8.42 (1969).

See also NJI2d Civ. 2.02B, Authorities.

F. INJURY TO CHILDREN

NJI2d Civ. 8.51

INJURY TO CHILDREN, WHETHER TRESPASSERS OR LAWFUL ENTRANTS

Before the plaintiff can recover against the defendant [on (his, her) claim of (here identify claim involved)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That there was (a, an artificial) condition on defendant's (premises), at a place where the defendant knew, or had reason to know, children were likely to be;
2. That the defendant knew, or had reason to know, of the existence of this condition;

3. That the defendant knew, or had reason to know, that the condition involved an unreasonable risk of death or serious bodily harm to children likely to be there;

4. That (name of child), because of (his, her) youth, either did not discover the condition or, if (he, she) did discover the condition, did not realize the risk it presented;

5. That the usefulness to the defendant of maintaining the condition or permitting it to exist and the burden of eliminating the danger are slight as compared with the risk to the children involved;

6. That the defendant failed to exercise reasonable care to eliminate the danger or otherwise protect the children from it;

7. That this failure on the part of the defendant was a proximate cause of some damage to (name of child); and

8. The nature and extent of that damage.

SPECIAL NOTE

The distinction between invitees and licensees has been abolished. See the Comment & Authorities to NJI2d Civ. 8.01, 8.25.

COMMENT

This instruction applies to the so-called "attractive nuisance doctrine." However, as noted in the Authorities to NJI 8.04 (1969), the predecessor to this work, the instruction does not require that a "condition on defendant's land actually attracted this plaintiff. This is in line with all of the Nebraska cases except [one]." Those Authorities go on to note that the concept of attractiveness is one of the factors relevant to the requirement that the defendant realize children may come upon the land, and that the great weight of modern authority is in line with the instruction as drawn. Those Authorities cite *Krummack v. Missouri Pacific Ry. Co.*, 98 Neb. 773, 154 N.W. 541 (1915) and Restatement (Second) of Torts § 339 (1965). In addition, see *Davis v. Cunningham*, 196 Neb. 8, 10-11, 241 N.W.2d 343, 345 (1976) and *Gubalke v. Estate of Anthes*, 189 Neb. 385, 390-91, 202 N.W.2d 836, 840 (1972). See also Restatement (Second) of Torts § 339 comment e (1965), which says: "It is not necessary that the defendant shall know that the condition upon his land is likely to attract the trespasses of children, or that the children's trespasses shall be due to the attractiveness of the condition."

This instruction is written to apply to a child who is on the premises in question as a trespasser or a lawful entrant. In § 339, the Restatement (Second) of Torts (1965) defines the duty owed to a trespassing child. In § 343B, it states that where a defendant is liable for damage

suffered by a trespassing child, he or she is also liable if the child is a licensee or a business visitor. Comment c to § 343B explains further: a child who is a licensee or a business visitor, "may be entitled to greater protection than [one who is] a trespasser. This section is intended to say only that [such a child] is entitled to at least as much." And, finally, *Gubalke v. Estate of Anthes*, 189 Neb. 385, 390, 202 N.W.2d 836, 840 (1972), partly answers the question left open by comment c: "at least insofar as it pertains to children of tender years, [defendant's duty] does not depend upon whether the child is an invitee, licensee, or trespasser." For these reasons, though based on a Restatement section that applies to trespassing children, this instruction covers children who are trespassers, licensees, or business visitors. In the unlikely event of a different duty for children who are licensees or business visitors, this instruction will have to be limited accordingly, and a new instruction will have to be drawn.

This is the Burden of Proof and, in some cases, a portion of the Effect of Findings parts of the Statement of the Case instruction regarding the duty a possessor of land (but probably not an owner not in possession, *see* part I of the Comment to NJI2d Civ. 8.12) owes to a child. For the Issues and the rest of the Effect of Findings parts, use NJI2d Civ. 2.01 as a model.

Use only those paragraphs of the instruction as are in issue.

This instruction assumes that there is no question that the defendant is the proper party. *See also* NJI2d Civ. 8.12, Comment, and NJI2d Civ. 8.02, Comment.

Regarding the word "condition," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the word "premises," *see* NJI2d Civ. 8.01, Comment & Authorities. Regarding the words "had reason to know," *see* NJI2d Civ. 8.84.

Regarding the word "damage," though the controlling section of the Restatement and the *Davis* case (quoted in the Authorities, below) say that the condition must be such that *the defendant should realize* it involves an unreasonable risk of bodily harm to children, neither the Restatement nor the cases limit *the plaintiff's recovery* to bodily harm. Rather, the Restatement says that the defendant "is subject to liability for physical harm to children." And "physical harm," as used in the Restatement, is the equivalent of "damage." *See also* NJI2d Civ. 8.01, Comment & Authorities.

This Section is concerned only with conditions on the land, and not with activities of the possessor. As to liability to children for such activities, *see* §§ 333, 334 and 336 [NJI2d Civ. 8.02]. A "condition," however, includes controllable forces already in operation, as in the case of machinery in motion.

Restatement (Second) of Torts § 339, comment a (1965).

In *Davis v. Cunningham*, 196 Neb. 8, 12, 241 N.W.2d 343, 346 (1976), the court stated that "[t]he attractive nuisance doctrine is an aberration or abnormality in the law of negligence" and, as a result, the tendency is to limit, rather than extend it.

"In the case of an invitee we have held that it is the superior knowledge the invitor has or should have which is the foundation of liability; absent such superior knowledge, no liability exists." Such also is the case with respect to the duty of a possessor of land to children of tender years, for . . . a possessor cannot be expected to make the land completely "childproof."

Widga v. Sandell, 236 Neb. 798, 802, 464 N.W.2d 155, 158 (1991) (citations omitted).

Regarding an owner's duty to those using land with the owner's permission, without charge, and for recreational purposes, see NJI2d Civ. 8.61.

See generally the Comments to NJI2d Civ. 8.02 and NJI2d Civ. 8.12; the extensive comments to Restatement (Second) of Torts § 339 (1965); and W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 59 (5th ed. 1984).

Regarding the duty of a parent or any other person standing in that relation to an unemancipated minor a parent's duty to protect the minor from injury on the land, see the discussion of parental immunity at NJI2d Civ. 3.04, Comment & Authorities

AUTHORITIES

Restatement (Second) of Torts §§ 339 and 343B (1965); *Wiles v. Metzger*, 238 Neb. 943, 949–50, 473 N.W.2d 113, 118–19 (1991); *Widga v. Sandell*, 236 Neb. 798, 802, 464 N.W.2d 155, 158 (1991); *Davis v. Cunningham*, 196 Neb. 8, 10–11, 241 N.W.2d 343, 345 (1976); *Gubalke v. Estate of Anthes*, 189 Neb. 385, 390–91, 202 N.W.2d 836, 840 (1972). See also W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 59 (5th ed. 1984). "For liability to attach, all phases of the rule must be present." *Davis v. Cunningham*, *supra*.

"The standard of the occupier's duty, at least insofar as it pertains to children of tender years, does not depend upon whether the child is an invitee, licensee, or trespasser." *Gubalke v. Estate of Anthes*, 189 Neb. 385, 390, 202 N.W.2d 836, 840 (1972) (citing Restatement (Second) of Torts § 343B (1965)). Accord *Widga v. Sandell*, 236 Neb. 798, 801, 464 N.W.2d 155, 158 (1991).

Subparagraph number 1 offers the following parenthesized choice: "(a, an artificial)." This was done because it is not clear whether the condition involved need have been an artificial condition or could have

been a natural condition. Restatement (Second) of Torts § 339 caveat and comment p (1965).

"[A] possessor of land has no liability to a child of tender years for an artificial condition on the land unless the possessor knows or has reason to know of the condition in question." *Widga v. Sandell*, 236 Neb. 798, 802, 464 N.W.2d 155, 158 (1991).

"The condition must be one which involves 'an unreasonable risk of death or serious bodily harm' to a child, and one which should be foreseen. . . . The stress here is upon 'unreasonable.' " *Davis v. Cunningham*, *supra* (first internal quotation is from Restatement (Second) of Torts § 339 (1965), emphasis supplied in *Davis*; second internal quotation is from *Gubalke v. Estate of Anthes*, *supra*, which in turn quotes Prosser, *Law of Torts* § 59 (4th ed. 1971)).

Plaintiff must prove that because of his or her youth the child either did not discover the condition or, if the child did discover the condition, did not realize the risk. Regarding this element of the tort, *see Wiles v. Metzger*, 238 Neb. 943, 949–50, 473 N.W.2d 113, 118–19 (1991). Relevant to the issue of whether the child discovered the condition and, if so, appreciated the risk, are the "child's age, intelligence, knowledge, experience, and ability or capacity to discover, observe, understand, or appreciate the nature of the danger or condition of or on a possessor's land and avoid the danger in the condition which causes the child's injury or death." *Id.* at 954–55, 473 N.W.2d at 121–22. In *Wiles*, two boys killed in a cave-in were 18 and 12 year old boys of average intelligence and normal life experiences, were aware of gravity and other forces of nature pertaining to caves and the attractive nuisance doctrine was inapplicable as a matter of law. *Accord Terry v. Metzger*, 241 Neb. 795, 797, 491 N.W.2d 50, 52 (1992) (nineteen-year-old plaintiff).

Regarding the use of the words "had reason to know" in subparagraphs numbered 2 and 3 of the instruction, *see* Restatement (Second) of Torts § 339, comment h (1965). (Compare the discussion of the meaning of these words in the Authorities to NJI2d Civ. 8.84.)

G. PERSON USING LAND FOR RECREATIONAL PURPOSES

NJI2d Civ. 8.61

OWNER'S DUTY TO THOSE USING LAND WITH PERMISSION, WITHOUT CHARGE, AND FOR RECREATIONAL PURPOSES

A. ISSUES

In defense to the plaintiff's claim (here insert a statement of

plaintiff's claim), the defendant claims (here insert a statement of the claim regarding the Recreation Liability Act, a statement such as: "that he had invited or permitted the plaintiff to use his property for recreational purposes, and had done so without charging the plaintiff for the right to enter the property.")

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, that, at the time the plaintiff (was, claims to have been) (damaged, injured), the defendant had invited or permitted the plaintiff to use (his, her, its) property for recreational purposes, without charge for the right to enter the property.

[A charge for the right to enter the property, as that phrase is used in this instruction, does not include a fee paid to park a camper on a specific pad and it does not include a rental paid by (a group, an organization, a corporation, the state or federal government) for entering the property.]

C. EFFECT OF FINDINGS AND FURTHER BURDEN OF PROOF

If the defendant has *not* met this burden of proof, then you must disregard this defense.

If the defendant *has* met this burden of proof, then your verdict must be for the defendant unless you find that the plaintiff has proved by the greater weight of the evidence that the (damage suffered by, injury to) the plaintiff was proximately caused by defendant's willful or malicious failure to guard or warn against (here insert the dangerous condition, use, structure, or activity claimed by the plaintiff).

COMMENT

I. GOVERNMENTAL ENTITIES AND THE RECREATION LIABILITY ACT

The Recreation Liability Act does not apply to the land of governmental entities. As used in the Act, "owner of land" does not include governmental entities—the state or political subdivisions of the state—but just private landowners. *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2006). Regarding the liability of governmental entities, see *NJI2d Civ. 8.72*.

The statute on which this instruction is based is the Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 through 37-736 (Reissue 2016). This Act has to do with land that is opened to the public for recreational purposes. Oversimplified, and as limited in the Authorities below, the RLA limits the damages that can be recovered against the landowner for injury to one who is using the land for such purposes. It is a way to encourage landowners to make land available for public recreation. (The last sentence of section 37-734 of the RLA was held unconstitutional by *Teters v. Scottsbluff Pub. Sch.*, 256 Neb. 645, 651, 592 N.W.2d 155, 160 (1999) (holding that the sentence reading “[r]ental paid by a group, organization, corporation, or the state or federal government shall not be deemed a charge made by the owner of the land,” read in connection with other parts of the RLA, is void for vagueness), *overruled on other grounds by Bronsen*, 272 Neb. at 336, 722 N.W.2d at 29. The holding in *Teters* does not affect the rest of the RLA.)

There have been Nebraska cases that applied the RLA’s limited immunity in lawsuits seeking damages for injuries sustained on land owned by governmental entities. *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2006) makes it clear that the statute was never intended to, and does not, apply to governmental entities, and overrules cases to the contrary. The statute protects private landowners only.¹

Following *Bronsen*, the Unicameral passed L.B. 564. L.B. 564, which amends the Nebraska Political Subdivisions Tort Claims Act (PSTCA) and the State Tort Claims Act (STCA). These amendments provide governmental entities some protection from liability for claims relating to recreational activities on the entity’s land. This provides these entities with some of the protection that the RLA had been held to provide. This limited protection is discussed at NJI2d Civ. 8.72, Comment.

II. THE ACT APPLIES ONLY TO PREMISES LIABILITY ACTIONS

“The [Recreational Liability] Act applies only to premises liability actions.” *Hodson v. Taylor*, 290 Neb. 348, 359, 860 N.W.2d 162, 173, 174 (2015) (discussing this rule at 290 Neb. 359–361, 860 N.W.2d 174–75). This means that the defendants must either “own or occupy the property on which the injury occurred.” *Id.* (defining “owner” and “occupier”). And the cause of action must concern “either a condition on the land or the use of the land by a possessor.” *Id.* at 361, 359 N.W.2d at 175.

8.61

¹Cases overruled include *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Pub. Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981). Cases overruled to the extent

that they implicitly held to the contrary include *Iodence v. City of Alliance*, 270 Neb. 59 700 N.W.2d 562 (2005); *Teters v. Scottsbluff Pub. Sch.*, 256 Neb. 645, 592 N.W.2d 155 (1999); *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).)

III. AFFIRMATIVE DEFENSE

Although there are no Nebraska cases on the point, it is the opinion of the Committee that the claim described by this instruction is an affirmative defense: it imposes a burden on the defendant; and it may not be raised under a general denial. See NJI2d Civ. 2.02A through NJI2d Civ. 2.02D and NJI2d Civ. 11.46. The Committee may, however, be wrong. If so, and the claim described by this instruction is not an affirmative defense, then this instruction will have to be rewritten. For a model, see NJI2d Civ. 11.46, which is drafted alternatively as an affirmative defense instruction and otherwise, and see NJI2d Civ. 3.44.

In *Veskerna v. City of West Point, Neb.*, 254 Neb. 540, 578 N.W.2d 25 (1998), *overruled on other grounds*, *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2007), the City closed Main Street to vehicular traffic so that an "Oktoberfest" festival could be held thereon. Businesses along Main Street remained open. The district court held that the RLA protects the City from liability for injuries suffered by persons attending the festival, but it does not protect the City from liability for injuries suffered by persons who were going to and from business on Main Street but were not attending the festival. The district court then granted summary judgment to the City, on the basis of the protection of the Act. The Supreme Court reversed that judgment. It held that

[t]he Legislature did not intend for a court, nor is this court prepared, to look to the subjective intent of an injured plaintiff in using public land to determine whether or not the Act would bar an action. . . . [W]e cannot presume that the Legislature intended to create separate classes of plaintiffs based upon the individual subjective intent of said plaintiffs in using the property.

Id. at 543, 578 N.W.2d at 27, *overruled on other grounds*, *Bronsen*, *supra*. Veskerna's implication that the Recreation Liability Act applies to suits against the city is overruled by *Bronsen*. *Bronsen* only overrules *Veskerna* to the extent that it includes that implication. *Bronsen* does not overrule the holding that "[b]y its plain language, the Act was not intended to relieve landowners of liability based merely on the subjective intent of those members of the public who use the land." This holding was based, in large part, at least, on the theory that a city cannot take property that is already open to the public for non-recreational uses and limit its liability by temporarily declaring a second use, a recreational use, for the property. In this case, the City closed Main Street to auto traffic so that it could be used for an auto show. It did not close the street to pedestrian traffic. In this situation, Main Street could be used for one of its traditional uses; a person could cross the street to get to one of the open businesses along the street. It could also be used for a different purpose, one that might be recreational; a person could be in the street to attend the auto show. This sort of dual use might not ever apply to private property because private property is not open to

the public, including some of the public who enter the property for a recreational purpose.

III. CROSS REFERENCES

Regarding the parenthetical choice between “injury” and “damage,” see NJI2d Civ. 8.01, Comment & Authorities.

Willful and malicious are defined in NJI2d Civ. 8.81.

AUTHORITIES

This instruction has to do with the Recreation Liability Act, Neb. Rev. Stat. §§ 37-729 through 37-736 (Reissue 2016).

The purpose of [this Act] is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

Id. at § 37-730. *Accord* Brown v. Wilson, 252 Neb. 782, 786, 567 N.W.2d 124, 128 (1997) (discussing construction of Act); Holden v. Schwer, 242 Neb. 389, 393–94, 495 N.W.2d 269, 272–73 (1993); Thies v. City of Omaha, 225 Neb. 817, 818, 408 N.W.2d 306, 307 (1987) (Act limits liability in effort to encourage owners to make land available free to public for recreational purposes), *overruled on other grounds*, Bronsen v. Dawes Cty., 272 Neb. 320, 722 N.W.2d 17 (2006).

Because it is in derogation of common law, this Act is strictly construed. Dykes v. Scotts Bluff Cty. Agr. Soc., Inc., 260 Neb. 375, 382, 617 N.W.2d 817, 823 (2000); Brown v. Wilson, 252 Neb. 782, 786, 567 N.W.2d 124, 128 (1997). *See also* Brown v. State, 305 Neb. 111, 118, 939 N.W.2d, 354, — (2020) (“[I]t is well settled that statutes that purport to waive the State’s protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver. In order to strictly construe against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity.”) (footnote omitted). Strict construction of these statutes is discussed further at part VIII of this Comment & Authorities.

The land need not be opened to the public-at-large. The Act also applies when the owner only allows selected individuals to use the land. McIntosh v. Omaha Pub. Schs., 249 Neb. 529, 537, 544 N.W.2d 502, 508, 107 Ed. Law Rep. 995 (1996)), *overruled on other grounds*, Bronsen v. Dawes Cty., 272 Neb. 320, 722 N.W.2d 17 (2007); Holden v. Schwer, 242 Neb. 389, 396, 495 N.W.2d 269, 274 (1993).

On the other hand, a child invited to her friend’s home is not the “public.” “[T]he Act does not apply to a residential setting not open to

the public for recreational purposes, where the landowners' daughter invites a private friend home to play." *Brown v. Wilson*, 252 Neb. 782, 788, 567 N.W.2d 124, 129 (1997).

"[A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes," Recreation Liability Act, Neb. Rev. Stat. § 37-731 (Reissue 2016), unless the owner either "willful[ly] or malicious[ly] fail[s] to guard or warn against a dangerous condition, use, structure or activity, or . . . charges the person or persons who enter or go on the land," *id.* at § 37-734. *Accord Thies v. City of Omaha, supra.* (In *Thies*, the plaintiff argued that, despite the application of the Act, the standard was reasonable care because the city "voluntarily undertook the task of making the slides safe and did so negligently, while announcing publicly that the slides were safe. . . . We shall not impose a duty of reasonable care where the Legislature has decided that there shall be no duty." *Id.* at 819–20, 408 N.W.2d at 308.) *See generally* *Holden v. Schwer*, 242 Neb. 389, 393–97, 495 N.W.2d 269, 272–74 (1993). Note that the final sentence of § 37-734, reading "[r]ental paid by a group, organization, corporation, or the state or federal government shall not be deemed a charge made by the owner of the land," was declared unconstitutional in *Teters v. Scottsbluff Pub. Sch.*, 256 Neb. 645, 651, 592 N.W.2d 155, 160 (1999), *overruled on other grounds by Bronsen*, 272 Neb. at 336, 722 N.W.2d at 29. (*Teters* does not affect the rest of the RLA.)

In other words, "an owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility, although the owner may be liable for certain willful actions." *Garreans v. City of Omaha*, 216 Neb. 487, 490, 345 N.W.2d 309, 313 (1984), *overruled on other grounds, Bronsen, supra.*

The Recreation Liability Act can apply to an owner who leases land to another who allows it to be used free of charge for recreational purposes. Neb. Rev. Stat. § 37-733 (Reissue 2016). The Act's general definition of owner is this: "[it] includes tenant, lessee, occupant, or person in control of the premises." *Id.* at § 37-729.

Neb. Rev. Stat. § 37-729 (Reissue 2016) defines "charges" and *Garreans v. City of Omaha, supra*, says: "The clear meaning of this statute is that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility" as opposed to "a fee paid to park a camper upon a specific pad." *Garreans*, 216. at 491, 492, 345 N.W.2d at 313, *overruled on other grounds, Bronsen, supra.*

The final sentence of § 734 of the Act was declared unconstitutionally vague in *Teters*, 256 Neb. at 652, 592 N.W.2d at 160, *overruled on other grounds, Bronsen, supra.* The sentence reads: "Rental paid by a group, organization, corporation, or the state or federal government shall not be deemed a charge made by the owner of the land." When

read with § 37-729(4) of the Act, this sentence is void for vagueness. The sentence is severable from the rest of the Act. *Teters, supra*. The rest of the Act is not unconstitutionally vague. *Dykes v. Scotts Bluff Cty. Agr. Soc., Inc.*, 260 Neb. 375, 381, 617 N.W.2d 817, 822 (2000).

“Land includes roads, water, water courses, private ways and buildings, structures, and machinery or equipment thereon when attached to the realty.” Neb. Rev. Stat. § 37-729(1) (Reissue 2016). “Owner includes tenant, lessee, occupant, or person in control of the premises.” *Id.* Section 37-729(3) defines “recreational purposes.” *See also Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), *overruled on other grounds, Bronsen, supra*.

The Nebraska Recreation Liability Act “does not apply to independent indoor recreational facilities, including indoor swimming pools.” *Cassio v. Creighton Univ.*, 233 Neb. 160, 170, 446 N.W.2d 704, 711 (1989).

“[T]he viewing of livestock exhibits at a county fair is not a recreational purpose under [this Act].” *Dykes v. Scotts Bluff Cty. Agr. Soc., Inc.*, 260 Neb. 375, 383, 617 N.W.2d 817, 823 (2000).

See also W. Page Keeton, et al., Prosser and Keeton On the Law of Torts § 60, at 415–16 (5th ed. 1984); and Restatement (Second) of Torts § 359 (1965 & Supp. 1998).

H. PUBLIC SIDEWALK: OWNER AND ABUTTING OWNER

NJI2d Civ. 8.71

DUTY OF OWNER OF PROPERTY ABUTTING PUBLIC SIDEWALK

The owner of property (abutting, that borders on) a public sidewalk (has no, does not have a) duty to keep that sidewalk in a safe condition. (He, She, The owner) does, however, have a duty not to cause or contribute to a (defect in, condition of) the sidewalk, which (he, she) knew or should have known might cause injury to a reasonably careful person.

COMMENT

If the abutting property owner is the same political subdivision whose sidewalk it is, *see Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). *See also* NJI2d Civ. 8.72 Comment & Authorities discussion Nebraska’s Tort Claims Acts governing the sovereign immunity of the state and its political subdivisions.

The predecessor to this instruction appeared as number 9.01 in the 1969 edition of *Nebraska Jury Instructions*.

This instruction uses the word injury because the 1969 version of the instruction used that word. In part 4 of the Introduction to Chapter 8, "injury" is distinguished from "damage". Given that distinction, it might be that damage would be a more appropriate word.

This instruction states the common-law rule. The city may impose upon an abutting property owner the duty to maintain a public sidewalk. Statutes and ordinances must be consulted to determine whether there is liability under certain conditions not addressed in this instruction.

Regarding the common-law rule, *Stump v. Stransky*, 168 Neb. 414, 417, 95 N.W.2d 691, 694 (1959) quotes *Hanley v. Fireproof Bldg. Co.*, 107 Neb. 544, 546, 186 N.W. 534, 536 (1922) as follows:

"The law of this state imposes upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public. * * * Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition. * * * Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby."

Statutes to be consulted include Neb. Rev. Stat. §§ 14-3,105 and 14-3,106 (cities of the metropolitan class), 15-734 (cities of the primary class), 16-662 and 16-663 (cities of the first class), 17-557 and 17-557.01 (cities of the second class and villages) (Reissue 2012).

Local ordinances should also be consulted. Such ordinances will be construed to require notice to the owner of the abutting property to repair the sidewalk; in the absence of such notice, the owner will not be liable for damages suffered by reason of the defective or dangerous condition of the sidewalk. *Stump v. Stransky*, *supra*; *Connolly v. City of Omaha*, 159 Neb. 380, 383, 66 N.W.2d 916, 919 (1954); *Andresen v. Burbank*, 157 Neb. 909, 910-11, 62 N.W.2d 135, 136 (1954); *City of Lincoln v. Janesch*, 63 Neb. 707, 713, 89 N.W. 280, 282 (1902).

This instruction is for use in a case where: the required notice to the property owner has not been given; and there is a jury question as to whether the defendant caused or contributed to a defect. If the required notice was given, and, as a result, the defendant may be liable for not having put the sidewalk back into a safe condition, even then, it

may be that the liability runs only to the city. *See Stump v. Stransky*, as quoted above. If this situation does raise a jury question as to whether there was negligence on his or her part, then the usual negligence instructions apply.

In a case where the required notice to a property owner has been given and a duty thereby imposed on the abutting property owner, it seems that an injured plaintiff has a suit against the owner of the abutting property (rather than having to sue the city, which, in turn, could seek indemnification from the property owner). According to *Crosswhite v. City of Lincoln*, 185 Neb. 331, 334, 175 N.W.2d 908, 911 (1970), the city and the landowner are jointly and severally liable.

Defects in the sidewalk include accumulations of ice and snow. *Connolly v. City of Omaha*, *supra*.

As shown by various instructions throughout this chapter, the owner of a private sidewalk does have the responsibility to care for that sidewalk.

See also NJI2d Civ. 8.72, Comment and Authorities.

AUTHORITIES

At common law, the owner of property abutting a public sidewalk does not have a duty to keep that sidewalk in a safe condition. *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 668, 240 N.W.2d 32, 34 (1976); *Mackey v. Midwest Supply Co.*, 186 Neb. 834, 836-37, 186 N.W.2d 916, 918 (1971); *Stump v. Stransky*, 168 Neb. 414, 417, 95 N.W.2d 691, 694 (1959) (quoted in the Comment, above); *Connolly v. City of Omaha*, 159 Neb. 380, 382, 66 N.W.2d 916, 918 (1954); *Hanley v. Fireproof Bldg. Co.*, 107 Neb. 544, 546-47, 186 N.W. 534, 535 (1922). *See also* *City of Lincoln v. Janesch*, 63 Neb. 707, 713, 89 N.W. 280, 282-83 (1902). This is not true with regard to the owner of a private sidewalk. The rules expressed in the rest of this Chapter apply to them.

Abutting owners may, however, be held liable for sidewalk defects caused by the owners' own affirmative wrongdoing or negligent use. *Sipprell v. Merner Motors*, 164 Neb. 447, 453, 82 N.W.2d 648, 652 (1957). *See also* *Andresen v. Burbank*, 157 Neb. 909, 62 N.W.2d 135 (1954). When an abutting owner alters a sidewalk so that it will serve a use independent of and apart from the ordinary and customary use of a sidewalk, and does so for his or her own benefit, then that owner may be held liable for a dangerous condition so caused. *Crosswhite v. City of Lincoln*, 185 Neb. 331, 335, 175 N.W.2d 908, 911 (1970) (city and landowner joint tortfeasors). *See also* *Shupe v. Antelope Cty.*, 157 Neb. 374, 377, 59 N.W.2d 710, 713 (1953) (obstructions placed in public way must be removed or pedestrians warned of their existence).

These are negligence cases, not strict liability cases. *See, e.g., Con-*

nolly v. City of Omaha, supra; *Anthony v. City of Lincoln*, 152 Neb. 320, 41 N.W.2d 147 (1950).

I. THE TORT CLAIMS ACTS: TORT ACTIONS AGAINST STATE AND LOCAL GOVERNMENT

NJI2d Civ. 8.72

TORT CLAIMS ACTS

(Jury instruction on this issue is no longer called for. See the Comment & Authorities, below.)

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- II. LIMITED WAIVER OF SOVEREIGN IMMUNITY IN TWO TORT CLAIMS ACTS
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- XIV. STATUTORY CAP ON DAMAGES
- XV. LIMITED LIABILITY FOR CLAIMS ARISING OUT OF RECREATIONAL ACTIVITIES
- XVI. LIABILITY OF LAW ENFORCEMENT OFFICIALS
 - A. PROTECTING INDIVIDUALS FROM HARM CAUSED BY CRIMINAL CONDUCT: THE GENERAL RULE
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 - C. INJURIES TO THIRD PERSONS DURING LAW ENFORCEMENT VEHICULAR PURSUITS
- XVII. MUNICIPALITY'S DUTY REGARDING THE CONDITION OF PUBLIC SIDEWALKS AND STREETS
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I. THE GENERAL RULE OF SOVEREIGN IMMUNITY

A. IMMUNITY OF THE STATE AND ITS POLITICAL SUBDIVISIONS

A State's immunity from suit comes in part from the 11th Amendment to the United States Constitution and in part from the inherent immunity possessed by a sovereign, an immunity that passed through the Ratification of the United States Constitution. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (noting that immunity from suit "is inherent in the nature of sovereignty."), *quoted at* *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 380 (2006) (Thomas, J., dissenting); *Burke v. Bd. of Trustees*, 302 Neb. 494, 501–02, 924 N.W.2d 304, 310–11 (2019) (noting that the court has sometimes referred to the 11th Amendment of the United States Constitution as the source of Nebraska's sovereign immunity. "However, the sovereign immunity of a state neither derives from not is limited by the terms of the 11th Amendment. Rather, as we have recognized, a state's immunity from suit is a fundamental aspect of sovereignty.") (footnotes omitted); *State ex rel. Rhiley v. Neb. State Patrol*, 301 Neb. 241, 247, 917 N.W.2d 903, 908–09 (2018) (same as *Burke*, including same quotation); *Doe v. Bd. of Regents of Univ. of Neb.*, 280 Neb. 492, 510, 788 N.W.2d 264, 281 (2010) (same as *Burke*, above) (quoting *Fed. Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 753 (2002), *overruled on other grounds by* *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017), *as noted in* *Amend v. Neb. PSC*, 298 Neb. 617, 622 n.5, 905 N.W.2d 551, 556 n.5 (2018)). *See also* *Rouse v. State*, 301 Neb. 1037, 1041, 921 N.W.2d 355, 359–60 (2019); *Amend*, above; *Davis*, above; *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 145, 876 N.W.2d 388, 394 (2016); *S.I.D. No. 1, Butler Cty. v. Adamy*, 289 Neb. 913, 918, 858 N.W.2d 168, 174 (2015); *Jacobson v. Shrestha*, 288 Neb. 615, 624–25, 849 N.W.2d 515, 522–23 (2014) (discussing the origin of this sovereign immunity). *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321 (1934).

The 11th Amendment takes a part of that common-law immunity and puts it in the Constitution. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (stating that the 11th Amendment "confirms" some of the immunity the States already possess).

"[N]o suit may be maintained against the State unless the Legislature, by law, has so provided." *Rhiley*, above. Sovereign immunity bars tort recovery against the state and its political subdivisions, unless, by legislative action, the state or subdivision has waived this immunity. *See, e.g.*, *Reiber v. County of Gage*, 303 Neb. 325, 340–41, 928 N.W.2d 916, 928 (2019) ("The PSTCA reflects a limited waiver of governmental immunity and prescribes the exclusive procedure for maintenance of a tort claim against a political subdivision or its officers, agents, or employees."; regarding "limited waiver," *see* part II of this Comment & Authorities, below); *Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 788 N.W.2d 264 (2010) (overruled by, *Davis v.*

State, 297 Neb. 955, 902 N.W.2d 165 (2017)). *See also Amend*, above; *Davis*, above; *Lamb*, above (“Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.”); *S.I.D. No. 1, Butler Cty.*, above; *Jacobson*, above. Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.” *Burke v. Bd. of Trustees*, 302 Neb. 494, 504, 924 N.W.2d 304, 312 (2019); *Rhiley*, above, 301 Neb. at 248, 917 N.W.2d at 909. And, “Whether a court has subject matter jurisdiction is a threshold issue.” *Wizinsky v. State*, 308 Neb. 778, 786, 957 N.W.2d 466, 472 (2021). Regarding the lack of subject matter jurisdiction and for a more complete discussion of this topic, *see* part VI(B) of this Comment & Authorities, below.

When this immunity applies, “the proper remedy is to dismiss [the action] for lack of subject matter jurisdiction.” *Edwards v. Douglas County*, 308 Neb. 259, 267, 953 N.W.2d 744, 750 (2021) (“No matter how compelling the facts of a particular case may be, the judiciary does not have the power to waive sovereign immunity.” *Id.* at 280, 953 N.W.2d at 758.). As discussed in various places below, dismissal for lack of subject matter jurisdiction applies at the trial and appellate level. This is so for trial and appellate courts and, at either level, courts should determine their jurisdiction over the action “before considering nonjurisdictional grounds.” *Id.* at 267, 953 N.W.2d at 750. *See also*, *e.g.*, *Ex parte McCardle*, 74 U.S. 506, 512, 19 L. Ed. 264, 1868 WL 11093 (1868) (“The first question necessarily is that of jurisdiction.”). Regarding the lack of subject matter jurisdiction, *see* part VI(B) of this Comment & Authorities, below.

“[A] suit against a state agency is a suit against the State . . .” A suit against a state official in his or her official capacity is not a suit against the official, but, rather, a suit against the official’s office.” *Cappel v. State*, 298 Neb. 445, 452, 905 N.W.2d 38, 46 (2018). *See* part I(B) of this Comment & Authorities, below.

State agencies are defined “to include ‘all commissions of the State of Nebraska . . . the primary function of which is to act as . . . instrumentalities or agencies of the State of Nebraska,’ ” while they are “‘acting as[] instrumentalities or agencies of the State of Nebraska.’ ” *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 626, 905 N.W.2d 551, 558 (2018) (citing Neb. Rev. Stat. § 81-8,210(1) (Reissue 2014)). *See* parts I(B) and V of this Comment & Authorities, below.

Nebraska’s exceptions to sovereign immunity are found in the State Tort Claims Act, Neb. Rev. Stat. § 81-8,219, et seq. (Cum. Supp. 2017) (hereinafter STCA) and the Political Subdivision Tort Claims Act, Neb. Rev. Stat. § 13-910 (Cum. Supp. 2017) (hereinafter PSTCA). Unless otherwise stated, the same rules apply under the STCA and the PSTCA. *See* part III of this Comment & Authorities below.

B. IMMUNITY OF EMPLOYEES OF THE STATE AND ITS SUBDIVISIONS

The STCA and the PSTCA eliminate (create exclusions to) part of

the immunity of the employees of State and its subdivisions. This is discussed here and somewhat in parts I(A), II, and VI of this Comment & Authorities, below.

This sovereign immunity (unless waived) applies not only to the state and its subdivisions, but also their “employees who are acting within the scope of their employment.” *Jacobson v. Shresta*, 288 Neb. 615, 625, 849 N.W.2d 515, 522 (2014) (discussing the origin of this sovereign immunity and its application; *id.* at 624–25, 849 N.W.2d at 522–23.). *Accord, e.g., Rutledge v. City of Kimball*, 304 Neb. 593, 596–97, 935 N.W.2d 746, — (2019) (The PSTCA governs claims made against a political subdivision when the claim is based upon acts or omissions of an employee occurring within the scope of employment.”); *Cappel v. State*, 298 Neb. 445, 452, 905 N.W.2d 38, 46 (2018) (“A suit against a state official in his or her official capacity is not a suit against the official, but, rather, a suit against the official’s office.”); S.I.D. No. 1, *Butler Cty. v. Adamy*, 289 Neb. 913, 920, 858 N.W.2d 168, 175 (2015); *McKenna v. Julian*, 277 Neb. 522, 527, 763 N.W.2d 384, 389 (2009) (“Where a claim against an employee of a political subdivision is based upon acts or omissions occurring within the scope of employment, it is governed by the provisions of the PSTCA.” *Id.* at 530, 763 N.W.2d at 391); *Geddes v. York Cty.*, 273 Neb. 271, 275, 729 N.W.2d 661, 665 (2007). *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007).

This is distinguished from a suit against an employee of the state to obtain relief from an invalid act or abuse of authority.

“[A]ctions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds.” *Burke v. Bd. of Trustees*, 302 Neb. 494, 503, 924 N.W.2d 304, 311 (2019) (alteration in original). *Accord Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 898, 902 N.W.2d 115, 128 (2017) (“The State’s sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.”). In *Burke*, the plaintiff did not sue any state official. The only defendant she named was the Board of Trustees of the Nebraska State Colleges. *Id.* “Because *Burke*’s action against the Board is an action directly against the State, [and not a state official,] sovereign immunity applies to bar the action, unless the Legislature has waived it.” *Burke*, 302 Neb. at 504, 924 N.W.2d at 311. (*Burke* discusses why an “action against the Board is an action directly against the State.” See *Burke*, 302 Neb. at 500–01, 924 N.W.2d at 310.)

The Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016) is not an exception. It “does not waive the State’s sovereign immunity. Thus, a party who seeks declaratory relief by suing only the State must find authorization for

such remedy from a source other than the Uniform Declaratory Judgments Act.” *Burke*, 302 Neb. at 504, 924 N.W.2d at 312.

In a suit against an employee of either the state or a state agency, the “court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.” *McKenna*, 277 Neb. at 526, 763 N.W.2d at 388. *Accord*, e.g., *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 250, 917 N.W.2d 903, 910 (2018); *State ex. rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 661, 642 N.W.2d 132, 140 (2002).

“[T]he U.S. Supreme Court has held that state officials ‘acting in their official capacities’ are not ‘persons subject to liability for damages under [the Federal Tort Claims Act, 42 U.S.C.] § 1983. The Court interpreted § 1983 to mean that a suit against a state official in his or her official capacity is a suit against the official’s office. . . .

[Subsequently,] the Supreme Court clarified that a state official’s liability under § 1983 turns on the capacity in which the official was sued, not on the capacity in which the defendant acted. It held that state officials sued in their individual capacities can be personally liable under § 1983 for an action taken under color of state law that deprived the plaintiff of a federal right. A victory in a personal capacity action is a victory against the individual defendant, rather than against the entity that employs him”

Gillpatrick, 297 Neb. at 898–999, 902 N.W.2d at 128 (footnotes omitted)). *See also*, e.g., *Rhiley*, 301 Neb. at 249–50, 917 N.W.2d at 909–10; *Johnson v. State*, 270 Neb. 316, 320–23, 700 N.W.2d 620, 623, 625 (2005) (citing cases).

“Nebraska’s STCA is patterned after the Federal Tort Claims Act. Because Nebraska law is limited, we can look to the federal law for additional guidance.” *Rouse v. State*, 301 Neb. 1037, 1042, 921 N.W.2d 355, 360 (2019) (citation omitted)). However, “neither the reasoning nor the holdings of federal cases construing the [Federal Tort Claims Act] have any binding precedential effect on [the Nebraska Supreme] [C]ourt’s construction of Nebraska’s statutory language.” *Edwards v. Douglas County*, 308 Neb. 259, 269, 953 N.W.2d 744, 751–52 (2021) (stating that this is in part because the U.S. Supreme “Court does not always adhere to the same strict construction principles this court follows when construing statutes purporting to waive sovereign immunity.”).

Under [the STCA], whether a plaintiff has sued a state officer or employee in his or her individual capacity is irrelevant to whether the STCA bars a tort claim against that officer or employee. That is because § 81-8,210(4) [of the STCA] defines a tort claim to mean a claim for money damages caused by the

wrongful or negligent conduct of an officer or employee who was acting “within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.” And § 81-8,209 authorizes tort liability for a state officer or employee only to the extent that STCA permits. So, under the STCA’s definition of a tort claim, plaintiffs are limited to suing state officers and employees in their official capacities. We have held that only when the officer or employee was *not* acting within the scope of his or her office or employment can a plaintiff pursue a tort claim against the officer or employee individually. This means that if an officer or employee was acting within the scope of his or her office or employment and the alleged tortious conduct falls within an exception to the State’s waiver of tort immunity, the STCA bars a tort claim against the officer or employee, regardless of the capacity in which he or she was purportedly sued.

Davis v. State, 297 Neb. 955, 970, 902 N.W.2d 165, 181 (2017) (footnotes omitted) (“Here, the state defendants could not have committed the tortious acts . . . as private individuals. To the extent that *Davis* implies that the defendants may have acted in bad faith, that argument is relevant to whether the defendants are entitled to quasi-judicial immunity, not to whether they were acting with the scope of their office or employment.” *Id.* at 970–71, 902 N.W.2d at 181 (footnote omitted)).

If the employee was not acting within scope of his or her employment, then the plaintiff cannot recover against the state, but may pursue a claim against employee individually. If the employee was acting within scope of his or her employment, then the plaintiff must comply with the tort claims act, including its conditions and exceptions. Whether employees of political subdivisions were acting within scope of their employment is question for judge, sitting as fact finder, without a jury. *Bohl v. Buffalo Cty.*, 251 Neb. 492, 498–500, 557 N.W.2d 668, 673–74 (1997). The latter is so because § 13-907 provides that the suits to which the Tort Claims Acts apply shall be tried to the judge “without a jury.” *Jacobson*, 288 Neb. at 624–25, 849 N.W.2d at 625 (“Because a jury trial is not one of the terms of [the Legislature’s] waiver of governmental immunity . . . , a party is not entitled to a jury trial on its claim that a defendant is not a political subdivision employee.”). For more on the “without a jury point,” see Part IX of this Comment & Authorities.

Regarding identifying political subdivisions and agencies of the state, see part V of this Comment & Authorities, below.

Regarding law enforcement officers, see particularly part XVI of this Comment & Authorities, below

Regarding the discretionary function exception, see part XIII of this Comment & Authorities, below.

II. LIMITED WAIVER OF SOVEREIGN IMMUNITY IN TWO TORT CLAIMS ACTS

“The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.” Neb. Const. art. V, § 22. This is not a waiver of sovereign immunity; rather, it grants the Legislature the power to waive sovereign immunity. See *Burke v. Bd. of Trustees*, 302 Neb. 494, 502, 924 N.W.2d 304, 311 (2019). “[L]anguage permitting the State to ‘sue and be sued’ is not self-executing, but instead requires the Legislature to take specific action to waive the State’s sovereign immunity.” *Burke*, 302 Neb. at 505, 924 N.W.2d at 312. See *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 145, 876 N.W.2d 388, 394 (2016). “[N]o suit may be maintained against the State unless the Legislature, by law, has so provided.” *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 247, 917 N.W.2d 903, 909 (2018). *Accord Edwards v. Douglas County*, 308 Neb. 259, 265, 283, 953 N.W.2d 744, 756, 759 (2021) (“No matter how compelling the facts of a particular case may be, the judiciary does not have the power to waive sovereign immunity.” *Id.* at 280, 953 N.W.2d at 758.). In Nebraska, the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 (Reissue 2014) and 81-8,219 (Cum. Supp. 2017) (hereinafter STCA), is a limited waiver of the sovereign immunity of the State; it governs tort actions against the State itself. The Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 (Reissue 2012) and §§ 13-910 and 13-912 (Cum. Supp. 2017) (hereinafter PSTCA), is a limited waiver of the sovereign immunity of political subdivisions of the State; it governs tort actions against political subdivisions of the State of Nebraska. See, e.g., *Edwards*, above; *Lamb*, above.

And, “[t]he Legislature has provided limited waivers of the State’s sovereign immunity [and those waivers are] subject to statutory exceptions.” *Rouse v. State*, 301 Neb. 1037, 1041, 921 N.W.2d 355, 359 (2019). *Accord*, e.g., *Wizinsky v. State*, 308 Neb. 778, 786, 957 N.W.2d 466, — (2021); *Amend v. Neb. PSC*, 298 Neb. 617, 623–24, 905 N.W.2d 551, 557 (2018).

“Nebraska’s STCA is patterned after the Federal Tort Claims Act. Because Nebraska law is limited, we can look to the federal law for additional guidance.” *Rouse*, 301 Neb. at 1042, 921 N.W.2d at 360 (citation omitted). *Accord Johnson v. State*, 270 Neb. 316, 320–23, 700 N.W.2d 620, 623, 625 (2005) (citing cases). However, federal cases are not binding precedent. See part XIV of this comment & Authorities.

Regarding waiver of sovereign immunity, see the discussion below, throughout this Comment & Authorities; see particularly *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) (holding that the exceptions are jurisdictional in nature); also see particularly *Amend*, 298 Neb. at 624, 905 N.W.2d at 557; *Doe v. Bd. of Regents of Univ. of Neb.*, 280 Neb. 492, 788 N.W.2d 264 (2010) (noting that “‘the Eleventh Amendment [to the United States Constitution] does not define the scope of the States’ sovereign immunity; it is but one exemplification of that immunity.’

States also have inherent immunity from suit as ‘a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.’”), *overruled on other grounds* by *Davis v. State*, 297 Neb, 902 N.W.2d 165 (2017), as noted in *Amend v. Neb. PSC*, 298 Neb. 617, 622 n.5, 905 N.W.2d 551, 556 n.5 (2018); *Wise v. Omaha Pub. Schs*, 271 Neb. 635, 638–39, 714 N.W.2d 19, 22 (2006); *see also*. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (stating that the 11th Amendment “confirms” some of the immunity the States already possess); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (noting that immunity from suit “is inherent in the nature of sovereignty.”), *quoted at* *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 380 (2006) (Thomas, J., dissenting).

Regarding exceptions to the waiver, *see particularly* part VI(B) of this Comment & Authorities.

A. TORT ACTIONS AGAINST THE STATE

The STCA governs tort actions against the state the State of Nebraska. Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014), § 81-219 (Cum. Supp. 2017). *See, e.g.*, *Cole v. Isherwood*, 264 Neb. 985, 989, 653 N.W.2d 821, 826 (2002); *Blitzkie v. State*, 228 Neb. 409, 412, 422 N.W.2d 773, 775 (1988). *And see, e.g.*, *Catania v. Univ. of Neb.*, 204 Neb. 304, 315, 282 N.W.2d 27, 33 (1979).

Because the STCA and the PSTCA are to be construed in harmony, *see* part III of this Comment & Authorities, below, the same rules apply both statutes.

B. TORT ACTIONS AGAINST POLITICAL SUBDIVISIONS

The PSTCA governs tort actions against political subdivisions of the State of Nebraska are governed by the PSTCA. Neb. Rev. Stat. § 13-901, et seq. (Reissue 2012), §§ 13-910, 13-912 (Cum. Supp. 2017).

“The PSTCA reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. It is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.” *Geddes v. York Cty.*, 273 Neb. 271, 275, 729 N.W.2d 661, 665 (2007) (footnotes omitted). *Accord, e.g.*, *Rutledge v. City of Kimball*, 304 Neb. 593, 597, 935 N.W.2d 746, — (2019); *Brock v. Dunning*, 288 Neb. 909, 919, 854 N.W.2d 275, 286 (2014); *Hall v. Cty. of Lancaster*, 287 Neb. 969, 976-77, 846 N.W.2d 107, 114 (2014), *overruled on other grounds* by *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *Stonacek v. City of Lincoln*, 279 Neb. 869, 877, 782 N.W.2d 900, 908 (2010); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 85, 727 N.W.2d 447, 454 (2007), *overruled on other grounds* by *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020); *Keller v. Tavarone*, 265 Neb. 236, 240, 655 N.W.2d 899, 903 (2003); *Hatcher v. Bellevue Volunteer Fire Dept.*, 262 Neb. 23, 29, 628 N.W.2d 685, 691

(2001); *Keller v. Tavarone*, 262 Neb. 2, 11, 628 N.W.2d 222, 230 (2001); *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988) (wide ranging discussion of applicability and requirements of Act). *And see* *Edwards v. Douglas County*, 308 Neb. 259, 282, 953 N.W.2d 744, 759 (2021) (“[T]he PSTCA provides the exclusive means by which to maintain a tort claim against a political subdivision and its employees.” (internal quotation marks and a footnote omitted); *Catania v. Univ. of Neb.*, 204 Neb. 304, 315, 282 N.W.2d 27, 33 (1979) (discussing the inefficacy of an attempted waiver of a statutory section that “provide[s] an exclusive remedy against the state and a particular forum for judicial trial”).

The PSTCA was formerly found in Chapter 23 of the Nebraska Revised Statutes. It is currently found in Chapter 13. This will account for the difference between the statutory citations in some older cases, on the one hand, and the newer cases, on the other. A cross-reference table for access back and forth between the former section numbers and the new section numbers can be found at Neb. Rev. Stat. Ch. 23, art. 24, § 23-2401 et seq. (Reissue 2012).

Because the PSTCA and STCA are to be construed in harmony, *see* part III of this Comment & Authorities, immediately below, the same rules apply under both statutes.

III. THESE STATUTES SHOULD BE CONSTRUED IN HARMONY

As a general rule, similar provisions in the STCA and the PSTCA should be construed in harmony. *Amend v. Neb. PSC*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018); *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 146, 876 N.W.2d 388, 394 (2016); *Kimminau v. City of Hastings*, 291 Neb. 133, 142, 864 N.W.2d 399, 408 (2015) (“[W]here language in the PSTCA is similar to language in the [STCA], cases construing the one statute are applicable to construction of the other.”); *Big Crow v. City of Rushville*, 266 Neb. 750, 755, 669 N.W.2d 63, 67 (2003), *superseded by rule on other grounds, as stated in* *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 691 N.W.2d 508 (2005); *Cole v. Isherwood*, 264 Neb. 985, 989, 653 N.W.2d 821, 825 (2002), *superseded by rule on other grounds, as stated in* *Weeder, supra*.

IV. VICARIOUS LIABILITY OF THE STATE OR SUBDIVISION

“Except as otherwise provided, in all suits brought under the PSTCA, ‘the political subdivisions shall be liable in the same manner and to the same extent as a private individual under like circumstances.’ § 13-908.” *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007), *overruled on other grounds* by *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020). *Accord, e.g., Moser*, 307 Neb. at 23, 948 N.W.2d at —; *Reiber v. Cty. of Gage*, 303 Neb. 325, 341, 928 N.W.2d 916, 928 (2019); *Phillips v. Liberty Mut. Ins. Co.*, 293 Neb. 123, 130, 876 N.W.2d 361, 367 (2016). *See also* 28 U.S.C. § 2674 (“The United States

shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]” This comes up again in part X of this Comment & Authorities, below.

Regarding the exemptions “otherwise provided,” see part VI, below.

An employer may not be found vicariously liable unless the employee is liable. NJI2d Civ. 6.02, Comment & Authorities. This general rule applies in actions under the two tort claims acts. *E.g.*, *Hatcher v. Bellevue Volunteer Fire Dept.*, 262 Neb. 23, 35–36, 628 N.W.2d 685, 691–92, (2001); *D.K. Buskirk & Sons, Inc. v. State*, 252 Neb. 84, 89–94, 560 N.W.2d 462, 466–69 (1997). See also *Jacobson v. Shresta*, 288 Neb. 615, 624–25, 849 N.W.2d 515, 522–23 (2014); *McKenna v. Julian*, 277 Neb. 522, 527, 763 N.W.2d 3894, 389 (2009); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007), *overruled on other grounds* by *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 498–500, 557 N.W.2d 668, 673–74 (1997); *Haman v. Marsh*, 237 Neb. 699, 710, 467 N.W.2d 836, 845 (1991) (state liability for negligence of its agents or employees can only be created “by general law, uniform in its application to persons”).

Regarding the elements of a cause of action under the STCA and the PSTCA, see part X of this Comments & Authorities, below

V. THE COVERAGE OF THE TWO TORT CLAIMS ACTS

State agencies are defined “to include ‘all commissions of the State of Nebraska . . . the primary function of which is to act as . . . instrumentalities or agencies of the State of Nebraska,’” while they are “‘acting as[] instrumentalities or agencies of the State of Nebraska.’” *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 626, 905 N.W.2d 551, 558 (2018) (citing Neb. Rev. Stat. § 81-8,210(1) (Reissue 2014)).

Public hospitals and health-care providers: The Nebraska Hospital-Medical Liability Act, cited and discussed at NJI2d Civ. 12.01, Comment, governs many of the procedures applicable to claims of malpractice against health-care professionals in Nebraska. That statute contains no waiver of sovereign immunity. If the malpractice action is against health-care professionals who are employees of the state or political subdivision, then the only waiver of sovereign immunity is that in the applicable Tort Claims Act. A party filing suit against a state health-care provider must comply with both the Nebraska Hospital-Medical Liability Act and the appropriate Tort Claims Act. *Keller v. Tavarone*, 262 Neb. 2, 12–13, 628 N.W.2d 222, 230–31 (2001).

Public schools: *E.g.*, *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007), *overruled on other grounds* by *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020).

Public universities: “The University [of Nebraska] and its Board of Regents are agencies of the state, and tort claims against the University

must be brought in accordance with the provisions of the [STCA]." *Shlien v. Bd. of Regents*, 263 Neb. 465, 470, 640 N.W.2d 643, 648 (2002).

Boards of mental health: The boards of mental health in the various judicial districts in Nebraska are state agencies for purposes of tort liability. Therefore, the provisions of the STCA are applicable. *Zimmerman v. Douglas Cty. Hosp.*, 252 Neb. 583, 586-88, 563 N.W.2d 349, 351-352 (1997).

OPPD: The Omaha Public Power District is a political subdivision under the PSTCA. *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 17, 554 N.W.2d 636, 639 (1996). *See also* *Marshall v. Dawson Cty. Pub. Power Dist.*, 254 Neb. 578, 578 N.W.2d 428 (1998).

Volunteers: Volunteer firefighters are covered by the PSTCA. *Hatcher v. Bellevue Volunteer Fire Dept.*, 262 Neb. 23, 29-33, 38, 628 N.W.2d 685, 691-92, 697 (2001).

But not contract actions: Contract actions, on the other hand, are not governed by the two tort claims acts. *Employers Reinsurance Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 748-49, 438 N.W.2d 124, 127 (1989). Contract suits against the State of Nebraska or a Nebraska state agency are governed by the State Contract Claims Act, Neb. Rev. Stat. §§ 81-8,302, (Reissue 2014). For a discussion of this Act, *see* *Irving F. Jensen Co., Inc. v. State, Dept. of Roads*, 272 Neb. 162, 719 N.W.2d 716 (2006) and the cases cited and discussed therein.

VI. SOVEREIGN IMMUNITY ITSELF AND THE EXCEPTIONS TO THE TORT CLAIMS ACTS' WAIVER OF THAT IMMUNITY ARE JURISDICTIONAL

A. THE EXCEPTIONS DISCUSSED

Each of the tort claims acts contains a list of exceptions or exemptions to the Act's waiver of sovereign immunity. STCA, Neb. Rev. Stat. § 81-8,219 (Cum. Supp. 2017); PSTCA, Neb. Rev. Stat. § 13-910 (Cum. Supp. 2017). *See, e.g.* *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020); *Kimminau v. City of Hastings*, 291 Neb. 133, 141, 864 N.W.2d 399, 407 (2015); *Hall v. Cty. of Lancaster*, 287 Neb. 969, 979, 846 N.W.2d 107, 115 (2014), *overruled on other grounds by* *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *Stonacek v. City of Lincoln*, 279 Neb. 869, 877, 782 N.W.2d 900, 908 (2010) ("The waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision, such as the city.").

"It is well settled that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver." Same quotation: *Burke v. Bd. of Trustees*, 302 Neb. 494, 504, 924 N.W.2d 304, 312 (2019) (*see also id.* at 507, 924 N.W.2d at 313-14); *Amend v. Neb. PSC*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018). *Accord, e.g.,* *Edwards*

v. Douglas County, 308 Neb. 259, 283, 268, 953, 953 N.W.2d 744, 750–51, 759 (2021); Brown v. State, 305 Neb. 111, 118, 939 N.W.2d, 354, — (2020). The strict construction of the Tort Claims Acts is discussed at length at part VIII of this Comment & Authorities, below.

Some, *but not all*, of the exceptions are discussed here. Consult the statute for the complete list of exceptions.

The STCA shall not apply to: (4) any claim arising out of assault, battery, false imprisonment, malicious prosecution, abuse of process, libel, slander, or interference with contract rights. Neb. Rev. Stat. § 81-8,219(4) (Cum. Supp. 2017). The court has called this the intentional tort exception.

The assault and battery parts of this exception are discussed at great length in both *Edwards v. Douglas Cty.*, 308 Neb. at 270–81, 953 N.W.2d at 751–56 (2021) and *Moser v. State*, 307 Neb. 18, 23–32, 948 N.W.2d 194, — (2020), each citing cases and discussing the history of this exception in Nebraska and in the U.S. Supreme Court. *See also*, e.g., *Rutledge v. City of Kimball*, 304 Neb. 593, 597–600, 935 N.W.2d 746, — (2019). “Because the assault and battery exceptions in the STCA and the . . . PSTCA are nearly identical, cases construing” the one are applicable to the other. *Moser*, 307 Neb. at 25, 948 N.W.2d at — (parentheses around PTSCA omitted). Exemptions from this exception apply to “bar[] claims against the government which sound in negligence” “whenever an assault ‘is essential to the claim.’” *Edwards*, 308 Neb. at 277, 953 N.W.2d at 756 (“Plaintiffs cannot circumvent the assault and battery exemption though ‘artful pleading’ Because the Legislature has broadly exempted from the PSTCA ‘[a]ny claim arising out of assault,’ it is immaterial whether *Edwards* has alleged the assault occurred because [of] the government[’s negligence] *Id.* at 279, 953 N.W.2d at 757.”).

Stonacek v. City of Lincoln, 279 Neb. 869, 782 N.W.2d 900 (2010), discusses the “misrepresentation” exception found in § 13-910(7) of the PSTCA and the same exception in the Federal Tort Claims Act. *Id.* at 877, 882–86, 782 N.W.2d at 908, 910–13. Governmental immunity, the exceptions to the tort claims acts, and the tort of false imprisonment is discussed at *Davis v. State*, 297 Neb. 955, 980–81, 902 N.W.2d 165, 186–87 (2017) (citing cases).

And it shall not apply to:

(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal.

Neb. Rev. Stat. § 81-8,219(9) (Cum. Supp. 2017). Regarding this section of the statute, *see particularly* *Fickle v. State*, 273 Neb. 990, 735 N.W.2d

754 (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007). Regarding the PSTCA, *see* Neb. Rev. Stat. § 13-910(9) (Cum. Supp. 2017) (same quotation but for the substitution of “political subdivision” for “governmental entity”).

“Under this provision, the State is immune from liability against allegations of a malfunctioning traffic signal unless the malfunction was not corrected by the State within a reasonable time after it received actual or constructive notice of the problem.” *Fickle*, 273 Neb. at 995, 735 N.W.2d at 754. Regarding such a device that has malfunctioned, been destroyed, or been removed, *see also* NJI2d Civ. 7.05.

The STCA further provides that it shall not apply to:

(7) Any claim based upon the failure to make inspection or making an inadequate inspection or negligent inspection of any property, other than property owned by or leased to the state to determine whether the property complies with or violates any statute, ordinance, rule or regulation or contains a hazard to public health or safety unless the state had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety[.]

Neb. Rev. Stat. § 81-8,219(7) (Cum. Supp. 2017). Regarding the PSTCA, *see* Neb. Rev. Stat. 13-910(3) (Cum. Supp. 2017) (same quotation but for the omission of the comma after the first use of the word “property,” the substitution of “such political subdivision” for the first use of the word “state,” and the substitution of “political subdivision” for the second use of the word “state”).

The PSTCA provides that it shall not apply to “[a]ny claim arising out of the alleged insufficiency or want of repair [as regards the general or overall condition] of any highway . . . , bridge, or other public thoroughfare,” regarding spot or localized defects, the political subdivision shall only be liable if it had “actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim.” Neb. Rev. Stat. § 13-910(12) (Cum. Supp. 2017). *See Kimminau*, 291 Neb. at 144, 864 N.W.2d at 407–08 (2015). Regarding the STCA, *see* Neb. Rev. Stat. § 81-8,219(13) (Cum. Supp. 2017) (same quotation; referring to the state rather than political subdivisions). (These statutory sections appear to be, at least in part, a reaction to *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992), *superseded on other grounds by statute and rule change, as noted in* *Walton v. Patil*, 279 Neb. 974, 983, 783 N.W.2d 438, 445 (2010), *overruled on other grounds by* *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).)

In *Bean v. State*, 222 Neb. 202, 205, 382 N.W.2d 360, 362 (1986), the Court stated that, “The State’s conduct in maintaining its highways

falls squarely within the purview of the [STCA], § 81-8,209 et seq.” The statute on which that quotation was based has been changed. See Neb. Rev. Stat. § 81-8,219 (Cum. Supp. 2017). It seems doubtful that the Court would say the same thing were the issue to arise today.

In cases involving governmental immunity to a political subdivision’s reaction to a natural disaster or a civil defense emergency, governmental immunity is not waived “and the district court does not acquire subject matter jurisdiction, absent factual allegations of willful misconduct, gross negligence, or bad faith on the part of the political subdivision.” *Lawry v. Cty. of Sarpy*, 254 Neb. 193, 201, 575 N.W.2d 605, 610 (1998) (citing and discussing both the STCA and the PSTCA), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). (Regarding subject matter jurisdiction, see part VI(B) of this Comment & Authority, immediately below.)

The discretionary function exception is discussed in part XIII of this Comment & Authorities, below, under the heading “The Discretionary Function Exception.”

As discussed below in this Comment & Authorities, when a plaintiff’s complaint shows on its face that a claim is barred by one of the exceptions, then the state’s immunity is jurisdictional. It need not be pleaded; it can be raised for the first time on appeal; and it can be raised by a party or the court *sua sponte*.

B. THE IMMUNITY ITSELF AND THE WAIVER OF THAT IMMUNITY IN THE TORT CLAIMS ACTS ARE JURISDICTIONAL

1. Summary

Under the cases and statutes cited and discussed below, among others, the following is true. The state and its political subdivisions have a general sovereign immunity from suit. By statute—the STCA and the PSTCA, respectively—the state has waived a limited amount of this sovereign immunity. Each of these statutes contains a number of exceptions to the waiver; if a case falls within one of the exceptions, then sovereign immunity from suit is not waived; if sovereign immunity is not waived, then a court lacks subject matter jurisdiction. Such a case must be dismissed.

A lack of subject matter jurisdiction—and, therefore, sovereign immunity—cannot be waived by the parties or the court. It is not waived by a failure to plead it. It is not waived when neither party raises it. It is not waived if the state or subdivision pleads it as an affirmative defense. It can be raised for the first time on appeal—raised by a party or by the appellate court itself. If the appellate court finds that sovereign immunity does apply, then the appellate court either voids any judgment below and dismisses the case or it remands with appropriate directions.

Statutes that are purported to waive sovereign immunity are strictly construed against waiver and in favor of the sovereign immunity of the state or subdivision. Strict construction of these statutes is discussed further at part VIII of this Comment & Authorities.

“The first question necessarily is that of jurisdiction.” *Ex parte McCordle* 74 U.S. 506, 512 (1869).

2. After *Davis v. State* Sovereign Immunity is a Question of Subject Matter Jurisdiction

In 2017, *Davis v. State* recognized that sovereign immunity is a question of subject matter jurisdiction. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) (“[It] is by nature jurisdictional . . . *Id.* at 974, 902 N.W.2d at 183.) *Accord, e.g.*, *Cappel v. State*, 298 Neb. 445, 451, 905 N.W.2d 38, 45 (2018) (“Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.”).²

“[A] state’s immunity from suit is a fundamental aspect of sovereignty.” *Burke v. Board of Trustees of Nebraska State Colleges*, 302 Neb. 494, 501–02, 924 N.W.2d 304, 310 (2019).

“[A] trial court lacks subject matter jurisdiction over an action against the State unless the State[, by legislative action,] has consented to suit.” *Burke*, 302 Neb. at 502, 924 N.W.2d at 31). *See also, id.*, at 504,

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²Among other things, this means that sovereign immunity is not an affirmative defense.

Prior to *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165, 186 (2017) there were two situations in which governmental immunity was an affirmative defense.

■ The STCA and the PSTCA both include a list of exceptions to their sovereign-immunity waiver. Prior to *Davis*, those exceptions were affirmative defenses to be pleaded and proved by the government. *E.g.*, *Lawry v. County of Sarpy*, 254 Neb. 193, 198, 575 N.W.2d 605, 608 (1998) (overruled by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)); *Sherrod v. State Dept. of Correctional Services*, 251 Neb. 355, 361, 557 N.W.2d 634, 639 (1997) (overruled by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)). *See also Amend v. Nebraska Public Service Commission*, 298 Neb. 617,

622 n.5, 905 N.W.2d 551, 556 n.5 (2018). After *Davis*, the exceptions themselves are jurisdictional and the cases that held otherwise are overruled. If an exception applies, the court lacks subject matter jurisdiction. *See the discussion in part VI(B)(3) & (4), below.*

■ Also prior to *Davis*, the immunity itself was an affirmative defense when the government chose to plead it as such. *E.g. Maresh v. State*, 241 Neb. 496, 502, 489 N.W.2d 298, 305 (1992) (overruled by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)) *superseded on other grounds by statute and rule change, as noted in Walton v. Patil*, 279 Neb. 974, 983, 783 N.W.2d 438, 445 (2010). As discussed herein, after *Davis* how the government pleads (*see part VII(A)(3)*), or does not plead, its sovereign immunity is irrelevant: the immunity itself is jurisdictional.

924 N.W.2d at 312. Said a bit differently, “Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State.” Same quotation: *Burke*, 302 Neb. at 502, 924 N.W.2d at 311; *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 248, 917 N.W.2d 903, 909 (2018) (“[N]o suit may be maintained against the State unless the Legislature, by law, has so provided.”. *See also, e.g., Reiber v. County of Gage*, 303 Neb. 325, 340–41, 928 N.W.2d 916, 928 (2019) (“The PSTCA reflects a limited waiver of governmental immunity and prescribes the exclusive procedure for maintenance of a tort claim against a political subdivision or its officers, agents, or employees.”; regarding “limited waiver,” *see* part II of this Comment & Authorities, below); *Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 788 N.W.2d 264 (2010) (overruled by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)). *See also Amend*, above; *Davis*, above; *Lamb*, above; *S.I.D. No. 1, Butler Cty.*, above; *Jacobson*, above. So, if there are no applicable statutory exclusions to the state’s inherent immunity, or if there is an applicable statutory exception to the exclusion, then the trial court has no jurisdiction in the first place. Regarding the lack of subject matter jurisdiction, *see also* part I(A) of this Comment & Authorities, above.

“The first question [for any court] necessarily is that of jurisdiction. [If the court lacks jurisdiction] it is useless, if not improper, to enter into any discussion of other questions.” *Ex parte McCardle*, 74 U.S. 506, 512 1869). “Whether a court has subject matter jurisdiction is a threshold issue.” *Wizinsky v. State*, 308 Neb. 778, 786, 957 N.W.2d 466, — (2021). Looked at another way, “the threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.” Same quotation: *Ashby v. State*, 279 Neb. 509, 518, 779 N.W.2d 343, 352 (2010); *Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754, 766 (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007). *Accord Lambert v. Lincoln Pub. Schs.*, 306 Neb. 192, 198, 945 N.W.2d 84, — (2020). When this immunity applies, “the proper remedy is to dismiss [the action] for lack of subject matter jurisdiction.” *Edwards v. Douglas County*, 308 Neb. 259, 267, 953 N.W.2d 744, 750 (2021). The whole point of sovereign immunity is that where that immunity applies the sovereign owes no duty. *See* the part XI of this Comment & Authorities headed “Duty,” below.

“[All] courts have a duty to determine whether they have subject matter jurisdiction” *Burke*, 302 Neb. at 499, 924 N.W.2d at 309 (brackets and italics added). “Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.” *Omaha Expo & Racing*, 307 Neb. at 180–81, 949 N.W.2d at —. It can be raised at any stage of the litigation. “

“Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. This is so even where . . . neither party has raised the issue.” *Cullinane v. Beverly Enters.*—Neb., 300 Neb. 210, 219, 912

N.W.2d 774, 786 (2018) (footnotes omitted). *Accord, e.g., Omaha Expo & Racing*, 307 Neb. at 192, 949 N.W.2d at — (“Because the district court lacked subject matter jurisdiction to consider [the matter at hand], we, in turn, lack jurisdiction to consider the district court’s review.”); *Butler Cty. Landfill, Inc. v. Butler Cty. Bd. of Supervisors*, 299 Neb. 422, 427–28, 908 N.W.2d 661, 666 (2018); *In re Application of Northeast Neb. Pub. Power Dist.*, 300 Neb. at 246, 912 N.W.2d at 891; *Boyd*, 298 Neb. at 824, 906 N.W.2d at 37.

When this immunity applies, “the proper remedy is to dismiss [the action] for lack of subject matter jurisdiction.” *Edwards v. Douglas County*, 308 Neb. 259, 267, 953 N.W.2d 744, 750 (2021). As discussed in various places below, dismissal for lack of subject matter jurisdiction applies at the trial and appellate level. This is so for trial and appellate courts and, at either level, courts should determine their jurisdiction over the action “before considering nonjurisdictional grounds.” *Edwards*, 308 Neb. at 267, 953 N.W.2d at 750 (2021). “*See also, e.g., Ex parte McCardle*, 74 U.S. at 512 (“The first question necessarily is that of jurisdiction.”). Regarding the lack of subject matter jurisdiction, *see* part VI(B) of this Comment & Authorities, below.

That an appellate court may consider exceptions to this immunity for the first time on appeal does not mean that the state can relitigate “factual disputes relevant to the application of [the] exception[s] for the first time on appeal. But an appellate court has the power to determine whether a plaintiff’s allegations, taken as true, show that a tort claim is facially barred by an . . . exception.” *Davis*, 297 Neb. at 979, 902 N.W.2d at 186.

“Subject matter jurisdiction is a question of law. . . . [and a]n appellate court reviews questions of law independently of the lower court’s conclusion.” *Burke*, 302 Neb. at 499–500, 924 N.W.2d at 309 (footnotes omitted). *Accord, e.g., In re Estate of Adelung*, 306 Neb. 646, 655–56, 947 N.W.2d 269, — (2020). *See also* part VI(C) or this Comment & Authorities, below.

When sovereign immunity otherwise applies, then, absent a statutory exception, an appellate court has no power to adjudicate the merits of the claim; its jurisdiction is limited to the power to determine that it lacks jurisdiction and “to vacate a void order [or] remand the cause with appropriate directions.” *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 944, 902 N.W.2d 147, 153 (2017). *Accord, e.g., Omaha Expo & Racing v. Neb. State Racing Comm’n*, 307 Neb. 172, 181, 949 N.W.2d 183, — (2020) (“A court action taken without subject matter jurisdiction is void.”); *Davis*, 297 Neb. at 979, 902 N.W.2d at 186.

Additionally, *Davis* quotes the United States Supreme Court’s holding “that ‘sovereign immunity is by nature jurisdictional . . . and the terms of the United States’ consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” *Davis*, 297 Neb. at 974, 902

N.W.2d at 183 (alteration in original) (some multiple quotation marks omitted) (quoting *Henderson v. United States*, 517 U.S. 654, 675–76 (1996) (Thomas, J. dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (opinion for a unanimous Court))).

“It is well settled that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.” Same quotation: *Burke v. Bd. of Trustees*, 302 Neb. 494, 504, 924 N.W.2d 304, 312 (2019) (*see also id.* at 507, 924 N.W.2d at 313–14); *Amend v. Neb. PSC*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018). (This “strict construction” is discussed further at part VIII of this Comment & Authorities.) “To strictly construe against a waiver of sovereign immunity, we broadly read exemptions to a waiver of sovereign immunity.” *Amend*, 298 Neb. at 624, 905 N.W.2d at 557. *Accord* *Edwards v. Douglas County*, 308 Neb. 259, 268, 953 N.W.2d 744, 751 (2021); *Reiber v. Cty. of Gage*, 303 Neb. 325, 342, 928 N.W.2d 916, 928 (2019). *Rouse v. State* cites *Amend* and states exactly the same thing except that it uses the word “exceptions” instead of “exemptions”; either word seems appropriate. *Rouse v. State*, 301 Neb. 1037, 1041, 921 N.W.2d 355, 360 (2019). The strict construction of the Tort Claims Acts is discussed at length at part VIII of this Comment & Authorities, below.

When an exception to the STCA or PSTCA’s waiver of sovereign immunity is apparent on the face of the complaint, then the exception is jurisdictional and cannot be waived—even if the defendant pleads it as affirmative defense. *See Davis*, 297 Neb. at 979, 902 N.W.2d at 186. *See also Amend v. Neb. PSC*, 298 Neb. 617, 622, 629, 905 N.W.2d 551, 556, 560 (2018). *And see, e.g., Catania v. Univ. of Neb.*, 204 Neb. 304, 315, 282 N.W.2d 27, 33 (1979) (holding that the STCA requirement that the suit must be “filed in the district court for the county in which the alleged wrongful act or omission occurred” is jurisdictional (subject matter jurisdiction); as such, absent “specific legislative authority, neither the state nor one of its agencies may waive [that] requirement[].”

For more on the subject of the state or subdivision’s inability to waive the jurisdictional bar of sovereign immunity, *see* part VIII(A)(3) and VI(B)(4) of this Comment and Authorities. Political subdivisions may “waive immunity to some extent by purchasing liability insurance. . . . [T]he terms of the liability policy determine whether the immunity is waived.” *City of Lincoln v. Cty. of Lancaster*, 297 Neb. 256, 261–62, 898 N.W.2d 374, 378–79 (2017) (citing Neb. Rev. Stat. § 13-916 (Reissue 2012)).

“[W]hen a plaintiff’s complaint shows on its face that a claim is barred by one of the exceptions, the State’s inherent immunity from suit is a jurisdictional issue that an appellate court cannot ignore. . . . We hold that an exception to the State’s waiver of immunity under the STCA is an issue that the state may raise for the first time on appeal and that a court may consider *sua sponte*.” *Davis*, 297 Neb. at 979, 902

N.W.2d at 186. “Simply put, a political subdivision’s sovereign immunity from suit is a jurisdictional issue that an appellate court cannot ignore.” *Edwards v. Douglas County*, 308 Neb. 259, 265, 953 N.W.2d 744, 749 (2021). The exceptions cannot be waived by a failure to plead them. *Davis*, above. “[E]ven where a party has not raised the issue, an appellate court has the power to determine whether a plaintiff’s allegations, taken as true, show that a tort claim is facially barred by the STCA.” *Amend*, 298 Neb. at 623, 905 N.W.2d at 556 (“[W]hen a jurisdictional defect is apparent on the face of a plaintiff’s complaint . . . an appellate court has the power to determine whether a plaintiff’s allegations, taken as true, show that a tort claim is facially barred by an . . . exception [to a tort claims act].”). *Accord Cappel v. State*, 298 Neb. 445, 458–59, 905 N.W.2d 38, 49–50 (2018) (“Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.” *Id.* at 451, 905 N.W.2d at 45).

The Nebraska Constitution provides “The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.” Neb. Const. art. V, § 22. This is not a waiver of sovereign immunity; rather, it grants the Legislature the power to waive sovereign immunity. *See Burke v. Bd. of Trustees*, 302 Neb. 494, 502, 924 N.W.2d 304, 311 (2019). “[L]anguage permitting the State to ‘sue and be sued’ is not self-executing, but instead requires the Legislature to take specific action to waive the State’s sovereign immunity.” *Burke*, 302 Neb. at 505, 924 N.W.2d at 312.

It is true that “‘actions to compel an officer to perform an act the officer is legally required to [perform] are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds.’” *Burke*, 302 Neb. at 503, 924 N.W.2d at 311. It is equally true that “[a]ctions to restrain a state official from performing an affirmative act” that the law forbids the official from performing are not barred by sovereign immunity.” *Burke*, 302 Neb. at 503, 924 N.W.2d at 311. In *Burke*, the plaintiff did not sue any state official. The only defendant she named was the Board of Trustees of the Nebraska State Colleges. *Id.* “Because *Burke*’s action against the Board is an action directly against the State, [and not a state official,] sovereign immunity applies to bar the action, unless the Legislature has waived it.” *Burke*, 302 Neb. at 504, 924 N.W.2d at 311. (*Burke* discusses why an “action against the Board is an action directly against the State.” *See Burke*, 302 Neb. at 500–01, 924 N.W.2d at 310.)

The Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016) is not an exception. It “does not waive the State’s sovereign immunity. Thus, a party who seeks declaratory relief by suing only the State must find authorization for such remedy from a source other than the Uniform Declaratory Judgments Act.” *Burke*, 302 Neb. at 504, 924 N.W.2d at 312.

On a related matter,

[42 U.S.C. §] 1983 provides a civil remedy for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law. But it does not necessarily provide a remedy for litigants seeking such remedy against a state. The enactment of § 1983 did not abrogate the State's 11th Amendment immunity, which bars such suits unless the state has waived its immunity or unless [the United States] Congress has exercised its undisputed power under § 5 of the Fourteenth Amendment to override that immunity."

Cappel, 298 Neb. at 451, 905 N.W.2d at 45. State courts have concurrent jurisdiction to entertain federal civil rights actions. When a state court is hearing a federal civil rights action, "federal law is controlling and preempts any conflicting state law," including procedural requirements. *Shearer v. Leuenberger*, 256 Neb. 566, 575, 591 N.W.2d 762, 768(1999) ("Because Shearer's civil rights claim is advanced under federal law [i.e., 42 U.S.C. § 1983], she need not comply with the procedural requirements of the [STCA]"), *overruled on other grounds by Simon v. City of Omaha*, 267 Neb. 718, 727, 677 N.W.2d 129, 137 (2004). See also part VII(B) of this Comment & Authority.).

3. Waiver of Sovereign Immunity

As mentioned in many places above and below in this part of the Comment & Authorities, a lack of subject matter jurisdiction cannot be waived except by the legislative branch. For the latter point, see, e.g., *Rhiley v. Neb. State Patrol*, 301 Neb. 241, 247, 917 N.W.2d 903, 908–09 (2018) ("[N]o suit may be maintained against the State unless the Legislature, by law, has so provided.")

It cannot be waived by the parties or the court. As noted in various places in this part, part VI, of these Comment & Authorities, the immunity itself and the statutory exceptions to the tort claims acts deprive the court of subject matter jurisdiction. Sovereign immunity—as a general matter and as regards the exceptions to the tort claims acts—is a matter of subject matter jurisdiction. "Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties." Same quotation: *Boyd v. Cook*, 298 Neb. 819, 830, 906 N.W.2d 31, 41 (2018); *J.S.*, 297 Neb. at 353–54, 899 N.W.2d at 898; *Estate of Evertson*, 295 Neb. 301, 307, 889 N.W.2d 73, 79 (2016); *Rice v. Adam*, 254 Neb. 219, 225, 575 N.W.2d 399, 404 (1998); *In re J.T.B.*, 245 Neb. 624, 631, 514 N.W.2d 635, 640 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 868, 509 N.W.2d 618, 868 (1994). See also, e.g., *Catania v. Univ. of Neb.*, 204 Neb. 304, 315, 282 N.W.2d 27, 33 (1979) (holding that the STCA requirement that the suit must be "filed in the district court for the county in which the alleged wrongful act or omission occurred" is jurisdictional (subject matter jurisdiction); as such, absent "specific legislative authority, neither the state nor one of its agencies may waive [that] requirement[]").

“Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.” *Omaha Expo & Racing*, 307 Neb. at 180–81, 949 N.W.2d at ____ “[T]his court has repeatedly held that an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.” *Cappel v. State*, 298 Neb. 445, 459, 905 N.W.2d 38, 50 (2018) *Accord, e.g., Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 59, 917 N.W.2d 435, 454 (2018); *Lawry v. Cty. of Sarpy*, 254 Neb. 193, 201, 575 N.W.2d 605, 610 (1998) (citing and discussing both the STCA and the PSTCA), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). It is a matter to be addressed by the legislative branch.

Sovereign immunity cannot be waived by a failure to plead it. *E.g., Davis*, 297 Neb. at 979, 902 N.W.2d at 186. And it is not waived if the state or subdivision pleads it as an affirmative defense *See, e.g., Amend v. Neb. PSC*, 298 Neb. 617, 622, 629, 905 N.W.2d 551, 556, 560 (2018); *Davis v. State*, 297 Neb. 955, 979 N.W.2d 165, 186 (2017). *See also, Amend*, 298 Neb. at 623, 905 N.W.2d at 556 (“[E]ven where a party has not raised the issue, an appellate court has the power to determine whether a plaintiff’s allegations, taken as true, show that a tort claim is facially barred by the STCA.”).

It is not waived if it is not addressed in the court below. That is, it may be raised for the first time on appeal. The State’s inherent immunity from suit is jurisdictional and that it may be raised for the first time on appeal—raised either by the state or the appellate court itself. *E.g., Amend*, 298 Neb. at 622, 905 N.W.2d at 556. “This rule,” said the Court, “is more consistent with the settled principle that lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.” *Id.* at 622–23, 905 N.W.2d at 556. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 868, 509 N.W.2d 618, 868 (1994). *Cappel v. State Dept. of Roads*, 298 Neb. 445, 459, 50 905 N.W.2d 38, (2017) (“[T]his court has repeatedly held that an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.”).

Political subdivisions may “waive immunity to some extent by purchasing liability insurance. . . . [T]he terms of the liability policy determine whether the immunity is waived.” *City of Lincoln v. Cty. of Lancaster*, 297 Neb. 256, 261–62, 898 N.W.2d 374, 378–79 (2017) (citing Neb. Rev. Stat. § 13-916 (Reissue 2012)).

In cases involving governmental immunity to a political subdivision’s reaction to a natural disaster or a civil defense emergency, governmental immunity is not waived “and the district court does not acquire subject matter jurisdiction, absent factual allegations of willful misconduct, gross negligence, or bad faith on the part of the political subdivision.” *Lawry v. Cty. of Sarpy*, 254 Neb. 193, 201, 575 N.W.2d 605, 610 (1998).

As noted above, the Nebraska Constitution provides “The state may

sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.” Neb. Const. art. V, § 22. This is not a waiver of sovereign immunity; rather, it grants the Legislature the power to waive sovereign immunity. See *Burke v. Bd. of Trustees*, 302 Neb. 494, 502, 924 N.W.2d 304, 311 (2019). “[L]anguage permitting the State to ‘sue and be sued’ is not self-executing, but instead requires the Legislature to take specific action to waive the State’s sovereign immunity.” *Burke*, 302 Neb. at 505, 924 N.W.2d at 312.

And, regarding a related matter, “[I]t is well settled that statutes that purport to waive the State’s protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver. In order to strictly construe against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity.” *Brown v. State*, 305 Neb. 111, 118, 939 N.W.2d, 354, — (2020) (footnote omitted). This is discussed further in part VIII of this Comment & Authorities, below.

4. An Open Question

Davis, holds that “when a plaintiff’s complaint shows on its face that a claim is barred by one of the exceptions, the State’s inherent immunity from suit is a jurisdictional *issue that an appellate court cannot ignore*.” *Davis*, 297 Neb. at 979, 902 N.W.2d at 186 (emphasis added). *Davis* also notes that the United States “Supreme Court has held that a State’s 11th Amendment immunity defense ‘sufficiently partakes of the nature of a jurisdictional bar’ that it can be raised for the first time on appeal, although [the court] has *discretion* to determine that a State has waived that argument by failing to raise it on appeal.” *Davis*, 297 Neb. at 975, 902 N.W.2d at 184 (footnote omitted) (brackets and added) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); citing *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, (1982); *Sosna v. Iowa*, 419 U.S. 393 (1975).

There is a seeming tension between the Nebraska Supreme Court’s statement that the appellate court *cannot ignore* the issue and the United States Supreme Court’s statement that the appellate court has the *discretion* to call a waiver of immunity when the State fails to raise it (and presumably the plaintiff has not raised it either, so the court notices it on its own). Whether there is any such tension is a subject for later cases. It is clear, however, that neither the holdings nor the reasoning of United States Supreme Court cases has binding precedential effect on Nebraska courts. See part XIV of this Comment & Authorities.

C. WHERE THE RELEVANT FACTS ARE UNDISPUTED, WHETHER IMMUNITY PRECLUDES SUIT, AN EXCLUSION ALLOWS SUIT, OR AN EXCEPTION TO THE EXCLUSION PRECLUDES SUIT IS A QUESTION OF LAW

“The determination of constitutional requirements presents a ques-

tion of law. . . . Whether a plaintiff's allegations present a claim that is barred by an exception to the State's waiver of tort immunity in a tort claims act presents a question of law." *Davis v. State*, 297 Neb. 955, 968, 902 N.W.2d 165, 180 (2017). *Accord*, e.g., *Edwards v. Douglas County*, 308 Neb. 259, 264, 953 N.W.2d 744, 749 (2021) (PSTCA); *Brown v. State*, 305 Neb. 111, 115, 939 N.W.2d, 354, — (2020) (STCA); *Rutledge v. City of Kimball*, 304 Neb. 593, 596, 935 N.W.2d 746, — (2019) (PSTCA); *Kimminau v. City of Hastings*, 291 Neb. 133, 140, 864 W.2d 399, 407 (2015) *Hall v. Cty. of Lancaster*, 287 Neb. 969, 976–77, 846 N.W.2d 107, 114 (2014), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

"Subject matter jurisdiction is a question of law. When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion." *Burke v. Bd. of Trustees*, 302 Neb. 494, 499–500, 924 N.W.2d 304, 309 (2019) (footnotes omitted). *Accord*; *Rouse v. State*, 301 Neb. 1037, 1041, 921 N.W.2d 355, 359–60 (2019). *Accord*, e.g., *Brown*, 305 Neb. at 115, 939 N.W.2d. at —; *Rutledge*, 304 Neb. at 596, 935 N.W.2d at —; *Amend v. Neb. PSC*, 298 Neb. 617, 625, 905 N.W.2d 551, 625 (2018) ("Where the facts are undisputed, whether an exception to immunity under the STCA precludes suit is a question of law."); *Moreno v. City of Gering & Scotts Bluff Cty.* 293 Neb. 320, 326, 878 N.W.2d 529, 535 (2016).

"Whether a plaintiff's allegations present a claim that is barred by an exception to the State's waiver of tort immunity in a tort claims act presents a question of law." *Davis v. State*, 297 Neb. 955, 968, 902 N.W.2d 165, 180 (2017). *Accord*, e.g., *Moser v. State*, 307 Neb. 18, 22, 948 N.W.2d 194, — (2020) ("a question of law[] for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court."); *Kimminau*, 291 Neb. at 140, 864 N.W.2d at 407; *Hall*, 287 Neb. at 976–77, 846 N.W.2d at 114, *overruled on other grounds by Davis*, above.

See also part XIII of this Comment & Authorities, below, discussing the discretionary function exception.

D. JURISDICTION AND THE COURT IN WHICH THE SUIT MUST BE FILED

The STCA's requirement that the suit must be "filed in the district court for the county in which the alleged wrongful act or omission occurred" is jurisdictional (subject matter jurisdiction); as such, absent "specific legislative authority, neither the state nor one of its agencies may waive [that] requirement[]." *Catania v. Univ. of Neb.*, 204 Neb. 304, 315, 282 N.W.2d 27, 33 (1979).

VII. CLAIMANTS UNDER THESE ACTS MUST FILE NOTICE

"Where the relevant facts are undisputed, whether the notice

requirements of the STCA or the PSTCA have been satisfied is a question of law, on which an appellate reaches a conclusion independent of the lower court's ruling." *Saylor v. State*, 306 Neb. 147, 153, 944 N.W.2d 726, __ (2020). Regarding "question of law," see part VI(C) of this Comment & Authorities, above. *Accord*, e.g., *Great Northern Insurance Company v. Transit Authority of City of Omaha*, 308 Neb. 916, 925-26, 958 N.W.2d 378, __ (2021).

A. THE REASONS NOTICE IS REQUIRED AND THE REQUIRED CONTENT OF THE NOTICE

The STCA and the PSTCA require that a claimant file written notice of his or her claim with the state or the subdivision before filing the claim in court. STCA, Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014); PSTCA, Neb. Rev. Stat. § 13-919 (Reissue 2012). *See, e.g.*, *Patterson v. Metro. Util. Dist.*, 302 Neb. 442, 446, 923 N.W.2d 717, 720-21 (2019). The notice must include the time and place of the occurrence that is the subject of the claim, as well as "other known facts pertinent to the claim." *Patterson*, 302 Neb. at 446, 302 N.W.2d at 720 (citing Neb. Rev. Stat. § 13-905 (Reissue 2012)). The notice must also include "a proper demand of the relief sought to be recovered." *Jessen v. Malhotra*, 266 Neb. 393, 398, 665 N.W.2d 586, 591 (2003). Otherwise, the notice "fails to accomplish one of its recognized objectives." *Id.*

Written notice filed with the designated person serves a number of purposes. It notifies the subdivision of "possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made." *Jessen v. Malhotra*, 266 Neb. at 398, 665 N.W.2d at 591. *Accord Patterson*, 302 Neb. at 446, 923 N.W.2d at 720-1. It also "ensure[s] that notice of pending claims is provided to those who have a legal duty to file those claims in the official records of the political subdivision, and to notify the governing body of the subdivision." *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 325, 664 N.W.2d 461, 468 (2003). *See also, e.g.*, *Patterson*, 302 Neb. at 446, 923 N.W.2d at 721; *Komar v. State*, 299 Neb. 301, 306, 908 N.W.2d 610, __ (2018); *Keller v. Tavarone*, 265 Neb. 236, 242, 655 N.W.2d 899, 904-05 (2003) ("The primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest.").

As discussed below, in part VIII(B) of this Comment & Authorities, while the statutory rule requiring notice must be strictly construed, the part of the statute regarding the contents of the notice "should be liberally construed so as to not deny relief to a meritorious claim." *Big Crow*

v. City of Rushville, 266 Neb. 750, 754, 669 N.W.2d 63, 66 (2003). *Accord* Chicago Lumber Co. v. School Dist. No. 71, 227 Neb. 355, 417 N.W.2d 757 (1988). Substantial compliance with these requirements is sufficient. *Id.*

B. NOTICE IN FEDERAL CIVIL RIGHTS ACTIONS FILED IN STATE COURT

State courts have concurrent jurisdiction to entertain federal civil rights actions. In such a case, "federal law is controlling and preempts any conflicting state law," including procedural requirements. *Shearer v. Leuenberger*, 256 Neb. 566, 575, 591, 762, 768 (1999) ("Because Shearer's civil rights claim is advanced under federal law [*i.e.*, 42 U.S.C. § 1983]), she need not comply with the procedural requirements of the [STCA]," *overruled on other grounds by* *Simon v. City of Omaha*, 267 Neb. 718, 727, 677 N.W.2d 129, 137 (2004)).

C. NOTICE IS NOT A CONDITION PRECEDENT

Notice is not a substantive element of claimant's negligence action against the state or the subdivision. Likewise, it is not a condition precedent to the state's or the subdivision's tort liability. In other words, it is not jurisdictional. Rather, it is an affirmative defense to an action under either Act. *Cole v. Isherwood*, 264 Neb. 985, 991, 653 N.W.2d 821, 827 (2002) ("[T]he filing requirements . . . and the final disposition requirements . . . of the State Tort Claims Act are conditions precedent to the commencement of suit, but are not jurisdictional prerequisites for the adjudication of a tort claim against the State."); *Keller v. Tavarone*, 265 Neb. 236, 240, 655 N.W.2d 899, 903 (2003); *Bauers v. City of Lincoln*, 245 Neb. 632, 639, 514 N.W.2d 625, 630 (1994) (discussing notice and its effect on the accrual date of a cause of action against a city; stating that notice "is a condition precedent to filing a lawsuit. Although a condition precedent to maintaining an action is not the same as the application of a statute of limitations, our analysis is guided by the principles we have applied to determine when an action has accrued and whether that action is barred by a statute of limitations.").

D. NONCOMPLIANCE WITH NOTICE IS AN AFFIRMATIVE DEFENSE

Plaintiff's failure to comply with these notice requirements does not deprive the district court of subject matter jurisdiction. Rather, it is an affirmative defense that must be raised by the defendant. *Big Crow v. City of Rushville*, 266 Neb. 750, 754-57, 669 N.W.2d 63, 67 (2003); *Keller v. Tavarone*, 265 Neb. 236, 240, 655 N.W.2d 899, 903 (2003). "The issue of noncompliance with the notice provisions of the PSTCA must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance." *Wise v. Omaha Pub. Schs.*, 271 Neb. 635, 637, 714 N.W.2d 19 (2006). *See also* *Great Northern Insurance Company v. Transit Authority of City of Omaha*, 308 Neb. 916, 925-26, 958 N.W.2d

378, — (2021) (“The PTSCA specifies various nonjudicial procedures which we have characterized as conditions precedent to the filing of a lawsuit, and a claimant’s failure to follow these procedures may be asserted as an affirmative defense in an action brought under the act. . . . The presuit claim presentment requirements are procedural . . . ; they are not jurisdictional.”)

Prior to January 1, 2003, this affirmative defense had to be raised in either the answer or a demurrer. Effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 691 N.W.2d 508 (2005). “A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer.” *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515. The affirmative defense of noncompliance with the notice provisions of the PSTCA “is not one of the enumerated defenses which can be asserted by a motion to dismiss pursuant to rule 12(b).” *Wise*, 271 Neb. 635 at 638, 714 N.W.2d at 22. It seems, then, that this affirmative defense must be raised in the answer and cannot be raised in a rule 12(b)(6) motion.

If the state or the subdivision *does* properly raise the issue, the burden to show compliance is on the claimant. STCA, Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014); PSTCA, Neb. Rev. Stat. § 13-919 (Reissue 2012). *E.g.* *Jessen v. Malhotra*, 266 Neb. 393, 397, 665 N.W.2d 586, 590 (2003); *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 322, 664 N.W.2d 461, 466 (2003); *Keller v. Tavarone*, 262 Neb. 2, 11, 628 N.W.2d 222, 230 (2001); *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 6, 567 N.W.2d 294, 297 (1997) (the notice requirement is a procedural precedent to commencement of claim; noncompliance is affirmative defense and is waived if not raised before the first tribunal or agency charged with determining cause of action); *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 18, 554 N.W.2d 636, 639 (1996); *Schoemaker v. Metro. Util. Dist.*, 245 Neb. 967, 969, 515 N.W.2d 675, 677 (1994) (these notice requirements are to be liberally construed to avoid dismissal of meritorious claim for technical noncompliance).

Section 13-906 of the PSTCA provides that a lawsuit may not be filed in district court unless 6 months have passed without a resolution of a claim properly filed with a political subdivision. Neb. Rev. Stat. § 13-906 (Reissue 2012). Section 81-8,213 of the STCA is the functional equivalent of § 13-906. *Big Crow v. City of Rushville*, 266 Neb. 750, 755, 669 N.W.2d 63, 67 (2003).

“Because compliance with statutory time limits such as [these] can be determined with precision, the doctrine of substantial compliance has no application.” *Big Crow*, 266 Neb. at 754, 669 N.W.2d at 67-68.

E. WITH WHOM NOTICE MUST BE FILED

To be effective, the notice of claim must be given to the person or office specified in the statute. *Komar v. State*, 299 Neb. 301, 306, 908

N.W.2d 610, 614 (2018) (“Before suit can be filed under the STCA, a claimant must submit the claim in writing to the Risk Manager within 2 years after the claim accrued.” (citing Neb. Rev. Stat. § 81,8,227(1) (Reissue 2014)); *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 322–27, 664 N.W.2d 461 (2003); *Schoemaker v. Metro. Util. Dist.*, 245 Neb. 967, 969, 515 N.W.2d 675, 677 (1994); *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989). The substantial compliance rule does not apply to the rule that notice must be filed with *the* recipient designated by the subdivision to receive said notice. Notice filed with anyone other than the designated recipient “‘does not substantially comply with the notice requirements of . . . the Act.’” *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 323, 664 N.W.2d 461, 467 (2003) (quoting *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989)). *See also* part VIII(B) of this Comment & Authorities, below.

F. FILING SUIT CONSTITUTES WITHDRAWAL OF NOTICE

Notice is also discussed at length in *Malzahn v. Transit Auth. of City of Omaha*, 244 Neb. 425, 428–30, 507 N.W.2d 289, 292–93 (1993). *Malzahn* holds that filing the lawsuit on a claim is notice of an intent to withdraw that claim from consideration by the governing body sued.

G. THE EFFECT OF NOTICE ON THE ACCRUAL DATE OF THE CAUSE OF ACTION

Regarding notice and its effect on the accrual date of a cause of action against a city, *see* the part of this Comment & Authorities headed “Statute of Limitations,” below.

VIII. THESE STATUTES ARE TO BE STRICTLY CONSTRUED

A. STRICT CONSTRUCTION

“It is well settled that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.” Same quotation: *Moser v. State*, 307 Neb. 18, 24, 25, 948 N.W.2d 194, — (2020); *Burke v. Bd. of Trustees*, 302 Neb. 494, 504, 924 N.W.2d 304, 312 (2019) (*see also id.* at 507, 924 N.W.2d at 313); *Amend v. Neb. PSC*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018). *Accord, e.g.*, *Edwards v. Douglas County*, 308 Neb. 259, 268, 953 N.W.2d 744, 750–51 (2021); *Rutledge v. City of Kimball*, 304 Neb. 593, 602, 935 N.W.2d 746, — (2019); *Reiber v. Cty. of Gage*, 303 Neb. 341–42, 928 N.W.2d 916, 928 (2019); *Rouse v. State*, 301 Neb. 1037, 1041, 921 N.W.2d 355, 360 (2019) (stating that waiver “is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.”); *State ex rel. Rhiley v. Nebraska State Patrol*, 301 Neb. 241, 247, 917 N.W.2d 903, 908–09 (2018); *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 145, 876 N.W.2d 388, 394 (2016); *S.I.D. No. 1, Butler Cty. v. Adamy*, 289 Neb. 913, 919, 858 N.W.2d 168, 174 (2015); *McKenna v. Julian*, 277

Neb. 522, 528, 763 N.W.2d 384, 390 (2009); *Geddes v. York Cty.*, 273 Neb. 271, 275, 729 N.W.2d 661, 665 (2007).

And “[a] waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.” Same quotation: *Edwards*, above. *Moser*, 307 Neb. at 24, 948 N.W.2d at —. *Accord*, e.g., *Rouse*, 301 Neb. at 1041, 921 N.W.2d at 360.

“[S]tatutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state’s sovereign immunity. Waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.” *Hoiengs v. Cty. of Adams*, 245 Neb. 877, 888–89, 516 N.W.2d 223, 233–35 (1994) (citations and multiple internal quotation marks omitted). *Accord*, e.g., *Reiber*, v. 303 Neb. at 342, 928 N.W. 2d at 928 *Burke*, 302 Neb. at 502, 924 N.W.2d at 311; *Rhiley*, 301 Neb. at 247, 917 N.W.2d at 908–09; *Amend*, 298 Neb. at 624, 905 N.W.2d at 557; *SID No. 1 v. Adamy*, 289 Neb. at 919, 858 N.W.2d at 174; *Johnson v. State*, 270 Neb. 316, 319–20, 700 N.W.2d 620, 622–23 (2005); *Woollen v. State*, 256 Neb. 865, 875, 593 N.W.2d 729, 875 (1999).

“To strictly construe against a waiver of sovereign immunity, we broadly read exemptions to a waiver of sovereign immunity.” *Amend*, 298 Neb. at 624, 905 N.W.2d at 557. *Accord* *Brown v. State*, 305 Neb. 111, 118, 939 N.W.2d, 354, — (2020), *Moser*, 307 Neb. at 29, 948 N.W.2d at —. *Rouse* cites *Amend* and states exactly the same thing except that it perhaps inadvertently substitutes the word “exceptions” for the word “exemptions”; exemptions must be the appropriate word. *Rouse*, 301 Neb. at 1041, 921 N.W.2d at 350–60.

As discussed in part VIII(B) of this Comment & Authorities immediately below, while the statutory rule requiring notice must be strictly construed, the part of the statute regarding the contents of the notice “should be liberally construed so as to not deny relief to a meritorious claim.” *Big Crow v. City of Rushville*, 266 Neb. 750, 754, 669 N.W.2d 63, 66 (2003). *Accord* *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988).

B. THE SUBSTANTIAL COMPLIANCE RULE

On the other hand, while, as stated above, the statutory requirement that the claimant give notice is to be strictly construed, the statutory rules regarding the content of that notice “are to be liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance.” *Schoemaker v. Metro. Util. Dist.*, 245 Neb. 967, 971, 515 N.W.2d 675, 678 (1994). *Accord*, *Big Crow v. City of Rushville*, 266 Neb. 750, 754, 669 N.W.2d 63, 66 (2003) (the exact time and precise location need not be given); *Jessen v. Malho-*

tra, 266 Neb. 393, 398, 665 N.W.2d 586, 591 (2003); *Schoemaker v. Metro. Util Dist.*, 245 Neb. 967, 971, 515 N.W.2d 675, 678 (1994); *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). This is sometimes expressed as the “substantial compliance” rule. *See, e.g., Saylor v. State*, 306 Neb. 147, 157, 944 N.W.2d 726, — (2020) (“[W]e have long applied the substantial compliance doctrine when deciding whether the content of a claim satisfied the statutory presuit claim presentment requirements”) *Chicago Lumber*, above, stating that substantial compliance with these requirements is sufficient. This rule is also discussed above, at parts VII(D), (E), and (F).

[W]e have long applied the substantial compliance doctrine when the question presented was whether the *content* of a presuit tort claim satisfied the statute and supplied the political subdivision with sufficient notice to enable it to accomplish the primary goals of the presuit claim presentment requirements under the PSTCA and similar statutes. . . . But . . . we have declined to apply the substantial compliance doctrine when the question presented did not involve compliance with content-based requirements.

We have refused to apply the substantial compliance doctrine when the presuit claim was not filed with the statutorily authorized recipient, reasoning that notice to the wrong recipient may deprive a political subdivision of the opportunity to investigate and settle claims and thus must be given to a person or entity specified in the statute. Similarly, we have refused to apply the substantial compliance doctrine to presuit claims that did not comply with the statutory time limits under the PSTCA, reasoning that, unlike the general requirements regulating the content of presuit claims, the time limits are specific and can be determined with precision. And finally, we have refused to apply the substantial compliance doctrine when the content of the purported claim was so indefinite or contingent in nature it could not fairly be characterized as presenting a tort claim at all.

Saylor, 306 Neb. at 160–61, 944 N.W.2d at — (footnotes omitted).

Noting that the substantial compliance rule has been long applied in cases under the PSTCA, in *Saylor* the court holds that it applies equally to cases under the STCA. *Saylor*, 306 Neb. at 162, 164, 944 N.W.2d —, — (ruling on a question of first impression; noting that claims under “the PSTCS and the STCA are not in derogation of sovereign immunity, but rather are administrative in nature,” *id.*; “[A]pplying the substantial compliance doctrine when analyzing the *content* of presuit claims under the PSTCA and the STCA is [not] inconsistent with the well-settled principle that statutes in derogation of sovereign immunity must be strictly construed, *id.* at 164, 944 N.W.2d at—).

Notice as a condition precedent to suit and the fact that the

substantial compliance rule does not apply thereto is discussed above, at part VII of this Comment & Authorities.

IX. NONJURY TRIALS

Tort suits against the state and its political subdivisions “shall be heard and determined by the appropriate court without a jury.” Neb. Rev. Stat. § 13-907 (Reissue 2012). *See also* Jacobson v. Shrestha, 288 Neb. 615, 849 N.W.2d 515 (2014) (discussing at length the right to a jury trial, the sovereign immunity of the state, its subdivisions, and the employees of each, and why § 13-907 is constitutional; stating that *see also* Jacobson, 288 Neb. at 624–25, 849 N.W.2d at 625 (“Because a jury trial is not one of the terms of [the Legislature’s] waiver of governmental immunity . . . , a party is not entitled to a jury trial on its claim that a defendant is not a political subdivision employee.”)).

Regarding the statutes of limitations in sovereign immunity cases versus statutes of limitations in general, *see* the part of this Comment & Authorities below, headed “Statute of Limitations.”

X. THE ELEMENTS OF THE CAUSE OF ACTION

“Except as otherwise provided, in all suits brought under the PSTCA, ‘the political subdivisions shall be liable in the same manner and to the same extent as a private individual under like circumstances.’ [Neb. Rev. Stat.] § 13-908 [Reissue 2012].” Doe v. Omaha Pub. Sch. Dist., 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007), *overruled on other grounds* by Moser v. State, 307 Neb. 18, 948 N.W.2d 194 (2020). *Accord*, e.g., Edwards v. Douglas County, 308 Neb. 259, 266, 953 N.W.2d 744, 750 (2021); Moser, 307 Neb. at 23, 948 N.W.2d at —; Reiber v. Cty. of Gage, 303 Neb. 325, 341, 928 N.W.2d 916, 928 (2019); Phillips v. Liberty Mut. Ins. Co., 293 Neb. 123, 130, 876 N.W.2d 361, 367 (2016). *See also* 28 U.S.C. § 2674 (“The United States shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]”). This came up above in part IV of this Comment & Authorities.

“A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, *i.e.*, duty, breach of duty, causation, and damages.” Same quotation: Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch., 262 Neb. 66, 72–73, 628 N.W.2d 697, 703 (2001); Drake v. Drake, 260 Neb. 530, 536, 618 N.W.2d 650, 656 (2000). *Accord*, e.g., Thomas v. Board of Trustees of Nebraska State Colls., 296 Neb. 726, 734, 895 N.W.2d 692, 699 (2017) (State Tort Claims Act); Phillips, *supra*; Hall v. Cty. of Lancaster, 287 Neb. 969, 983, 846 N.W.2d 107, 118 (2014), *overruled on other grounds* by Davis v. State, 297 Neb. 955, 902 N.W.2d 165 (2017); Connelly v. City of Omaha, 284 Neb. 131, 140, 816 N.W.2d 742, 753 (2012); Ginapp v. City of Bellevue, 282 Neb. 1027, 1033, 809 N.W.2d 487, 492 (2012); Ashby v. State, 279 Neb. 509, 518, 779 N.W.2d 343, 352 (2010); Ehlers

v. State, 276 Neb. 605, 609, 756 N.W.2d 152, 156 (2008); *Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754 (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007); *Malolepszy v. State*, 273 Neb. 313, 319, 729 N.W.2d 669, 674 (2007); *Brandon v. Cty. of Richardson*, 252 Neb. 839, 842, 566 N.W.2d 776, 779 (1997) (action against police officer for failure to protect victim of crime). Regarding proximate cause in an action under the tort claims act, *see particularly* *Woollen v. State*, 256 Neb. 865, 883–86, 593 N.W.2d 729, 742–44 (1999).

These same rules apply under both the STCA and the PSTCA. *See* part III, above. Regarding vicarious liability under the STCA and the PSTCA, *see* part IV, above.

For more on the elements of negligence generally, turn to NJI2d Civ. 2.01, Authorities.

XI. DUTY

“The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.” Same quotation in the context of a tort claim against the State: *Ashby v. State*, 279 Neb. 509, 518, 779 N.W.2d 343, 352 (2010) (“Absent duty, a negligence claim fails.” *Id.* at 523, 779 N.W.2d at 355); *Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754, 766, (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 754 (2007). *Accord, e.g.,* *Stonacek v. City of Lincoln*, 279 Neb. 869, 879, 782 N.W.2d 900, 909 (2010). This point is discussed generally, including in the context of suits against the State of Nebraska or its political subdivisions, at NJI2d Civ. 3.02, Comment & Authorities. *See also* part VI(B) of this Comment & Authorities, above.

The boundaries of the duty owed by state and local government will ordinarily be coextensive with the duty owed by others. “[T]his [is] consistent with the decision of the Legislature, via the Political Subdivisions Tort Claims Act, to hold a political subdivision liable to an injured party for the negligence of its employees in the same manner that a private person would be liable to such a claimant, with certain exceptions.” *Drake v. Drake*, 260 Neb. 530, 537, 618 N.W.2d 650, 657 (2000). Regarding the liability of officers and employees of the State and its political subdivisions, *see* part I(B) of this Comments & Authorities, above.

“A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. Whether a duty exists at all is a question of law.” *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007), *overruled on other grounds by* *Moser v. State*, 307 Neb. 18, 948 N.W.2d 194 (2020) “The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.” *Ashby*, 279 Neb. at 518–19, 779 N.W.2d at 352–53. *Accord, e.g.,* *Phillips, supra*; *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1033, 809 N.W.2d

487, 492 (2012). *See generally* NJI2d Civ. 3.02, Comment & Authorities. Regarding “question of law” and the Tort Claims Acts generally, *see* part VI(C) of this Comment & Authorities, above.

Another way of looking at sovereign immunity is that where sovereign immunity bars suit the State or subdivision has no duty.

XII. STATUTE OF LIMITATIONS

A. IN GENERAL

The applicable statutes of limitations are PSTCA, Neb. Rev. Stat. § 13-920(3) (Reissue 2012) and STCA, Neb. Rev. Stat. § 81-8,227(1) (Reissue 2014). *See also*, Neb. Rev. Stat. § 25-213 (Reissue 2016) (regarding the tolling of the STCA and the PSTCA statutes of limitations). Regarding the statutes of limitations, *see particularly* *Komar v. State*, 299 Neb. 301, 307–14, 908 N.W.2d 610, 614–618 (2018) (“The 2-year limitations period referenced in § 81-8,227(1) governs not just the time for submitting claims to the Risk Manager, but also the time for beginning suit under the STCA. Under certain circumstances, the STCA provides a 6-month extension for beginning suit.” *Id.* at 307, 908 N.W.2d at 614 (footnote omitted)).

We [have] explained that there are only two exceptions to the 2-year limitation on suits and stated:

One is where the governmental subdivision takes some action on the claim before the 2 years has expired but at a time when less than 6 months remains for filing suit. The second occurs if the claimant withdraws his claim within the 2-year period but at a time when less than 6 months to file suit remains.

Patterson v. Metro. Util. Dist., 302 Neb. 442, 448, 923 N.W.2d 717, 722 (2019) (interpreting the relevant statute at some length) (quoting *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 495, 304 N.W.2d 55, 57 (1981)).

See also *Brock v. Dunning*, 288 Neb. 909, 919, 854 N.W.2d 275, 286–87 (2014); *Sharkey v. Bd. of Regents*, 260 Neb. 166, 175, 615 N.W.2d 889 (2000), *abrogated on other grounds by* *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010) (stating that six months is an extension of time, not a limitation); *Collins v. State*, 264 Neb. 267, 272, 646 N.W.2d 618, 621 (2002) (“[W]hen a claimant files a claim with the claims board within 2 years from the date the claim accrued and allows the claims board to reach a determination on the claim, the claimant has 6 months to file suit from the date of mailing of notice as to the final disposition of the claim. To the extent [that prior cases] indicate a different rule, they are overruled.” *Id.* at 268, 646 N.W.2d at 619); *Hullinger v. Bd. of Regents*, 249 Neb. 868, 870–973, 546 N.W.2d 779, 782–984 (1996) (lengthy discussion), *partially overruled by* *Collins v. State*, *supra* (limiting the application of the rule from *Hullinger*); *Davis v. Town of Clatonia*, 231 Neb. 814, 816–18, 438 N.W.2d 479, 480–81 (1989).

And see *Millman v. Cty. of Butler*, 235 Neb. 915, 934–36, 458 N.W.2d 207, 220 (1990) (stating that under the PSTCA, as is the general rule otherwise, a defendant alleging the statute of limitations as an affirmative defense has the burden of proving same; if there is no evidence on the issue of the statute of limitations, then the issue not submissible), *appeal after remand* 244 Neb. 125, 504 N.W.2d 820 (1993).

“There is no legal duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuances of the law.” In *re* estate of *McElwee*, 266 Neb. 317, 326–27, 664 N.W.2d 461, 470 (2003).

A pending Worker’s Compensation claim does not toll the statute of limitations for suit under the tort claims acts. *Polinski*, 251 Neb. at 19–21, 554 N.W.2d at 640–41.

For a general discussion of the time at which a cause of action accrues, *see* NJI2d Civ. 5.04, Comment. In the context of political subdivisions, *see particularly*, *Strode v. City of Ashland*, 295 Neb. 44, 53, 886 N.W.2d 293, 302 (2016) (discussing “when the injured party has the right to institute and maintain a lawsuit”); *Polinski*, 251 Neb. at 18, 20, 554 N.W.2d at 640 (stating that the cause of action accrues when the potential plaintiff discovers, or in exercise of reasonable diligence should discover, subdivisions negligence); *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988); *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W.2d 327 (1988).

Regarding the notice required by the STCA and the PSTCA and its effect on the accrual date of a cause of action, *see* *Bauers v. City of Lincoln*, 245 Neb. 632, 639, 514 N.W.2d 625, 630 (1994), which is quoted above along with the discussion of the requirement that claimants under these Acts must file notice.

Further regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D and 12.04, Comment & Authorities, and cross-references therein.

B. THE “SAVINGS CLAUSE”: FILING SUIT UNDER THE WRONG STATUTE AND ITS AFFECT ON THE TORT-CLAIMS STATUTE OF LIMITATIONS

The STCA and PSTCA provide that if a claim is filed under “any . . . law of this state” other than the PSTCA and if the tribunal in which it is filed determines that the PSTCA provides the exclusive remedy, then the time to make the claim and begin suit under the PSTCA shall be extended for a period of six months from the date of the court order. STCA, Neb. Rev. Stat. § 81-8,227 (Reissue 2014); PSTCA, Neb. Rev. Stat. § 13-919(2) (Reissue 2012).

Our Supreme Court has held that this “savings clause” does not apply to a plaintiff who files with the wrong tribunal, but outside of the

PSTCA's one-year notice requirement. Keller first filed a medical malpractice action under the NHMLA. She filed that action within the time bar of the NHMLA's statute of limitations, but not within the PSTCA's one-year notice requirement. The district court found that the defendant was an employee of a political subdivision and, therefore, the PSTCA provided the only remedy. The Supreme Court affirmed. She then commenced proceedings under the PSTCA. For the first time, she filed the required notice, but outside of the PSTCA requirement that the notice be filed within one year of the accrual date of the claim. The Supreme Court held that the PSTCA savings clause only applies to a claim presented to the wrong tribunal, but (regardless of that tribunal's statute of limitations) within the one-year notice requirement of the PSTCA. Along the way, the Court acknowledged that Keller's contrary interpretation, "is not necessarily inconsistent" with the wording of the PSTCA savings clause, but it is "inconsistent with the statutory purpose reflected in the [Act's] notice provisions" *Keller v. Tavarone*, 265 Neb. 236, 242-43, 655 N.W.2d 899, 905 (2003) (holding that "a claim 'made or filed under any other law of this state,' within the meaning of § 13-919(2), must still be filed within the 1-year time limit imposed by the appropriate notice provision).

The statutory purpose of the notice requirement is discussed above in part VII of this Comment & Authorities. *See also Baker's Supermarkets, Inc. v. State, Dept. of Agric.*, 248 Neb. 984, 993, 540 N.W.2d 574, 580 (1995) (stating that in the statutory construction "or" may be read as "and" where a strict reading leads to unreasonable result and defeats intent of statute).

C. THE BAR OF THE STATUTE OF LIMITATIONS IS A QUESTION FOR THE TRIER OF LAW

Some years ago, the Unicameral amended the statute governing statute-of-limitations trial-procedure to provide that, unless waived by all parties, factual issues concerning the bar of a statute of limitations shall be determined by a jury. Neb. Rev. Stat. § 25-221 (Reissue 2016). Litigants in an action under the STCA or the PSTCA are not entitled to a jury trial. Each act specifies that the lawsuit is to be decided by the appropriate court, without a jury. STCA, Neb. Rev. Stat. 81-8,214 (Reissue 2014) and PSTCA, Neb. Rev. Stat. § 13-907 (Reissue 2102). *See also Jacobson v. Shresta*, 288 Neb. 615, 849 N.W.2d 515 (2014). These are not cases that fall under the more general legislative requirement for statute of limitations factual issues, where those issues are to be decided by the jury unless all parties waive; they are, rather, cases that fall under the more specific tort claims acts, which state that there shall be no jury. The requirement that the jury be waived by all parties would not apply in the specific case where a jury is not allowed in the first place.

It seems that § 25-221 does not override § 81-8,214 or § 13-907 and create a right to a jury trial in these cases. It seems that the subsequent

amendment to the general trial-procedure statute has no effect on tort claims against State and local government. "Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute." *Schaffer v. Cass Cty.*, 290 Neb. 892, 898, 863 N.W.2d 143, 147 (2015) (citing cases). This amendment to § 25-221 is discussed in the Statute of Limitations part of the Comment & Authorities to NJI2d Civ. 12.04.

Additionally, in a suit under either tort claims act the trier of law and the trier of fact are the same person: the judge.

Regarding the fact that these trials are to the court—and not to a jury, see part IX of this Comment & Authorities, above.

D. THE DISCOVERY RULE

The discovery rule is applicable to the statute of limitations provision in the STCA and the PSTCA. *Shlien v. Bd. of Regents*, 263 Neb. 465, 474, 640 N.W.2d 643, 651 (2002). The discovery rule is discussed at NJI2d Civ. 12.04, Comment & Authorities.

E. EQUITABLE ESTOPPEL

Both the state and its political subdivisions may be subject to equitable estoppel. *Hike v. State (Hike II)*, 297 Neb. 212, 217–221, 899 N.W.2d 614, 620–623 (2017); *Christiansen v. Cty. of Douglas*, 288 Neb. 564, 582, 849 N.W.2d 493, 506 (2014); *Inner Harbour Hosps., Ltd. on Behalf of Hibberd v. State Dept. of Soc. Servs.*, 251 Neb. 793, 804, 559 N.W.2d 487, 495 (1997). "[T]he State and its political subdivisions can be equitably estopped from relying on the statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of prevent manifest injustice." *Rauscher v. City of Lincoln*, 269 Neb. 267, 275–76, 691 N.W.2d 844, 852 (2005). *Accord Woodard v. City of Lincoln*, 256 Neb. 61, 67, 588 N.W.2d 831, 836 (1999). Regarding the elements of equitable estoppel, see the cases cited at NJI2d Civ. 9.01, Comment & Authorities. See also NJI2d Civ. 1.45, Comment (regarding judicial estoppel).

"The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances, where right and justice so demand; in such cases, the doctrine is applied with caution and only for the purpose of preventing manifest injustice." *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 326, 664 N.W.2d 461, 468 (2003). *Accord Christiansen*, 288 Neb. at 582, 849 N.W.2d at 505–07. See also NJI2d Civ. 1.45, Comment (regarding judicial estoppel).

"Equitable estoppel does not create a new right or give a cause of action; rather, it serves to protect rights already acquired." *Christiansen*, 288 Neb. at 582, 849 N.W.2d at 507.

“[T]he express notice requirements of the Act leave no room for application of the equitable tolling doctrine.” *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 21, 554 N.W.2d 636, 641 (1996).

Regarding equitable estoppel generally, *see* NJI2d Civ. 9.01, Comment & Authorities. Different aspects of estoppel are discussed at six different places herein: *See* NJI2d Civ. 1.45, (judicial estoppel: False Testimony (Falsus in Uno, Falsus in Omnibus)); NJI2d Civ. 6.26-6.28 (“Partner by Estoppel”); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract).

See generally the references in the Index, under Equitable Estoppel.

XIII. THE DISCRETIONARY FUNCTION EXCEPTION

“[T]he discretionary function exception is expressed in nearly identical language in the [STCA], *see* Neb. Rev. Stat. § 81-8,219(1) (Cum. Supp. 2017), and the [PSTCA]; thus, cases construing the state exception apply as well to the exception granted to political subdivisions by § 13-910(2) [(Cum. Supp. 2017)].” *Lawry v. Cty. of Sarpy*, 254 Neb. 193, 198, 575 N.W.2d 605, 608 (1998), *overruled on other grounds by* *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). *Accord* *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018). *See also* part III of this Comment & Authorities, above (discussing the fact that the STCA and the PSTCA are to be construed in harmony).

The exceptions to the waiver of sovereign immunity, including the discretionary function exception, in the STCA and the PSTCA are jurisdictional: subject matter jurisdiction. *Lambert v. Lincoln Pub. Schs.*, 306 Neb. 192, 198, 945 N.W.2d 84, 89 (2020); *Amend v. Neb. PSC*, 298 Neb. 617, 622 n.5, 905 N.W.2d 551, 556 n.5 (2018); *Davis v. State*, 297 Neb. 955, 969-70, 902 N.W.2d 165, 180-81 (2017). “If the discretionary function exception applies, the political subdivision is immune from suit and the proper remedy is to dismiss the action for lack of subject matter jurisdiction.” *Lambert*, 306 Neb. at 198, 945 N.W.2d at —. For a complete discussion of the jurisdictional nature of the exceptions, *see* part VI of this Comment & Authorities, above.

A discretionary function cannot be a basis for liability under the tort claims acts. *E.g.*, *Holloway v. State*, 293 Neb. 12, 20, 875 N.W.2d 435, 444 (2016); *D.K. Buskirk & Sons, Inc. v. State*, 252 Neb. 84, 89-94, 560 N.W.2d 462, 466-69 (1997) (extensive discussion of discretionary function exception).

“If a claim comes within the [discretionary function exemption], then the claim is barred by sovereign immunity and the political subdivision, officer, or employee cannot be liable [and the court] lack[s]

subject matter jurisdiction.” *Reiber v. Cty. of Gage*, 303 Neb. 325, 341, 928 N.W.2d 916, 928 (2019). (Regarding sovereign immunity and subject matter jurisdiction under the STCA and the PSTCA, see part VI of this Comment & Authorities, above.)

“The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.” Same quotation: *Mercer v. North Central Service, Inc.*, 308 Neb. 224, 234, 953 N.W.2d 551, 559 (2021); *Kimminau v. City of Hastings*, 291 Neb. 133, 144, 864 N.W.2d 399, 409 (2015) (A county’s actions in response to notice of a “spot or localized defect on a roadway” is not a policy decision, but a “ministerial act[] at the operational level pursuant to the county’s statutory duty to maintain its roads”); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 89, 727 N.W.2d 447, 457 (2007), *overruled on other grounds* by *Moser v. State*, 307 Neb. 18, 928 N.W.2d 916 (2020). *Accord, e.g.*, *McGauley v. Washington Cty.*, 297 Neb. 134, 139, 897 N.W.2d 851, 856 (2017); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 416–18, 591 N.W.2d 532, 743 (1999); *D.K. Buskirk & Sons*, 252 Neb. at 89–94, 560 N.W.2d at 466–69 (applies only where there is no room for policy judgment).

“It is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case.” Same quotation: *Lambert*, 306 Neb. at 198, 945 N.W.2d at —; *Holloway*, 293 Neb. at 23, 875 N.W.2d at 445; *Doe*, 273 Neb. at 89, 727 N.W.2d at 457 (multiple quotation marks omitted). *Accord, e.g.*, *Wizinsky v. State*, 308 Neb. 778, 787, 957 N.W.2d 466, — (2021); *Parker, supra*.

“The employee’s conduct must involve judgment or choice or there is no discretion for the discretionary function exemption to protect.” *Tadros v. City of Omaha*, 269 Neb. 528, 539, 694 N.W.2d 180, 189–90 (2005).

Determining whether the discretionary function exemption applies involves a two-step analysis. “First, the court must consider whether the action is a matter of choice for the acting employee. This element is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice.” *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 809, 678 N.W.2d 82, 90 (2004). *Accord* *Wizinsky v. State*, 308 Neb. at 787, — N.W.2d at — (stating, “whether the action is a matter of choice for the acting political subdivision or employee.”); *Mercer*, 308 Neb. at 234, 957 N.W.2d at 953; *Lambert*, 306 Neb. at 199, 945 N.W.2d at —; *McGauley*, 297 Neb. at 139, 897 N.W.2d at 856; *Holloway*, 293 Neb. at 20, 875 N.W.2d at 444 (finding that the relevant statute’s use of the word “may” satisfies the first step); *Kimminau*, 291 Neb. at 145, 864 N.W.2d at 410; *Doe*, 273 Neb. at 89, 727 N.W.2d at 457; *Tadros*, 269 Neb. at 539, 694 N.W.2d at 189–90. Second, if the court decides that the action is discretionary, then “it must determine whether that judgment is of the kind that the

discretionary function exemption was designed to shield.” Same quotation: *Wizinsky*, 308 Neb. at 787–88, 957 N.W.2d at —; *McGauley*, 297 Neb. at 139–40, 897 N.W.2d at 856; *Aguallo*, 267 Neb. at 809, 678 N.W.2d at 91. *Accord Mercer*, 308 Neb. at 234–35, 953 N.W.2d at —; *Lambert*, 306 Neb. at 199–200, 945 N.W.2d at —; *Tadros*, 269 Neb. at 539, 694 N.W.2d at 189.

Regarding the latter—the kind of action the legislature designed this exemption to shield—the Court has stated that

[t]he basis for the discretionary function exception was the desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The exception properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgments.

Aguallo, 267 Neb. at 809–10, 678 N.W.2d at 91 (multiple quotation marks and ellipses omitted) (*Aguallo* quotes *Parker*, 256 Neb. at 417, 591 N.W.2d at 540 (1999) (in part quoting *Jasa By and Through Jasa v. Douglas Cty.*, 244 Neb. 944, 957, 510 N.W.2d 281, 289 (1994), in addition quoting a number of other cases). *Accord Wizinsky*, 308 Neb. at 787, 957 N.W.2d at —; *Mercer*, 308 Neb. at 234, 953 N.W.2d at —; *Lambert*, 306 Neb. at 199, 945 N.W.2d at —; *McGauley*, 297 Neb. at 139, 897 N.W.2d at 856 (“The purpose of the discretionary function exception is to prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”); *Holloway*, 293 Neb. at 23, 875 N.W.2d at 445; *Kimminau*, 291 Neb. at 144, 864 N.W.2d at 409 (same quotation as *McGauley*, above); *Doe*, 273 Neb. at 89–90, 727 N.W.2d at 456–57; *McCormick v. City of Norfolk*, 263 Neb. 693, 698, 641 N.W.2d 638, 642 (2002) (finding that the installation of traffic control devices is a discretionary function). *See also Blaser v. Cty. of Madison*, 288 Neb. 306, 316, 847 N.W.2d 293, 301 (2014) (“[T]he placement of traffic control devices is a discretionary function, although once a decision to utilize a particular device has been made, the device is required to conform to the Manual [on Uniform Traffic Control Devices]”; regarding the manual, *see* Neb. Rev. Stat. § 60-6,118 (Reissue 2010)). *And see* part VI(A) of this Comment & Authorities, discussing the legislative purpose behind requiring the claimant to give notice to the governmental entity responsible for the act or omission that is the gravamen of the claim.

The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts

at an operational level, where there is no room for policy judgment. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.

Holloway, 293 Neb. at 23, 875 N.W.2d at 445 (footnotes omitted). *Accord*, *Lambert*, 306 Neb. at 199, 945 N.W.2d at ____.

“Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards.” *Mercer*, 308 Neb. at 234, 953 N.W.2d at ____ *Accord* *Lambert*, 306 Neb. at 200, 945 N.W.2d at ____.

“Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away” *Tadros*, 269 Neb. at 540, 694 N.W.2d at 190 (quoting *Aslakson v. U.S.*, 790 F.2d 688, 693 (8th Cir. 1986) (interpreting Federal Tort Claims Act)).

[W]hen (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as a result of the dangerous condition or hazard. In such a situation, a governmental entity’s failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exception

Mercer, 308 Neb. at 235, 953 N.W.2d at ____ (footnotes omitted). *Accord* *McGauley*, 297 Neb. at 140, 897 N.W.2d at 856 (stating, in the context of a safe work environment, that such functions are not discretionary); *Holloway*, 293 Neb. at 24–26, 875 N.W.2d at 446 (discussing *Lemke v. Metro. Utils. Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993)).

“Whether the allegations made by the plaintiff present a claim that it precluded by ‘the discretionary function exception’ is a question of law.” *Hall v. County of Lancaster*, 287 Neb. 969, 976, 846 N.W.2d 107, 114 (2014) (overruled on other grounds by, *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017)). *Accord* *Mercer*, 308, Neb. at 232–33, 953 N.W.2d at ____; And appellate courts are obliged to decide the issue independent of the decision of the trial court. *Mercer*, above; *Lambert*, 306 Neb. at 198, 945 N.W.2d at ____; *Hall*, above “Whether undisputed facts demonstrate that liability is precluded by the discretionary function

exception . . . is a question of law.” *Doe*, 273 Neb. at 90, 727 N.W.2d at 457 (“When the facts are undisputed, the determination of whether the discretionary function exception applies is a question of law.”). Regarding “question of law” and the Tort Claims Acts generally, *see* part VI(C) of this Comment & Authorities, above.

In addition to the above, also *see* *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 191–92, 609 N.W.2d 338, 345–46 (2000); *Woollen v. State*, 256 Neb. 865, 886, 593 N.W.2d 729, 743 (1999); *Talbot v. Douglas Cty.*, 249 Neb. 620, 624–27, 544 N.W.2d 839, 843–44 (1996) (discussing quasi-judicial immunity, particularly that of a public prosecutor); *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992); *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

Furthermore, our Supreme Court has noted that in a case where the discretionary function exception presumptively applies the United States Supreme Court has “imposed a pleading standard that requires [that the] plaintiff’s factual allegations . . . support a finding that the . . . discretionary function exception does not apply.” *Davis*, 297 Neb. at 975, 902 N.W.2d at 183 (citing *United States v. Gaubert*, 499 U.S. 315 (1991)).

Regarding the liability of state and subdivision officers and employees, *see also*, part I(B) of this Comments & Authorities.

XIV. STATUTORY CAP ON DAMAGES

The damages recoverable against a political subdivision are limited by statute. “The total amount recoverable under the Political Subdivisions Tort Claims Act . . . shall be limited to: (1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence.” Neb. Rev. Stat. § 13-926 (Reissue 2012).

This statutory cap on damages does not violate any of the following clauses of the Nebraska Constitution: the Equal Protection Clause, art. I, § 3; the Due Process Clause, art. I, § 3; the Special Legislation Clause, art. I, § 16; or the Enjoyment of Property Clause, art. I, § 25. *Staley v. City of Omaha*, 271 Neb. 543, 552–57, 713 N.W.2d 457, 468–70 (2006). *See also* *Connelly v. City of Omaha*, 284 Neb. 131, 147–49, 816 N.W.2d 742, 757–59 (2012) (Due Process Clause).

“Under Nebraska law, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the parents.” *Connelly v. City of Omaha*, 284 Neb. 131, 150, 816 N.W.2d 742, 759 (2012). Each cause of action is separate from the other. That is, these two claims are not subject to a single damage cap—not subject to subpart (1) of Neb. Rev. Stat. § 13-926 (Reissue 2012). A separate damage cap applies to the child, on the one hand, and the parents, on the

other. *Id.* at 150-53, 816 N.W.2d at 759-61. In the case of two parents, this raises the question of whether their total recovery is limited to the \$1 million damage cap, or whether each parent singly can recover up to \$1 million. This is resolved by determining “whether the claims [asserted by the parents] are separate and distinct from each other.” *Id.* at 155, 816 N.W.2d at 761-63 (discussing the issue and finding that the parents’ claims at bar were not “separate and distinct”).

NJI2d Civ. 5.04 discusses further this situation: There is a statutory cap on damages; the actual damage suffered exceeds the damage award allowed by the cap; and the damages must be reduced because of the damaged party’s comparative negligence. Must the comparative-negligence reduction be applied to the total amount of damage suffered, before reducing that amount to comply with the cap, or must it be applied after the damages are reduced to comply with the cap? In a bench trial involving a \$1 million statutory cap on damages to an innocent third party injured during a vehicular pursuit by the police, the trial court found that the plaintiff sustained \$3 million in damages. Because the plaintiff was not wearing his seatbelt, citing Neb. Rev. Stat. § 60-6,273, the court reduced the \$3 million in damages by 5%. Only then did the court reduce the plaintiff’s damages to \$1 million. The defendant argued that the 5% reduction should have been applied after the reduction to \$1 million. The Supreme Court affirmed the trial court. *Werner v. Cty. of Platte*, 284 Neb. 899, 924, 926, 824 N.W.2d 38, 60, 61 (2012). Regarding the general topic of injuries to third parties during a law enforcement vehicle pursuit, see this Comment & Authorities, below, under the heading “Liability of Law Enforcement Officials.”

Regarding the appellate court’s review of the amount of damages awarded by the trial court, see the heading “Burden on Appeal,” below in this Comment & Authorities.

XV. LIMITED LIABILITY FOR CLAIMS ARISING OUT OF RECREATIONAL ACTIVITIES

In *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2006), the Court overruled prior holdings that the Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 through 37-736 (Reissue 2016), applied to lawsuits claiming damages against governmental-entity landowners and therefore applied the RLA’s limited immunity from liability to governmental entities. This aspect of *Bronsen* is discussed at NJI2d Civ. 8.61.

Following *Bronsen*, the Unicameral amended the STCA and the PSTCA to reimpose some limits on the damages that can be recovered against a governmental entity for a claim relating to recreational activities on its property—that is, to provide governmental entities some protection from liability for claims relating to recreational activities on their land, some protection the RLA provides to private landowners, and formerly (prior to *Bronsen*) provided to government landowners.

The amendments to these two tort claims acts are nearly identical

in wording and apparently identical in substance. Each adds a new exception to the respective tort claims act's waiver of sovereign immunity. Quoting the amendment to the STCA, the limitation on tort claims recovery provides as follows:

The [STCA] shall not apply to:

.....

(13)(a) Any claim relating to recreational activities on property leased, owned, or controlled by the state for which no fee is charged (i) resulting from the inherent risk of the recreational activity, (ii) arising out of a spot or localized defect of the premises unless the spot or localized defect is not corrected within a reasonable time after actual or constructive notice of the spot or localized defect, or (iii) arising out of the design of a skatepark or bicycle motocross park constructed for purposes of skateboarding, inline skating, bicycling, or scootering that was constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction. For purposes of this subdivision, the state shall be charged with constructive notice only when the failure to discover the spot or localized defect of the premises is the result of gross negligence.

Neb. Rev. Stat. § 81-8,219 (Cum. Supp. 2017).

For th[is] exception . . . to apply, the following elements must be met: (1) The claim must relate to a recreational activity on property leased, owned, or controlled by the State; (2) the claim must result from an inherent risk of that recreational activity; and (3) no fee must have been charged for the plaintiff to participate in, or be a spectator at, the recreational activity.

Brown v. State, 305 Neb. 111, 118, 939 N.W.2d, 354, — (2020) (“The parties generally agree that Brown was engaged in some sort of recreational activity at the time he was injured, but they disagree on what the activity was. Until the answer to this threshold question is known, the remaining questions as to the applicability of [this exception] cannot be determined.”).

The first thing for the court to do is “to identify the recreational activity, if any, in which the plaintiff was engaged as either a participant or spectator. Only after [that] can a principled determination be made as to whether the plaintiff’s tort claim relates to that particular activity and whether the claim resulted from an inherent risk of that particular activity.” *Brown*, 305 Neb. at 115, 939 N.W.2d, at —.

The amended statute continues with a broad definition of recre-

ational activities, defines inherent risks as “those risks that are characteristic of, intrinsic to, or an integral part of the activity,” and defines gross negligence as “the absence of even slight care in the performance of a duty involving an unreasonable risk of harm.” The amendment also defines fee. It states that, as opposed to another subdivision of the Act, this subdivision “shall apply to any claim arising from the inspection or failure to make an inspection or negligent inspection of premises owned or leased by the state and used for recreational activities.”

It requires the posting and maintenance of specified warning signs and states that “[t]he absence of a sign shall not give rise to liability on the part of the state.”

When a claimant makes a recreational-injury claim against a governmental-entity landowner, consult the STCA or the PSTCA and particularly these amendments to those Acts.

This is an exception to the limited waiver of sovereign immunity in each tort claims act. As such, this immunity is jurisdictional, *i.e.*, subject matter jurisdiction. This is discussed in part VI of this Comment & Authorities, above.

XVI. LIABILITY OF LAW ENFORCEMENT OFFICIALS

A. PROTECTING INDIVIDUALS FROM HARM CAUSED BY CRIMINAL CONDUCT: THE GENERAL RULE

“Law enforcement officials, including supervising probation officers and, consequently, state and local governments, generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.” *Bartunek v. State*, 266 Neb. 454, 459, 666 N.W.2d 435, 440 (2003). *Accord* *Brandon v. Cty. of Richardson*, 252 Neb. 839, 842–44, 566 N.W.2d 776, 779–780 (1997).

There are two exceptions to the general rule stated above. One is based on the relationship between the law enforcement officer and the victim—the one harmed. The other is based on the officer’s relationship with the one who caused the harm.

B. TWO EXCEPTIONS

1. The Officer’s Relationship with the One Harmed

The first of these two exceptions is based on the existence of some special relationship (some form of privity) between the officer and the victim (*i.e.*, the one harmed), a relationship that sets the victim apart from the general public. This relationship must be one where “there are explicit assurances of protection that give rise to reliance on the

part of the victim.’” *Bartunek v. State*, 266 Neb. 454, 460, 666 N.W.2d 435, 440 (2003) (quoting *Brandon v. Cty. of Richardson*, 252 Neb. 839, 843–44, 566 N.W.2d 776, 779–780 (1997)). *Accord* Restatement (Second) of Torts § 315(b) (1965). There must be both a specific undertaking on the part of the law enforcement officer and a specific reliance on the part of the victim. *Bartunek*, 266 Neb. at 461, 666 N.W.2d at 441. This required more than just general reliance. “The plaintiff must specifically act or refrain from acting in such a way as to exhibit particular reliance upon the actions of the probation officer or police officer in providing personal protection.” *Bartunek*, 266 Neb. at 461, 666 N.W.2d at 441.

Brandon recognized, and *Bartunek* reaffirmed, two applications of this exception: “(1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm.’” *Bartunek*, 266 Neb. at 460, 666 N.W.2d at 440 (quoting *Brandon*, 252 Neb. at 843–44, 566 N.W.2d at 779–780). In *Brandon* the plaintiff’s allegations were sufficient to fit the case under an exception to the general rule. A duty is established when law enforcement officials “have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking.” *Bartunek*, 266 Neb. at 460, 666 N.W.2d at 441 (quoting *Brandon*, 252 Neb. at 843–44, 566 N.W.2d at 779–780).

2. The Officer’s Relationship with the One Who Caused the Harm

The second exception is based on a special relationship between the law enforcement officer and the third person (*i.e.*, the one who caused the harm), a relationship that imposes a duty on the law enforcement officer to control the acts of the third person. *Bartunek*, 266 Neb. at 459, 462–63, 666 N.W.2d at 440, 441–42; Restatement (Second) of Torts § 315(a) (1965). The relationship that creates this duty must be custodial. *Bartunek*, 266 Neb. at 462, 666 N.W.2d at 441.

C. INJURIES TO THIRD PERSONS DURING LAW ENFORCEMENT VEHICULAR PURSUITS

A governmental entity’s liability for injuries caused to third parties during a vehicular pursuit by law enforcement officers is governed by Neb. Rev. Stat. § 81-8,215.01 (Reissue 2014) (applicable to the state) and § 13-911 (Reissue 2012) (applicable to political subdivisions). The first numbered paragraph of § 13-911 states, “(1) In case of death, injury, or property damage to any innocent third party proximately caused by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.” The first paragraph of § 81-8,215.01 is exactly the same except where the former reads “a political subdivision” or “the political subdivision,” the latter reads “the state.”

Regarding such an action, see, among others, the following cases:

Fales v. Cty. of Stanton, 297 Neb. 41, 898 N.W.2d 352 (2017) (stating that “an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong,” *id.* at 46, 898 N.W.2d at 356; citing the essential elements of the cause of action, *id.* at 47, 898 N.W.2d at 357; discussing the definition of “innocent third party,” *id.*); *Maclovi-Sierra, v. City of Omaha*, 290 Neb. 443, 860 N.W.2d 763 (2015); *Werner v. Cty. of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012) (among other things, defining and discussing “innocent third party” and the effect on damages of the third party’s failure to wear his seatbelt); *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Meyer v. State*, 264 Neb. 545, 548–56, 650 N.W.2d 459, 462–67 (2002) (noting that pursuit by the law enforcement officer need not be the sole proximate cause, but merely a proximate cause of the damage); *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001) (discussing the following rules: under the statute controlling vehicular chases by the police, the State is strictly liable for damage caused to innocent third persons; the State’s liability is primary (based on the actions of officers) and not secondary (derived from the liability of the person being pursued); the officer’s conduct must be examined to determine whether it was a proximate cause of the plaintiff’s injuries); *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992); *Jura v. City of Omaha*, 15 Neb. App. 390, 395, 727 N.W.2d 735, 739 (2007) (“For a passenger [in the vehicle being pursued] to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle.”).

Section 13-911 creates strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a law enforcement officer employed by the political subdivision during the vehicular pursuit; and (3) the claimant is an innocent third party.

Maclovi-Sierra, 290 Neb. at 454, 860 N.W.2d at 772. *Accord Fales*, 297 Neb. at 47, 898 N.W.2d at 357.

As paraphrased by the Court, in Neb. Rev. Stat. § 13-911 (Reissue 2012), the Unicameral set out

“three requirements [that] must be met before a finding can be made that a vehicular pursuit under § 13-911 has occurred: (1) There must be an active attempt by a law enforcement officer to apprehend occupants of another motor vehicle, (2) the driver of the fleeing vehicle must be aware of the attempt to apprehend, and (3) the driver must resist apprehension by taking some action, such as speeding ignoring the officer, or attempting to elude the officer while driving at a speed which is not reasonable under the conditions.

Williams v. City of Omaha, 291 Neb. 403, 410, 865 N.W.2d 785, (2015).

Whether law enforcement sought to apprehend a motorist is a mixed question of law and fact. *Williams v. City of Omaha*, 291 Neb. 403, 410, 865 N.W.2d 786, (2015) (“The meaning of ‘apprehend’ [is] a question of law.”; defining “apprehend,” *id.* at 411–12, 865 N.W.2d at 786–87). As the Nebraska Court of Appeals has noted, vehicular pursuit as defined by § 13-911(5) “involves multiple elements and, thus, is a much more nuanced matter than simply deciding whether one vehicle is trying to ‘catch up’ to, or maintain sight of, another.”

Maclovi-Sierra, 290 Neb. at 454–55, 860 N.W.2d at 772–73 (footnotes omitted) (discussing the difference between pursuit, on the one hand, and catching up or maintaining sight, on the other). *Accord Fales*, 297 Neb. at 48, 898 N.W.2d at 357.

For the pursuit . . . to have been a proximate cause of the accident, the pursuit must have caused the motorist to resist apprehension by maintaining or increasing speed, or by attempting to elude the pursuing officer at unreasonable speeds.” *Williams v. City of Omaha*, 291 Neb. 403, 413, 865 N.W.2d 787, (2015).

Regarding an innocent third-party passenger, the Court has

reject[ed] the notion that a passenger who may have qualified as an innocent third party at the beginning of a pursuit cannot lose that status. If during the pursuit a passenger takes some action that makes him or her become a person sought to be apprehended, the passenger does not remain an innocent third party by virtue of the fact that law enforcement began the pursuit to apprehend the driver only.

Fales, 297 Neb. at 50, 898 N.W.2d at 359 (finding that when the passenger threw a beer can out the window of the car being pursued he lost any innocent-third-party claim he might have otherwise had). The passenger becomes an additional target of the pursuit. *Id.* at 51, 898 N.W.2d at 359.

XVII. MUNICIPALITY'S DUTY REGARDING THE CONDITION OF PUBLIC SIDEWALKS AND STREETS

The 1969 edition of NEBRASKA JURY INSTRUCTIONS contained two instructions on a municipality's duty regarding the condition of its streets and sidewalks: NJI 9.02 and 9.03 (1969). The year after the publication of that volume, the PSTCA changed the nature of this kind of lawsuit; under that Act, tort suits against political subdivisions “shall be heard and determined by the appropriate court without a jury.” Neb. Rev. Stat. § 13-907 (Reissue 2012).

The following summarizes the current state of Nebraska law on the

duty of a municipality regarding the conditions of its streets and sidewalks: A city is required to use reasonable care to keep its streets and sidewalks in reasonably safe condition. If a city has either actual or constructive notice of a defect in a street or a sidewalk, then the city must either remedy the defect or warn those passing over the street or the sidewalk of the existence of the defect. Constructive notice comes about when a defect has existed for such a length of time that the city, in the exercise of reasonable care, should have discovered it.

"Generally, it is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence." *Malolepszy v. State*, 273 Neb. 313, 319, 729 N.W.2d 669, 674 (2007). *Accord Fickle v. State*, 273 Neb. 990, 1000, 735 N.W.2d 754, 766, (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007)

Likewise, a municipal corporation is not an insurer of those using its streets and sidewalks; rather, it must use reasonable care in the construction, maintenance, and repair of its streets and sidewalks, so that they will be in a reasonably safe condition for the use of persons passing over them. *Woollen v. State*, 256 Neb. 865, 886, 593 N.W.2d 729, 743 (1999); *Scholl v. Cty. of Boone*, 250 Neb. 283, 289, 549 N.W.2d 144, 148 (1996); *Hill v. City of Lincoln*, 249 Neb. 88, 93, 541 N.W.2d 655, 660 (1996); *McGinn, supra*; *Hendrickson v. City of Kearney*, 210 Neb. 8, 11–12, 312 N.W.2d 677, 679 (1981); *Doht v. Village of Walthill*, 207 Neb. 377, 379, 299 N.W.2d 177, 178–79 (1980); *Hupfer v. City of North Platte*, 134 Neb. 585, 586, 279 N.W. 168, 169 (1938).

A municipal corporation has a duty to keep its streets and sidewalks in a reasonably safe condition. *E.g.*, *Mackey v. Midwest Supply Co.*, 186 Neb. 834, 837, 186 N.W.2d 916, 918 (1971); *Stump v. Stransky*, 168 Neb. 414, 417, 95 N.W.2d 691, 694 (1959); *Hanley v. Fireproof Bldg. Co.*, 107 Neb. 544, 547, 186 N.W. 534, 535, 24 A.L.R. 382 (1922).

This duty may include protection from falling objects. *McGinn v. City of Omaha*, 217 Neb. 579, 581, 352 N.W.2d 545, 547 (1984); *Chaney v. Village of Riverton*, 104 Neb. 189, 190, 177 N.W. 845, 846, 10 A.L.R. 244 (1920). *See also* Casenote, *When the Bough Breaks: Municipal Tort Liability in Nebraska After McGinn v. City of Omaha*, 19 Creighton L.Rev. 543 (1986) (regarding municipal liability for harm caused by falling trees and branches).

A city will not be held liable for injuries suffered as a result of a defective or dangerous condition existing on its street or sidewalk unless the city knew or should have known of its existence, that is, unless either the city had actual notice, or the condition had existed for such a length of time that, in the exercise of reasonable care, the city should have known. *McGinn, supra*; *Doht, supra*; *Northdruff v. City of Lincoln*, 66 Neb. 430, 433, 92 N.W. 628, 628 (1902). *See also* *Woollen*, 256 Neb.

865, 882, 593 N.W.2d 729, 741 (1999) (actual or constructive knowledge of a hazard or dangerous condition, coupled with failure to follow governing statutes, policies, or rules mandating warning or correction may be evidence of duty and breach thereof).

If a city has knowledge of the existence of a general defective condition, all particular defects are covered, and separate notice of a particular defect need not be shown. *Northdruff*, 66 Neb. at 433, 92 N.W. at 628.

There is no duty to search for defects when there is no reason to believe they exist. *McGinn*, 217 Neb. at 587–88, 352 N.W.2d at 552; *Northdruff*, *supra*; *City of Lincoln v. Pirner*, 59 Neb. 634, 638, 81 N.W. 846, 846–47 (1900).

Such an action does not lie for slight holes or depressions which are not in the nature of traps and from which danger could not reasonably be anticipated. The test, ordinarily, is whether the “inequalities” are such that they are likely to cause injury to travelers exercising due care. *Doht*, 207 Neb. at 379, 299 N.W.2d at 178–79; *Christensen*, 201 Neb. at 349–50, 268 N.W. at 93; *Hupfer*, 134 Neb. at 586, 279 N.W. at 170.

“Generally, negligence may not be predicated on a curve or variation in a road or the location or dimension of a bridge according to road plans ‘unless it is so obviously dangerous that no reasonable or prudent [person] would approve the plans.’” *Gilbert v. City of Tekamah*, 221 Neb. 614, 617, 379 N.W.2d 758, 760 (1986) (emphasis added in *Gilbert*) (quoting *Olson v. Wayne Cty.*, 157 Neb. 213, 220, 59 N.W.2d 400, 404 (1953)).

Those traveling over streets and sidewalks must use reasonable care for their own safety. *Hill*, 249 Neb. at 93–94, 541 N.W.2d at 660; *Doht*, 207 Neb. at 380, 299 N.W.2d at 179; *Anthony*, *supra*; *Hupfer*, *supra*. In the absence of knowledge of defects or obstructions, a traveler may assume that the sidewalks or streets are free from defects. *Crosswhite v. City of Lincoln*, 185 Neb. 331, 335, 175 N.W.2d 908, 910 (1970); *Hupfer*, *supra*. See also *NJI2d Civ.* 3.01.

“In the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk, night or day, has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger.”

Hill, 249 Neb. at 97, 541 N.W.2d at 661 (quoting *Crosswhite*, 185 Neb. at 334, 175 N.W.2d at 910).

Regarding a municipality’s liability for sidewalk defects and the af-

firmative defenses of contributory negligence and assumption of the risk, *see Hill*, 249 Neb. 88, 541 N.W.2d 655 (1996).

XVIII. BURDEN ON APPEAL

The following rule applies to both the State Tort Claims Act and the Political Subdivision Tort Claims Act. (The STCA and the PSTCA are to be construed in harmony; *see* part III of this Comment & Authorities, above). “[T]he factual findings of a trial court will not be disturbed on appeal unless they are clearly wrong.” Same quotation, *e.g.*, *Reiber v. Cty. of Gage*, 303 Neb. 325, 334, 928 N.W.2d 916, 924 (2019) (PSTCA); *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 724, 885 N.W.2d 1, 9 (2016) (PSTCA); *Moreno v. City of Gering*, 293 Neb. 320, 326, 878 N.W.2d 529, 534 (2016) (PSTCA); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1032, 809 N.W.2d 487, 1033 (2012); *Stonacek v. City of Lincoln*, 279 Neb. 869, 876, 782 N.W.2d 900, 907 (2010) (PSTCA). *Accord, e.g.*, *McGauley v. Washington Cty.*, 297 Neb. 134, 138, 897 N.W.2d 851, 855 (2017) (PSTCA); *Williams v. City of Omaha*, 291 Neb. 403, 408, 865 N.W.2d 779, 784–85 (2015); *Maclovi-Sierra v. City of Omaha*, 290 Neb. 443, 453, 860 N.W.2d 763, 772 (2015); *Hall v. Cty. of Lancaster*, 287 Neb. 969, 980, 846 N.W.2d 107, 116 (2014), *overruled on other grounds by Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *Fickle v. State*, 273 Neb. 990, 992–93, 996, 735 N.W.2d 754, 761, 763, (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007) (STCA).

On related matters, and as discussed in detail above, the exceptions in the STCA and the PSTCA raise issues of subject matter jurisdiction. Whether a complaint is barred by an exception to either Act is a question of law; failure to plead the issue is not a waiver and neither is the sovereign’s pleading it as an affirmative defense; the issue can be raised by the court *sua sponte*; and it can be raised for the first time on appeal. However, that the issue may be raised for the first time on appeal does not mean that the sovereign can relitigate factual disputes relevant to the application of the exceptions on appeal. *See, e.g.*, part VI(B)(5) of this Comment & Authorities, above.

“The amount of damages awarded in a case under the [STCA] is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.” *Fickle v. State*, 273 Neb. 990, 992, 996, 735 N.W.2d 754, 771 (2007), *clarified at* 274 Neb. 267, 735 N.W.2d 113 (2007). (Note that trials under the STCA and the PSTCA are nonjury trials. *See* part IX of this Comment & Authorities, above.

XIV. THE RELATIONSHIP BETWEEN THE FEDERAL AND THE NEBRASKA TORT CLAIMS ACTS

“Nebraska’s STCA is patterned after the Federal Tort Claims Act. Because Nebraska law is limited, we can look to the federal law for ad-

ditional guidance.” *Rouse v. State*, 301 Neb. 1037, 1042, 921 N.W.2d 355, 360 (2019) (citation omitted)). However, “neither the reasoning nor the holdings of federal cases construing the [Federal Tort Claims Act] have any binding precedential effect on [the Nebraska Supreme] [C]ourt’s construction of Nebraska’s statutory language.” *Edwards v. Douglas County*, 308 Neb. 259, 269, 953 N.W.2d 744, 751 (2021) (stating that this is in part because the U.S. Supreme “Court does not always adhere to the same strict construction principles this court follows when construing statutes purporting to waive sovereign immunity.”).

J. GENERAL DEFINITIONS

NJI2d Civ. 8.81

WILLFUL AND MALICIOUS OR WANTON ACTS DEFINED

A.

A failure to act was willful if it was intentional and occurred with actual knowledge that a danger existed and that injury was a likely result.

A failure to act was (malicious, wanton) if it was intentional and occurred with reckless disregard of its consequences.

B.

An act was willful if it was done intentionally and with actual knowledge that a danger existed and that injury was a likely result.

An act was (malicious, wanton) if it was done intentionally and with reckless disregard of its consequences.

SPECIAL NOTE

See the Special Note to NJI2d Civ. 8.11.

COMMENT

This instruction defines “willful” and “wanton” or “malicious.” The choice offered between the words “wanton” and “malicious” has to do with the fact that this instruction will be used in connection with two different areas of Nebraska law: the owner’s liability under Nebraska’s Recreation Liability Act (*see* NJI2d Civ. 8.61) and the occupant’s liability for injury to a trespasser (*see* NJI2d Civ. 8.02). In certain rare circumstances, it may still apply to the occupant’s liability for injury to a licensee (*see* NJI2d Civ. 8.11, Comment & Authorities).

■ The statute instructed on in NJI2d Civ. 8.61 uses the two words willful and malicious. The case that defines those terms, the *Garreans* case, cited below, uses the two words willful and wanton. *Garreans* clearly intended “wanton,” as it used the word, to be synonymous with “malicious.” In NJI2d Civ. 8.61, the Committee used the words of the statute.

■ The category of entrant upon land known as licensees has been abolished in Nebraska. See NJI2d Civ. 8.01 and 8.25, Comment & Authorities. The case predating the abolition of the licensee category, which defined the occupant’s duty to a licensee (and therefore to a trespasser, see the Comment to NJI2d Civ. 8.02), is the *Guenther* case, cited below. It uses the words willful and wanton, and, for their definition, relies on *Garreans*. In NJI2d Civ. 8.02 and in former NJI2d Civ. 8.12, which is now found at NJI2d Civ. 8.11, Comment & Authorities, the Committee uses the words of the *Guenther* case.

■ This instruction, NJI2d Civ. 8.81, instructs on both “willful and wanton” and “willful and malicious.”

If it aids clarity, this instruction may be tailored to the specifics of the case. Instruction on these definitions will be necessary where willful or malicious action or inaction is an element of a case or a defense, as it is in NJI2d Civ. 8.61, or where willful or wanton action or inaction is an element of a case, as it is in NJI2d Civ. 8.02 and former NJI2d Civ. 8.12. This definitional instruction should be given in close proximity to the instruction that calls for its use. If the placement of this instruction makes necessary an introductory sentence or paragraph, the Committee suggests one of the following:

“In this case (identify party) has the burden of proving that (identify other party)’s (action, failure to take action) was willful or (malicious, wanton).”

“In this case, (identify party) has the burden of proving (identify other party and particular act or failure to act that must be proved to have been willful, wanton, or malicious) was willful and (malicious, wanton).”

If only an act or a failure to act is involved, then use only Part A or Part B. If both are involved, then either use both paragraphs or combine the two parts into one. Parts A and B are separated and the failure to act part is placed first because it seems that that Part A alone will be needed more often than will Part B alone or both of them together.

See also the Authorities, below.

AUTHORITIES

Bronsen v. Dawes Cty., 272 Neb. 320, 327, 722 N.W.2d 17, 23 (2006);
Drake v. Drake, 260 Neb. 530, 543–45, 618 N.W.2d 650, 661–62 (2000);

Terry v. Metzger, 241 Neb. 795, 798–99, 491 N.W.2d 50, 53–54 (1992); Guenther v. Allgire, 228 Neb. 425, 422 N.W.2d 782 (1988); Gallagher By and Through Gallagher v. Omaha Pub. Power Dist., 225 Neb. 354, 358, 405 N.W.2d 571, 574 (1987), *overruled on other grounds*, Bronsen, *supra*; Garreans v. City of Omaha, 216 Neb. 487, 493–95, 345 N.W.2d 309, 314 (1984), *overruled on other grounds*, Bronsen, *supra*.

“[I]n order for an action to be willful and wanton, the evidence must prove that the defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result.” Drake v. Drake, 260 Neb. 530, 545, 618 N.W.2d 650, 662 (2000).

“Willful and malicious” infliction of injury falls somewhere between “negligent” infliction, on the one hand, and “intentional” infliction, on the other. The “likely to result” part of the standard expressed in *Drake v. Drake*, *supra*—accord *Garreans v. City of Omaha*, 216 Neb. 487, 494, 345 N.W.2d 309, 314 (1984), *overruled on other grounds*, Bronsen, *supra*; *Wicker v. City of Ord*, 233 Neb. 705, 712, 447 N.W.2d 628, 633 (1989)—seems to be toward the “negligent” side of the “negligent”-to-“intentional” spectrum. Prosser says that the usual meaning of willful and malicious requires actions from which it is “highly probable that harm [will] follow.” W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 34, at 213 (5th ed. 1984 & Supp. 1998). That seems more toward the middle. *Garreans* did not turn on the degree of likelihood that the harm would follow the action; rather, it turned on the fact that the defendant there did not have actual knowledge of the existence of the danger. *Garreans*, 216 Neb. at 495, 345 N.W.2d at 314. In *Drake*, where the point was that the plaintiff had not alleged sufficient facts, the statement was dicta. It is possible, then, that when the Court is faced with the question it will adopt Prosser’s standard. If that is the case, then the part of the instruction stating that the failure to act must occur, and the act must be done, “with actual knowledge that . . . that injury was a likely result” will have to be rewritten accordingly.

The instruction states that: “A failure to act was willful if it was intentional and occurred with actual knowledge that a danger existed and that injury was a likely result.” In *Garreans*, the court says: “An actor cannot act willfully in failing to remove a danger when he has no knowledge of it.” *Id.* at 495, 345 N.W.2d at 314. It also says, “the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result.” *Id.* at 493, 345 N.W.2d at 314. Regarding this part of the instruction and these quotations, the Committee has two comments:

(1) These quotations seem to indicate that the injury complained of has to have resulted from the danger anticipated. This concept is not in this instruction. It will be taken care of in the proximate cause part of the relevant burden of proof instruction.

(2) It is because of these quotations that the instruction says that there must be both "knowledge that a danger existed and that injury was a likely result." The Committee realizes that requiring knowledge both "that a danger existed" and "that injury was a likely result" may be redundant: If you prove actual knowledge that injury is a likely result of the act or the failure to act, you will have proved actual knowledge of a danger. For clarity's sake, however, it may be necessary to have both statements in the instruction.

This instruction requires knowledge of a danger of "injury." Query whether the law requires knowledge of a danger of "serious injury" and whether the law requires knowledge of "injury" as opposed to "damage":

- On the one hand, throughout the relevant part of *Garreans*, the court stated that injury must be a likely result of the act or the failure to act, and does so without specifying that any particular kind of injury must have been foreseen. Once, however, the court quoted a California case that said that the person in question must have knowledge "that serious injury is a probable . . . result." *Garreans*, at 494, 345 N.W.2d at 314. Since none of the other cases add the modifier "serious" and *Garreans* itself more often refers to this injury without the qualifying word "serious," that word is not in the pattern.

- On the other hand, there does seem to be an overtone of seriousness in *Garreans'* use of the word injury; and the purpose of the Recreation Liability Act seems to lean toward this notion that the danger must be more than a slight one; and *Garreans* turned on the fact that the defendant there did not have actual knowledge of the existence of the danger, rather than on the seriousness of the danger; *Garreans*, at 495, 345 N.W.2d at 314. And, in *Guenther*, which does not involve the *Garreans* statute, but which does rely on *Garreans* for its definition of willful and wanton, the court stated that the defendant had to have had "consciousness that the act or omission would probably cause serious injury." And, once again, the seriousness of the foreseeable injury was not in issue in *Guenther*.

- The Committee does not believe that the word "serious" belongs in the instruction, qualifying the word injury. The Committee has gone with the language of *Garreans*, which is relied on in *Guenther*, the case that establishes and thoroughly discusses the definition, and in *Drake*, the most recent case as of this writing. As a result, this instruction does not qualify "injury" with "serious." If the Committee is incorrect and the injury contemplated has to have been serious injury, this instruction will have to be changed accordingly. If the Committee is incorrect, then note that the focus is not on whether serious injury was actually suffered, but on whether serious injury was foreseeable.

- This instruction uses the word injury because the cases

discussed use that word. In the sense that “injury” is distinguished from “damage,” in part 4 of the Introduction to Chapter 8, it might be that damage would be a more appropriate word.

The language used in *Guenther* to define “willful” and “wanton” and the language of this instruction are not exactly the same, but, in the opinion of the Committee, the result is just the same:

- Willful, on the one hand, and malicious or wanton, on the other hand, are used somewhat interchangeably. *Garreans* contains a number of definitions of each and at various places and quoting various authorities a definition previously applied to willful is applied to wanton and vice versa. Because these instructions are to be read to lay persons, the Committee has tried to match the definition with the word based on the match that is better using lay definitions. The result is a match-up of definitions with words defined that coincides with some but not all of the match-ups of words with definitions in *Guenther* and *Garreans*. In any event, it seems to the Committee that it does not matter which of these two words carries which definition; in terms of defining the law for the jury, the result is the same.

- Defining one of these words, *Guenther* states that the act or omission “must be intended or must involve such reckless disregard of security and right as to imply bad faith.” *Guenther*, at 428–29, 422 N.W.2d at 785 (emphasis added). For this proposition, *Guenther* cites *Gallagher By and Through Gallagher v. Omaha Pub. Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987), *overruled on other grounds*, *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2007), which in turn quotes *Garreans*. In the opinion of the Committee, that the actor intended to act is not enough. Rather than expressing that proposition that the act must be either intended or reckless, the instruction expresses the proposition that the act must be intended and reckless. This is the *Garreans* approach and, in the judgment of the Committee, the correct approach. More recently, *Guenther’s* use of the word “or” is quoted in: *Drake v. Drake*, 260 Neb. 530, 545, 618 N.W.2d 650, 662 (2000); *Wicker v. City of Ord*, 233 Neb. 705, 712, 447 N.W.2d 628, 633 (1989). The Committee maintains its position that “and” is the correct conjunction. *See also Baker’s Supermkts. v. State*, 248 Neb. 984, 993, 540 N.W.2d 574, 580 (1995) (“or,” which is disjunctive, and “and,” is conjunctive, are so frequently interchanged that, in statutory construction, “or” may be read as “and” where strict reading leads to unreasonable result and defeats intent of statute). *And see Keller v. Tavarone*, 265 Neb. 236, 242–43, 655 N.W.2d 899, 905 (2003) (finding that plaintiff’s interpretation of the statute “is not necessarily inconsistent” with the wording of the statute, but, because it is “inconsistent with the statutory purpose,” adopting defendant’s interpretation).

In the *Olson* case, the court stated this: “In order for an action to be

willful or wanton, the evidence must prove that the defendant had actual knowledge that a danger existed and that the defendant had a constructive intention as to the likely consequences." *Olson v. SID No. 177*, 251 Neb. 380, 388, 557 N.W.2d 651, 656 (1997).

In *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996), the court stated that:

"In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result.

...

"To constitute willful negligence that act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury."

Id. at 803, 553 N.W.2d at 145 (quoting *Blackbird v. SDB Invs.*, 249 Neb. 13, 19, 541 N.W.2d 25, 30 (1995) (in turn quoting *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988)) (emphasis in *Guenther*). Accord *Syracuse Rural Fire Dist.*, *supra*; *Alexander*, *supra*. In the second paragraph of the above quotation, the Court states that the act "must be intended or must involve . . . reckless disregard. . . ." (Emphasis added.). *Syracuse Rural Fire Dist. v. Pletan*, 254 Neb. 393, 403-04, 577 N.W.2d 527, 534 (1998) and *Alexander v. Warehouse*, 253 Neb. 153, 158, 568 N.W.2d 892, 895 (1997) also use the word "or" in this same context. Again, as discussed above, the Committee believes that the correct conjunction is "and," rather than "or," and the former is the conjunction used in the pattern instruction.

NJI2d Civ. 8.82

REASONABLE CARE DEFINED

Reasonable care means the care that a reasonable person would exercise under similar circumstances.

COMMENT & AUTHORITIES

The phrase "reasonable care" is used in many of the instructions in Chapter 8. When one of those instructions is used, accompany it with this instruction, defining reasonable care, rather than NJI2d Civ. 3.02, defining negligence. (In effect, the jury is being told they must find that the defendant was negligent with regard to the safety of the plaintiff, but the word "negligence" is not being used; that means the definition of negligence, NJI2d Civ. 3.02, will not be used; that means there is a need for a definition of reasonable care.)

This instruction is based on NJI2d Civ. 3.02.

NJI2d Civ. 8.83

UNREASONABLE RISK OF HARM DEFINED

The term “unreasonable risk of harm” means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.

COMMENT & AUTHORITIES

This is the definition instruction for “unreasonable risk of harm.” “[T]he term “unreasonable risk of harm” means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.’” This instruction was approved in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964). *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 105–06, 306 N.W.2d 580, 582 (1981) (paragraph break omitted).

For a complete discussion of “unreasonable risk of harm,” see NJI2d Civ. 8.26, Comment & Authorities, part V. NJI2d Civ. 8.83 is a companion to former NJI2d Civ. 8.22 (which only applies to causes of action accruing on or before August 23, 1996; it would be highly unlikely, if not impossible, for any such cause of action to be alive today) and current NJI2d Civ. 8.26, each of which uses the phrase.

“‘[T]he term “unreasonable risk of harm” means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.’” This instruction was approved in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964). *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 105–06, 306 N.W.2d 580, 582 (1981) (paragraph break omitted).

NJI2d Civ. 8.84

DEFINITION—“SHOULD HAVE KNOWN,” “HAD REASON TO KNOW” AND “FROM FACTS WITHIN HIS OR HER KNOWLEDGE, SHOULD HAVE KNOWN”

The words (“should have known,” “should have realized,” “should have expected”) mean that the person in question was required to be reasonably attentive and, where adequate information could not be obtained by being reasonably attentive, to make reasonable inspections or investigations. (He, She) was also required to draw reasonably correct conclusions.

A person had (“reason to know,” “reason to expect”) something

if (he, she) had information from which a reasonable person either would have inferred that the fact in question existed or would have proceeded under the assumption that such fact existed.

The words "from facts within (his, her) knowledge, ('should have known,' 'should have realized,' 'should have expected')'" mean that the person in question was only required to draw reasonably correct conclusions from information known to (him, her); (he, she) was not required to pay attention to (his, her) surroundings or to make any inspection or investigation in regard to them.

COMMENT & AUTHORITIES

These distinctions are particularly important in the premises liability cases. See the discussion of *Krance v. Faeh* in the Authorities, below.

The phrases "reason to know" and "should know" are used in the law of agency in the same sense as they are used in this instruction. Restatement (Second) of Torts § 12, comment a (1965).

Restatement (Second) of Torts § 12 (1965) defines "reason to know" and "should know." Those definitions are expressed in more helpful detail and "from facts within his or her knowledge" is defined at Restatement (Second) of Torts § 334 comment c (1965). This instruction is based on both of those parts of the Restatement (Second) of Torts.

Comment c to § 334 of the Restatement (Second) of Torts (1965) (with parenthetical references are to Restatement (Second) of Torts § 12 (1965)) reads as follows:

The words "should know" as used in the Restatement of this Subject imply that the person in question is not only required to draw a correct conclusion from facts known to him, but also to ascertain the data necessary for drawing such a conclusion by a reasonable attention to and appreciation of the surrounding circumstances and, where adequate data cannot be thus obtained, by inspection or investigation. (See § 12.) The words "from facts within his knowledge," which are used in this Section to qualify the phrase "should know," are inserted to indicate that the possessor is required only to draw reasonably correct conclusions from data known to him, and is not required to exercise a reasonable attention to his surroundings or to make any inspection or investigation in regard to them. The words "should know," thus qualified, differ from the words "has reason to know" in the following particulars: the words "has reason to know" indicate that the person whose conduct is in question knows of facts which make the existence of some legally important fact possible, and, therefore, require him to look further into the matter before he assumes that it does not

exist. The words "from facts within his knowledge should know," on the other hand, indicate merely that the facts which he knows would without further investigation apprise a reasonable man of the existence of the legally important fact. The words "has reason to know" differ from the words "should know" in that the person whose conduct is in question in the first case is under no duty of inspection or investigation until some fact known to him apprises him of the necessity therefor. On the other hand, the words "should know" indicate that the person whose conduct is in question is under a general duty to be attentive to his surroundings and to make investigations irrespective of whether any fact within his knowledge indicates a peculiar necessity for his so doing. (See § 12.)

Krance v. Faeh, 215 Neb. 242, 249, 338 N.W.2d 55, 59 (1983) specifically notes these different standards and the importance that the jury instructions contain the correct standard.

Regarding the first paragraph of this instruction, § 12(2) of the Restatement (Second) says that " 'should know' . . . denote[s] the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists." Comment c to § 334, as quoted more fully above, says "the person in question is not only required to draw a correct conclusion from facts known to him, but also to ascertain the data necessary for drawing such a conclusion by a reasonable attention to and appreciation of the surrounding circumstances and, where adequate data cannot be thus obtained, by inspection or investigation [This] person . . . is under a general duty to be attentive to his surroundings and to make investigations irrespective of whether any fact within his knowledge indicates a peculiar necessity for his so doing." The first paragraph of the above instruction is based more on the comment c to § 334 than on § 12.

The second paragraph of the instruction is closely based on § 12(1), *supra*.

The third paragraph of the instruction defines words that are not used in § 12.

It is closely based on comment c to § 334.

CHAPTER 9

MISCELLANEOUS CIVIL ACTIONS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
|------|---|
| 9.01 | Fraudulent Misrepresentation |
| 9.02 | Fraudulent Concealment—Vendor/Purchaser Setting |
| 9.03 | Definition of Material Fact |
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NJI2d Civ. 9.01

FRAUDULENT MISREPRESENTATION

Before the plaintiff can recover against the defendant [on (his, her, its) claim of (misrepresentation, fraudulent misrepresentation, false representation, deceit)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant made the claimed representation;
2. That the representation was false;
3. That the representation was made fraudulently;
4. That, when (he, she, it) made the representation, the defendant intended that the plaintiff would rely on it;
5. That the plaintiff did rely on the representation;
6. That the plaintiff's reliance on the representation was reasonable;
7. That this representation was a proximate cause of some damage to the plaintiff; and
8. The nature and extent of that damage.

COMMENT & AUTHORITIES

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I. IN GENERAL

This is the Burden of Proof instruction to be used in a tort action for fraudulent misrepresentation. Use only those subparagraphs of this instruction that are put in issue by the pleadings and the evidence. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model.

NJI2d Civ. 15.08 defines "fraudulent representation"; that instruction should be given along with this one or adapted and substituted for the third numbered subparagraph of this instruction. Regarding fraudulent concealment in the vendor/purchaser setting, *see* NJI2d Civ. 9.02.

II. THE ELEMENTS OF THE CAUSE OF ACTION

In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements:

(1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.¹

This is an *almost* exact statement of the above instruction. However, this quotation and the pattern instruction differ in these two ways: First, this quotation takes NJI2d Civ. 15.08, which otherwise would be given along with this instruction, and blends it into part (3) of this instruction.

Second, regarding part 4 of the instruction, the case from which this quotation is taken, states that the representation must be “made with the intention that the plaintiff *should* rely upon it,”² while the pattern instruction states that the representation must be made with the intention “that the plaintiff *would* rely on it.”³ The Committee’s choice of the word “would” is not meant to comment on whether there is a dif-

9.01

¹Cao v. Nguyen, 258 Neb. 1027, 1031, 607 N.W.2d 528, 532 (2000). *Accord*, e.g., Cullinane v. Beverly Enters.—Neb., 300 Neb. 210, 231, 912 N.W.2d 774, 793 (2018); deNourie & Yost Homes, LLC v. Frost, 289 Neb. 136, 150, 854 N.W.2d 298, 311-12 (2014); Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure, 285 Neb. 48, 56, 825 N.W.2d 204, 212 (2013); Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure, 280 Neb. 997, 1009, 792 N.W.2d 484, 495 (2011) (regarding fraudulent concealment, stating, “(4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression”), *overruled on other grounds* by State v. Boche, 294 Neb. 912, 918, 885 N.W.2d 523, 529 (2016); Knights of Columbus Council 3152 v. KFS BD, Inc., 280 Neb. 904, 922, 791 N.W.2d 317, 331 (2010); Eicher v. Mid America Financial Inv. Corp., 275 Neb. 462, 474, 748 N.W.2d 1, 12 (2008); Brummels v. Tomasek, 273 Neb. 573, 578, 731 N.W.2d 585, 590 (2007); Eicher v. Mid America Financial Inv. Corp.,

270 Neb. 370, 378, 702 N.W.2d 792, 803 (2005); Agri Affiliates, Inc. v. Bones, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003); Schuelke v. Wilson, 250 Neb. 334, 342, 549 N.W.2d 176, 181-182 (1996).

See also the cases cited at NJI2d Civ. 15.21, Authorities, regarding the instruction on the affirmative defense of fraudulent representation. The elements of the two are the same, it is just that one is a cause of action and the other is an affirmative defense.

²Cao, 258 Neb. at 1031, 607 N.W.2d at 532. *See also* Foiles v. Midwest Street Rod Ass’n of Omaha, 254 Neb. 552, 556, 578 N.W.2d 418, 422 (1998); Evergreen Farms v. First Nat’l Bank & Trust, 250 Neb. 860, 866, 553 N.W.2d 728, 733 (1996); Agri Affiliates, Inc. v. Bones, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003).

³Cases using “would rely” include Foreman v. AS Mid-America, Inc., 255 Neb. 323, 344, 586 N.W.2d 290, 306 (1998); Ed Miller & Sons v. Earl, 243 Neb. 708, 719, 502 N.W.2d 444, 453 (1993); Broekemeier Ford, Inc. v. Clatanoff, 240 Neb. 265, 271, 481 N.W.2d 416, 420 (1992) (quoting Edwin Bender & Sons v. Ericson Livestock

ference between “would” and some definitions of “should” and, if there is, whether *Cao* intended the difference. It does seem to the Committee that “would rely” is a more precise expression of the element in question and eliminates some possible confusion arising from the word “should.”⁴

Also regarding part 4 of the pattern instruction, the requirement that the plaintiff would rely on the representation is “broad enough to include a plaintiff’s action or inaction in reliance upon [the] representation.”⁵ “Misleading half-truths can also constitute fraud.”⁶

The cases state that the representation must have been either known to be false or made recklessly without knowledge of its truth and as a positive assertion. The third element of the pattern instruction states that the representation must have been made fraudulently. This difference in wording between the cases and the instruction is taken care of when NJI2d Civ. 15.08, which defines “fraudulent representation,” is given along with the above instruction.

The sixth element of the pattern instruction requires that the plaintiff reasonably relied on the fraudulent representation.⁷ Whether a party’s reliance was reasonable is a question of fact.⁸ “A person is justified in relying upon a representation made to the party as a positive statement of fact, when an investigation would be required to ascertain its falsity.”⁹

After holding “that in order to maintain an action for damages for false representation, the plaintiff must allege and prove . . . that [the representation] was made with the intention that the plaintiff should rely upon it,” *Nielsen v. Adams* goes on to state the following:

Comm. Co., 228 Neb. 157, 165–66, 421 N.W.2d 766, 771 (1992)); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476, 476 N.W.2d 802, 809 (1991); *Dammann v. Litty*, 234 Neb. 664, 672, N.W.2d 522, 528 (1990); *Henderson v. Forman*, 231 Neb. 440, 449, 231 Neb. 440, 532 (1989).

⁴“Should” is the past tense of “shall.” “Should” is “2—used in auxiliary function to express duty, obligation, necessity, propriety, or expediency.” *Merriam Webster Unabridged Dictionary*, <http://unabridged.merriam-webster.com/unabridged/should> (last visited, May 13, 2019). Use of the word “would” better expresses this essential element of fraudulent misrepresentation than does the word “should.”

⁵*Knights of Columbus Council* 3152, 280 Neb. at 926, 791 N.W.2d at 322.

⁶*deNourie & deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 150, 854 N.W.2d 298, 311–12 (2014). See part IV of this Comment & Authorities, below.

⁷See, e.g., *Cullinane*, 300 Neb. at 231, 912 N.W.2d at 793 and the rest of the cases in note 1, above.

⁸*Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 747, 626 N.W.2d 472, 496 (2001).

⁹*Cao v. Nguyen*, 258 Neb. 1027, 1032, 607 N.W.2d 528, 533 (2000). *Accord Lucky 7, L.L.C. v. THT Realty, L.L.C.*, 278 Neb. 997, 1003–04, 775 N.W.2d 671, 676 (2009); *Foiles*, 254 Neb. at 557, 578 N.W.2d at 422.

If the defendant can establish by [the greater weight] of the evidence that the defendant had a reasonable basis to believe that the statement of fact was true, then recovery will be denied. If, on the other hand, the evidence is such that a reasonable person in the position of the defendant could not have honestly believed the statement to be true, recovery may be had. In any event, it need not be shown that the defendant also had a "bad" motive in doing what he or she did. The fact that the defendant deceives, itself, establishes scienter even though the defendant may have been unaware of the deception.

Therefore, to the extent that we have, in previous cases, included "intent to deceive" as a necessary element of a cause of action for fraudulent misrepresentation or deceit, we specifically now reject that view, and to the extent that [cases here listed] include as a necessary element "intent to deceive," they are specifically overruled.¹⁰

While intent to deceive is not a necessary element, the plaintiff still must prove defendant's intention that the plaintiff would rely on the representation. "[S]cienter is established when the evidence discloses that the defendant made a false statement with the intention that the plaintiff rely upon the statement."¹¹

III. THIS TORT GOES BY VARIOUS NAMES

This instruction contains the following parenthetical: "(misrepresentation, fraudulent misrepresentation, false representation, deceit)." These choices are offered because this tort goes by various names. At various times, and referencing various sources, *Nielsen v. Adams* "an action for fraudulent misrepresentation"¹² as "a cause of action for fraudulent misrepresentation or deceit,"¹³ "an action for damages for false representation,"¹⁴ and "the tort cause of action in deceit."¹⁵

Taking into consideration the words used at the trial, choose those most likely to be properly understood by the jury.

¹⁰*Nielsen v. Adams*, 223 Neb. 262, 271-72, 388 N.W.2d 840, 846 (1986). Note, however, that the intention that the plaintiff should rely on the statement, element 4 of the above pattern, is still an element of the plaintiff's case.

¹¹*Nielsen*, 223 Neb. at 272, 388 N.W.2d at 846.

¹²*Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

¹³*Id.* at 262, 388 N.W.2d at 841.

¹⁴*Id.* at 271, 388 N.W.2d at 846.

¹⁵*Id.* at 267, 388 N.W.2d at 843 (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 105 (5th ed. 1984)). See also *Zawaideh v. Nebraska Dept. of Health & Human Servs. (Zawaideh I)*, 280 Neb. 997, 1009, 792 N.W.2d 484, 495 (2011) (regarding "a claim for fraudulent misrepresentation or concealment"), *overruled on other grounds by State v. Boche*, 294 Neb. 912, 918, 885 N.W.2d 523, 529 (2016); *Alliance Nat'l Bank v. State Surety Co.*, 223 Neb. 403, 407-08, 390 N.W.2d 487, 490-91 (1986).

IV. A FALSE REPRESENTATION MUST BE A REPRESENTATION OF FACT

"To constitute a false representation, a statement must be made as a statement of fact, not merely the expression of an opinion."¹⁶ However, this tort does not require a positive statement of fact; it can include a failure to disclose a fact.¹⁷ And, as noted above, "[m]isleading half-truths can . . . constitute fraud."¹⁸

When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent. Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false. To reveal some information on a subject triggers the duty to reveal all known material facts. Consistent with imposing liability for half-truths, the Restatement (Second) of Torts § 527 provides that an ambiguous statement is fraudulent if made with intent that it be understood in its false sense or with reckless disregard as to how it will be understood.¹⁹

[T]he general rule is that one is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. While no action will lie where ordinary prudence would have prevented the deception, this rule is generally applied when the means of discovering the truth was in the hands of the party defrauded.²⁰

As discussed further in the Comment & Authorities, below, the plaintiff's reliance must be reasonable.

¹⁶Kliewer v. Wall Const. Co., 229 Neb. 867, 876, 429 N.W.2d 373, 380 (1988). *Accord* Henderson v. Forman, 231 Neb. 440, 448, 436 N.W.2d 526, 532 (1989). *See also* Agri Affiliates, Inc. v. Bones, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003) (stating that the representation must be made as a positive statement).

¹⁷Zawaideh I, 280 Neb. at 1010, 792 N.W.2d at 496 ("[O]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose.").

¹⁸deNourie & Yost Homes, LLC v. Frost, 289 Neb. 136, 150, 854 N.W.2d 298, 311-12 (2014).

¹⁹De Nourie, 289 Neb. at 150, 854 N.W.2d at 311 (quoting *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 922-23, 791 N.W.2d 317, 331-32 (2010)) (internal quotation marks omitted and footnotes omitted in *Knights of Columbus*).

²⁰Gibb v. Citicorp Mortg., Inc., 246 Neb. 355, 369, 518 N.W.2d 910, 920 (1994) (citation omitted). *Accord* Cullinane v. Beverly Enters.—Neb., 300 Neb. 210, 231, 912 N.W.2d 774, 793 (2018).

"[A]n overlap exists between fraudulent concealment claims, and misrepresentation claims based on half-truths or ambiguities. That is, if a defendant's partial or ambiguous representation is materially misleading, then the defendant has a duty to disclose known facts that are necessary to prevent the representation from being misleading."²¹

Generally, fraud cannot be based on predictions or expressions of mere possibilities in reference to future events. There are, however, certain exceptions to this general rule.

One exception is where a representation concerning a future event is falsely and fraudulently made with an intent to deceive. This exception most often is applied in cases in which the future event is within the control of the person making the representation. . . .

[Other exceptions are expressed in the following jury instruction approved by the Nebraska Court of Appeals:]

The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker (a) purports to have special knowledge of the matter that the recipient does not have, or (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or (c) has successfully endeavored to secure the confidence of the recipient, or (d) has some other special reason to expect that the recipient will rely on his opinion.

"As noted by the Court in *Burke v. Harman*, 6 Neb. App. 309, 345, 574 N.W.2d 156, 179 (1998), the category delineated in (d) above is 'quite expansive' and [seems to cover the situation in the case at hand.]"²²

V. JUSTIFIABLE RELIANCE

[T]he recipient of an intentionally false statement of material fact may justifiably rely on the statement if the recipient would have to investigate to discover its truth. It is true that under Nebraska law, the recipient of a representation must exercise ordinary prudence to ascertain its truth when the means of discovering the truth is in his or her hands. But in claims of

²¹*Knights of Columbus Council 3152*, 280 Neb. at 922, 791 N.W.2d at 331. *Accord deNourie & Yost Homes*, 289 Neb. at 150, 854 N.W.2d at 313.

²²*Outlook Windows Partnership*

v. York Intern. Corp., 112 F. Supp. 2d 877, 894 (D. Neb. 2000) (most citations, all to Nebraska state court opinions, omitted).

intentional misrepresentations, we have applied this rule only in limited circumstances: (1) when a property's defects would be obvious to a potential buyer upon inspection; (2) when the seller of a business gave the buyer all the expense and sales records to a buyer to ascertain the accuracy of the seller's statements regarding profits, did not vouch for his estimates, and recommended that the buyer have his estimates independently evaluated, but the buyer failed to follow through; and (3) when a plaintiff failed to read a legal agreement before signing it and had an opportunity to do so, assuming that the plaintiff's execution of the contract was not induced by fraud.²³

Furthermore, "a plaintiff's contributory negligence is not a defense to [intentional misrepresentation] claims. . . . So, absent information that should put a recipient on notice that a representation may be false, a person may generally rely on the truth of another's representation. In intentional misrepresentation cases, a plaintiff fails to exercise ordinary prudence only when the plaintiff's reliance is wholly unreasonable, given the facts open to the plaintiff's observation and his or her own skill and experience."²⁴

VI. DUTY TO DISCLOSE

The party alleged to have concealed the fact in question cannot be held liable unless that party had a duty to disclose. "Duty" is not part of the pattern instruction because the existence of a duty is a question of law. To the extent that "there are disputed facts bearing on the existence of the duty, they are to be determined by the trier of fact under appropriate instructions."²⁵ The factual inquiries that might arise might require "appropriate instructions" vary according to the circumstances of each case. The required "appropriate instructions" will have to be drafted to fit the particular case at bar.

[O]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if he is under a duty to the other to exercise reasonable care to disclose the matter in question. Existence of a duty to disclose the fact in

²³*deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 152-53, 854 N.W.2d 298, 313-14 (2014) (footnotes omitted). *Accord Cullinane v. Beverly Enters.*—Neb., 300 Neb. 210, 231, 912 N.W.2d 774, 793 (2018).

²⁴*deNourie & Yost Homes*, 289

Neb. at 153-54, 854 N.W.2d at 314 (footnotes omitted).

²⁵*Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure (Zawaideh I)*, 280 Neb. 997, 1010, 792 N.W.2d 484, 495 (2011).

question is a matter for the determination of the court, although if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as the existence of the duty.²⁶

"[A] party's mere silence about its financial condition cannot constitute a misrepresentation unless the other party asks for the information."²⁷

VII. POTENTIALLY CONFUSING LANGUAGE

A. "WOULD" RELY VERSUS "SHOULD" RELY

Part 4 of the pattern instruction says, "the defendant intended that the plaintiff would rely on [the representation]." Some cases say that the "the defendant intended that the plaintiff should rely on [the representation]." This difference and the Committee's resolution are discussed above, in part II of this Comment & Authorities.

B. "FRAUDULENT" OR "MATERIAL" MISREPRESENTATION

In some cases the court has said that "[t]o recover in an action for fraud based upon a misrepresentation of fact, the plaintiff must prove . . .," and then listed six elements, some of which are elements of "material misrepresentation," as it is defined in NJI2d Civ. 15.22, and some of which are the elements of "fraudulent misrepresentation," as it is defined in this instruction, NJI2d Civ. 9.01.²⁸

If these cases are fraudulent misrepresentation cases, they add the following to the tort described in this pattern instruction, *i.e.*, NJI2d Civ. 9.01: It must be a misrepresentation "of a material fact." If these cases are material misrepresentation cases, they add the following to the tort described in NJI2d Civ. 15.22: *See also* NJI2d 15.01 which covers the affirmative defense of fraudulent misrepresentation. The repre-

²⁶*Zawaideh I*, 280 Neb. at 1010, 792 N.W.2d at 496 (footnotes omitted). *See also, id.* at 1012, 792 N.W.2d at 497 ("[A] statement that contains only favorable matters and omits all references to unfavorable matters is as much a false representation as if all the facts stated were untrue. . . . And whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand.").

²⁷*deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 151, 854 N.W.2d 298, 312 (2014).

²⁸*Foreman v. AS Mid-America, Inc.*, 255 Neb. 323, 344, 586 N.W.2d 290, 304 (1998); *Henderson v. Forman*, 240 Neb. 939, 945, 486 N.W.2d 182, 186 (1992); *Dammann v. Litty*, 234 Neb. 664, 672, 452 N.W.2d 522, 527 (1990); and cases cited in each. *Accord* *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 719, 502 N.W.2d 444, 452 (1993) (involving "an action for fraud based on misrepresentation of a material fact").

sensation must be fraudulent, that is, it must be made recklessly as a positive assertion without knowledge concerning the truth of the representation. The Committee believes these cases present aberrant statements of the rule, and that N.J.I.2d Civ. 9.01 and 15.22 each expresses the correct rule for the cause of action it covers.²⁹

The pattern does not include the word “material.” It was the opinion of the Committee at the time N.J.I.2d Civ. 9.01 and N.J.I.2d Civ. 15.22 were drafted, that fraudulent misrepresentation of 9.01 and material misrepresentation of 15.22 were different torts and that materiality was not an element of the former and fraud was not an element of the latter. The Committee stands by its conclusion that materiality is not an element of this tort and omitting the word “material” from the statement of the elements correctly states the law of fraudulent misrepresentation.

The elements of the tort of fraudulent misrepresentation and the affirmative defense of same are discussed at N.J.I.2d Civ. 15.01. Please see the Comment and Authorities to that instruction for more.

C. NEGLIGENTLY MADE REPRESENTATIONS

While *Fulk v. McLellan*³⁰ seemed to clear up the “material misrepresentation” problem that is discussed just above, at the same time it raised a new problem. *Fulk* defines one of the essential elements as follows: “the representation was known to be false when made, was made recklessly without knowledge of its truth and as a positive assertion, [so far this is the tort described in this pattern instruction,] or was negligently made [now this is a different tort than the one in this pattern instruction].”³¹ For this proposition, *Fulk* cites *Commerce Savings Scottsbluff, Inc. v. F.H. Schafer Elevator, Inc.*³² *Commerce Savings* describes the cause-of-action element in question as follows: “‘that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion.’”³³

²⁹Most of the newer cases do not include the element of materiality. See, e.g., *Nathan v. McDermott*, 306 Neb. 216, 236, 945 N.W.2d 92, 108-09 (2020) (noting that the elements of the both the tort and the affirmative defense of fraudulent misrepresentation are the same and listing those elements; the list does not include that the misrepresentation must be “of a material fact.”); *deNourie & Yost Homes, LLC v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014); *Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure*, 285 Neb. 48, 56, 825 N.W.2d 204, 212 (2013); *Cao v. Nguyen*, 258

Neb. 1027, 1031, 607 N.W.2d 528, 532 (2000); *Foiles v. Midwest Street Rod Ass’n of Omaha, Inc.*, 254 Neb. 552, 556, 578 N.W.2d 418, 421 (1998); *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

³⁰*Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993).

³¹*Id.* at 148, 498 N.W.2d at 95.

³²*Id.* at 148-49, 498 N.W.2d at 95 (quoting *Commerce Sav. Scottsbluff, Inc. v. F.H. Schafer Elevator, Inc.*, 231 Neb. 288, 436 N.W.2d 151 (1989)).

³³*Commerce Savings*, 231 Neb. at 305-06, 436 N.W.2d at 163.

Commerce Savings does not include the “or was negligently made” language. *Fulk*’s inclusion of the “negligently made” language, without discussion and by citation to a case where it does not appear, seems to be inadvertent.³⁴

One with a cause of action based on negligent misrepresentation is referred to the discussion of this topic at part XIII(C) near the end of this Comment & Authorities, below.

VIII. DAMAGES

[T]he distinct tort of fraud or misrepresentation is generally an economic tort against financial interests, asserted to recover pecuniary loss. One who makes a fraudulent or negligent misrepresentation in a business transaction is normally liable only for the recipient’s pecuniary losses. And a pecuniary loss is a “loss of money or of something having a monetary value.” For misrepresentation claims, a defendant’s liability for pecuniary losses is generally limited to the plaintiff’s out-of-pocket losses or sometimes benefit-of-the-bargain losses, depending upon the context and type of misrepresentation.³⁵

In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he would have been in had the fraud not occurred. One who enters into an agreement by virtue of a material misrepresentation [has an election of remedies; that party] may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to the position which existed before entering into the contract.³⁶

In *Tolliver*, the plaintiff argued that it should be able to recover not only economic damages, but also noneconomic damages. The court found that, on the facts of this case and given its posture on appeal, this was

³⁴The newer cases—*Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003); *Foiles v. Midwest Street Rod Ass’n of Omaha, Inc.*, 254 Neb. 552, 556, 578 N.W.2d 418, 421 (1998); *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996); and other cases cited at the beginning of this Comment & Authorities—leave out the possibility of basing the tort on negligence alone. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d

168 (2003) discusses fraudulent misrepresentation and negligent misrepresentation and the difference between the two. *Agri Affiliates*, 265 Neb. at 805-06, 660 N.W.2d at 175.

³⁵*Tolliver v. Visiting Nurse Ass’n of the Midlands*, 278 Neb. 532, 539-40, 771 N.W.2d 908, 914-15 (2009) (footnotes omitted).

³⁶*Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 154-55, 396 N.W.2d 273, 281 (1986) (citations omitted).

not the case in which to decide whether noneconomic damages are available in a tort action for fraud or misrepresentation.³⁷

IX. THE BURDEN OF PROOF

In an action at law, the elements of fraudulent representation must be proved by the greater weight of the evidence. In an action at equity, the elements of fraudulent representation must be proved by clear and convincing evidence.³⁸ This is so because a cause of action for fraudulent *representation* sounds in equity. Contrast that with the fact that the burden of proof in a fraudulent *misrepresentation* case is the greater weight (or preponderance) of the evidence, as this is an action at law.³⁹ “Regrettably,” the Court has noted, “some of our opinions have overlooked the distinction between cases brought at law and those brought in equity and, consequently, have inadvertently stated that fraud in actions at law must be proved by ‘clear and satisfactory’ evidence.”⁴⁰

X. CIRCUMSTANTIAL EVIDENCE

“In a fraud case, direct evidence is not essential, but proof of fraud [may be] drawn from circumstantial evidence . . .”⁴¹

XI. AN AGENT’S LIABILITY

“[A]n agent may be liable for the agent’s fraudulent conduct, such as a misrepresentation of a material fact, during a transaction on behalf of the principal.”⁴²

XII. A SPOUSE’S LIABILITY

“The marital relationship itself is not sufficient to render one spouse liable for the fraudulent actions of the other.”⁴³

³⁷*Tolliver*, 278 Neb. at 542-43, 771 N.W.2d at 916-17.

³⁸This is discussed at NJI2d Civ. 2.12B, Authorities. *See particularly* deNourie & Yost Homes, LLC v. Frost, 289 Neb. 136, 162-63, 854 N.W.2d 298, 319 (2014); Nebraska Nutrients, Inc. v. Shepherd, 261 Neb. 723, 746, 626 N.W.2d 472, 495 (2001).

³⁹*Four R Cattle Co. v. Mullins*, 253 Neb. 133, 136, 570 N.W.2d 813, 816 (1997) (citing cases). *See generally* NJI2d Civ. 2.12B, Authorities.

⁴⁰*Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 263, 369

N.W.2d 96, 99 (1985). *See also* the discussion at NJI2d Civ. 2.12A.

⁴¹*Cullinane v. Beverly Enters.*—Neb., 300 Neb. 210, 232, 912 N.W.2d 774, 793 (2018). Regarding circumstantial evidence generally, *see* NJI2d Civ. 1.31.

⁴²*Edwin Bender and Sons v. Ericson Livestock Com’n Co., Inc.*, 228 Neb. 157, 167, 421 N.W.2d 766, 772 (1988). General rules regarding agents and principals and their liability for their own acts and the acts of the other are found in chapter 6, above.

⁴³*Four R Cattle Co. v. Mullins*,

XIII. STATUTE OF LIMITATIONS

"[T]he limitation period applicable to a tort action for fraud is 4 years."⁴⁴ "[T]he cause of action in such case shall not be deemed to have accrued until the discovery of such fraud[.]"⁴⁵—including "when 'there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.'"⁴⁶

Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired and that the defendant committed some affirmative act of fraudulent concealment which prevented the plaintiff from discovering his or her cause of action.⁴⁷

If the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts. In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show that defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct. Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired.⁴⁸

253 Neb. 133, 137, 570 N.W.2d 813, 816 (1997).

⁴⁴*Henderson v. Forman*, 240 Neb. 939, 944, 486 N.W.2d 182, 186 (1992), citing Neb. Rev. Stat. § 25-207(4) (Reissue [2016]). *Accord Fitzgerald v. Community Redev. Corp.*, 283 Neb. 428, 446, 811 N.W.2d 178, 194 (2012). *See also Chafin v. Wis. Province of the Soc'y of Jesus*, 301 Neb. 94, 97, 917 N.W.2d 821, 824 (2018).

⁴⁵*Fitzgerald, supra*, 283 Neb. at 446, 811 N.W.2d at 193-94. *Accord Chafin*, 301 Neb. at 97, 917 N.W.2d at 824.

⁴⁶*Id.* at 446, 811 N.W.2d at 194. *Accord Chafin*, 301 Neb. at 97, 917 N.W.2d at 824.

⁴⁷*Upah v. Ancona Bros. Co.*, 246 Neb. 585, 594-95, 521 N.W.2d 895, 902 (1994).

⁴⁸*Chafin*, 301 Neb. at 98-99, 917 N.W.2d at 824-25 (footnotes omitted). *See also Upah*, 246 Neb. at 600, 521 N.W.2d 895, 905 ("Generally, for fraudulent concealment to delay running of the statute of limitations, the concealment must be manifested by an affirmative act or misrepresentation.")

"Unless there is a fiduciary relationship between the parties, mere silence is not enough to overcome the applicable period of limitations."⁴⁹ "[I]f a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the party with a duty to disclose constitutes fraudulent concealment."⁵⁰

Additionally,

In order to survive a motion to dismiss, a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through due diligence, the plaintiff failed to discover his or her injury. "This means the who, what, when, where, and how: the first paragraph of any newspaper story."⁵¹

Regarding statutes of limitation generally, *see* NJI2d Civ. 2.02D, Comment & Authorities, for discussion and cross-references.

XIV. RELATED TOPICS

A. A CAUSE OF ACTION IN TORT VERSUS AN AFFIRMATIVE DEFENSE TO CONTRACT

This instruction is a first cousin to NJI2d Civ. 15.21, the instruction on fraudulent representation as an affirmative defense in a contract action.

Although contracts are often the end result of the plaintiff's reliance on the defendant's misrepresentation, the true legal dispute for a misrepresentation cause of action is the tortious actions of the defendant. We have stated that where a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort. In such a case, the tortious act, and not a breach of contract, is the gravamen of the action; the contract is the mere inducement creating the state of things which furnished the occasion for the tort. Thus we have held that fraud and deceit provide a ground for recovery that is independent of contract.⁵²

⁴⁹*Upah*, 246 at 595, 521 N.W.2d at 902. N.W.2d 602, 607–08 (1999).

⁵⁰*Upah*, 246. at 600, 521 N.W.2d at 905. *Accord* Schendt v. Dewey, 246 Neb. 573, 581–82, 520 N.W.2d 541, 548 (1994) (professional malpractice case). *See also* *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 330–32, 597

⁵¹*Chafin*, 301 Neb. at 100, 917 N.W.2d at 825 (footnotes omitted).

⁵²*Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure*, 285 Neb. 48, 56–57, 825 N.W.2d 204, 212–13 (2013) (footnotes omitted); *see also* NJI2d Civ. 15.21.

B. MATERIAL MISREPRESENTATION

This instruction, NJI2d Civ. 9.01, is the instruction for use in the tort of fraudulent misrepresentation. Regarding the tort of material misrepresentation, the affirmative defense instruction at NJI2d Civ. 15.22 may be adapted for use as a plaintiff's instruction in a tort action for material misrepresentation. If that is to be done, see *Dammann v. Litty*.⁵³

C. NEGLIGENT MISREPRESENTATION

The tort of "[n]egligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state."⁵⁴ "[I]n a case of negligent misrepresentation, the defendant need not know the statement is false. That is, the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation."⁵⁵

D. EQUITABLE ESTOPPEL

On a related topic, "[e]quitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations."⁵⁶ "[I]t applie[s] to transactions in which it is found that it would be unconscionable to permit a person to maintain a posi-

⁵³*Dammann v. Litty*, 234 Neb. 664, 672, 452 N.W.2d 522, 527 (1990).

⁵⁴*Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure*, 285 Neb. 48, 56, 825 N.W.2d 204, 212 (2013).

⁵⁵*Lucky 7, L.L.C. v. THT Realty, L.L.C.*, 278 Neb. 997, 1002, 775 N.W.2d 671, 675-76 (2009). See also *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 181, 738 N.W.2d 831, 837 (2007) (regarding alleged misrepresentation in hospital marketing materials there was no evidence of the essential element of reliance); *Brummels v. Tomasek*, 273 Neb. 573, 579-581, 731 N.W.2d 585, 591-92 (2007); *Washington Mut. Bank, FA v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004); *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 805-06, 660 N.W.2d 168, 175 (2003); *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 283-84, 570 N.W.2d 525, 529 (1997) (regarding an allegation that an insurance broker failed to exercise reasonable care or compe-

tence in supplying correct information to client; holding that negligent misrepresentation requires supplying false information); *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 369-73, 518 N.W.2d 910, 920-22 (1994) (adopting the negligent misrepresentation cause of action defined at Restatement (Second) of Torts § 552 (1977), citing cases, and discussing the tort); *Burke v. Harman*, 6 Neb. App. 309, 574 N.W.2d 156, 175-77 (1998) (discussing the measure of damages).

And see *Schmidt v. Omaha Public Power Dist.*, 245 Neb. 776, 783-84, 515 N.W.2d 756, 761-62 (1994) (holding that litigants cannot argue negligent misrepresentation when they did not plead same).

⁵⁶Same quotation: In re Estate of Fuchs, 297 Neb. 667, 679, 900 N.W.2d 896, 905 (2017); *Bryan M. v. Anne B.*, 292 Neb. 725, 734, 874 N.W.2d 824, 833 (2016); *Omaha Police Union Local 101, IUPA, AFL-CIO v. City of Omaha*, 292 Neb. 381, 389, 872 N.W.2d 765, 772 (2015). Accord, e.g., *Olsen v. Olsen*,

tion inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.”⁵⁷ “A claim of equitable estoppel rests in equity.”⁵⁸

The doctrine “is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations where the other elements of estoppel are present.”⁵⁹

The essential elements of equitable estoppel are set out in, among others, the cases cited in this footnote.⁶⁰

Different aspects of estoppel are discussed at six different places herein: See NJI2d Civ. 1.45, (judicial estoppel: False Testimony (Falsus

265 Neb. 299, 307-08, 657 N.W.2d 1, 8 (2003).

⁵⁷*Brick Dev. v. CNBT II*, 301 Neb. 279, 291, 918 N.W.2d 824, 833 (2018).

⁵⁸*Bryan M.*, 292 Neb. at 734, 874 N.W.2d at 822 (2016). *Accord*, e.g., *Olsen*, *supra*.

⁵⁹*Bryan M.*, 292 Neb. at 734, 874 N.W.2d at 833 (2016). *Accord*, e.g., *Olsen*, *supra*.

⁶⁰*Great Northern Insurance Company v. Transit Authority of City of Omaha*, 308 Neb. 916, 926, — N.W.2d —, — (2021) (listing six elements); *Nelssen v. Ritchie*, 304 Neb. 346, 934 N.W.2d 377 (2019) (“The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his or her detriment, the action party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.” *Id.* at 354, 934 N.W.2d at 383. Also listing the elements “as to the party estopped” and “[a]s to the other party.” *Id.* And discussing waiver of the right to claim estoppel. *Id.* at 355, 934 N.W.2d at 384.); *In re Estate of Fuchs*, 297 Neb. at 677–78, 900 N.W.2d at 904–905; *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 389, 872 N.W.2d 765, 771 (2015); *Bauermeister Deaver Ecology Land Use Dev., LLC v. Waste Mgmt. Co. of Neb., Inc.*, 290 Neb. 899, 913, 863 N.W.2d 131, 142 (2015) (discussing waiver and estop-

pel); *Rauscher v. City of Lincoln*, 269 Neb. 267, 275, 691 N.W.2d 844, 851-52 (2005) (“[E]quitable estoppel is not limited to circumstances of fraud.”); *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 326, 664 N.W.2d 461, 469 (2003) (“[E]quitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand[.]”); *Olsen*, *supra*; *Manker v. Manker*, 263 Neb. 944, 959, 644 N.W.2d 522, 535 (2002) (discussing the doctrine at great length); *Simons v. Simons*, 261 Neb. 570, 576, 624 N.W.2d 36, 41 (2001) (finding there is no equitable estoppel in case involving child support payments); *Woodard v. City of Lincoln*, 256 Neb. 61, 67-68, 588 N.W.2d 831, 836 (1999) (discussing the doctrine and applying it to the tort claims act); *Vanice v. Oehm*, 255 Neb. 166, 171, 582 N.W.2d 615, 619 (1998) (distinguishing equitable estoppel and laches); *Bohl v. Buffalo County*, 251 Neb. 492, 498-99, 557 N.W.2d 668, 673 (1997) (holding that the doctrine of equitable estoppel does not “excuse a plaintiff’s failure to comply with the Political Subdivisions Tort Claims Act”).

See also *McGill v. Lion Place Condo. Ass’n*, 291 Neb. 70, 89, 864 N.W.2d 642, 657 (2015) (stating that equitable estoppel requires “knowledge, actual or constructive, of the real facts”); *Fitzgerald v. Community Redev. Corp.*, 283 Neb. 428, 451–52, 811 N.W.2d 178, 197 (2012).

in Uno, Falsus in Omnibus)); NJI2d Civ. 6.26-6.28 ("Partner by Estoppel"); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract). *See generally* the references in the Index, under Equitable Estoppel.

E. EQUITABLE TOLLING

[Equitable tolling] permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time. Unlike the doctrine of equitable estoppel, equitable tolling requires no fault on the part of the defendant. Equitable tolling, however, does require due diligence on the part of the claimant.⁶¹

Tolling the application of a statute of limitations is discussed at NJI2d Civ. 12.04, Comment & Authorities.

NJI2d Civ. 9.02

FRAUDULENT CONCEALMENT—VENDOR/ PURCHASER SETTING

Before the plaintiff can recover against the defendant [on (his, her, its) claim of fraudulent concealment], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant knew (here insert a statement of the fact in question);
2. That this was a material fact;
3. That the defendant (concealed, suppressed) this material fact;
4. That this was not something the plaintiff knew or should have known, had (he, she, it (his, her, its) agent) been reasonably observant;
5. That the defendant (concealed, suppressed) this fact with the intent to (deceive, mislead) the plaintiff as to the true condition of the (property);
6. That the plaintiff was reasonably so (deceived, misled);

⁶¹In re Estate of Fuchs, 297 Neb. 667, 679, 900 N.W.2d 896, 905 (2017).

7. That this (concealment, suppression) was a proximate cause of some damage to the plaintiff; and

8. The nature and extent of that damage.

COMMENT & AUTHORITIES

I. IN GENERAL

This is the Burden of Proof instruction to be used in a tort action for fraudulent concealment in the vendor/purchaser setting and, perhaps, in the mortgagor/mortgagee setting. Regarding the latter, see the discussion below of *Platte Valley Fed. Savings & Loan Ass'n v. Gray*.¹ The instruction is written for the case in which the purchaser (or the mortgagor) is the plaintiff and the vendor (or the mortgagee) is the defendant. This will not always be the case. In *Platte Valley Fed. Savings & Loan* fraudulent concealment was raised in a counterclaim.

Use only those subparagraphs of this instruction that are put in issue by the pleadings and the evidence. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model. For the definition of "material fact," see NJI2d Civ. 9.03, which should be given along with this instruction.

This instruction is a first cousin to NJI2d Civ. 15.22, which is the instruction on material misrepresentation as an affirmative defense in a contract action. Regarding fraudulent misrepresentation, see NJI2d Civ. 9.01.

In the vendor/purchaser setting, the Nebraska Supreme Court specifically refused to adopt a theory of negligent concealment, noting that intent to deceive is an essential element and that to hold otherwise would not be "wise or good public policy."² See below in this Comment & Authorities for the definition of "conceal."

As noted above, this instruction may apply outside of the vendor/purchaser situation. In *Platte Valley Fed. Savings & Loan* the plaintiff/mortgagee (who was not the vendor of the property involved) brought a foreclosure action and the defendant/mortgagor counterclaimed for rescission, alleging fraudulent concealment on the part of the mortgagee "based on [mortgagee's] alleged misrepresentation that the property in question was not located in a flood plain."³ This was an equity action, so no jury instruction was involved. The court quoted the six elements

9.02

¹*Platte Valley Fed. Sav. & Loan Ass'n v. Gray*, 226 Neb. 135, 409 N.W.2d 617 (1987).

²*Nelson v. Cheney*, 224 Neb. 756, 761, 401 N.W.2d 472 (1987).

³*Platte Valley Fed. Savings & Loan*, 226 Neb. at 137, 409 N.W.2d at

from the *Nelson v. Cheney*, discussed in Part III of this Comment & Authorities, below, and applied them to this situation. The court stated: "Although the briefs were written as if this were a false representation case, during oral argument counsel for both parties agreed that this case is really one of fraudulent concealment. Thus, we will analyze it using the factors set forth in *Nelson v. Cheney*."⁴

In this context, note that:

(1) In an equity action for fraud, the burden of proof is not by the greater weight of the evidence, but by clear and convincing evidence.⁵

(2) The elements set forth for the at-law fraudulent concealment action in *Nelson v. Cheney* had to be proved by a preponderance (i.e., the greater weight) of the evidence.⁶

Regarding fraudulent concealment and the statutes of limitations and repose see NJI2d Civ. 12.04, Comment & Authorities, part VIII(K). Regarding statutes of limitations generally, see NJI2d Civ. 2.02D, Comment & Authorities, and cross-references therein.

Regarding the elements of fraudulent concealment used by the surviving spouse to rescind an antenuptial agreement, see *In re Estate of Stephenson*.⁷

II. THE ELEMENTS OF THE CAUSE OF ACTION

[T]o prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; [8] (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff

619.

⁴*Id.* at 137, 409 N.W.2d at 619.

⁵This is discussed at NJI2d Civ. 2.12A.

⁶*Platte Valley Fed. Savings & Loan*, 226 Neb. at 137, 409 N.W.2d at 619.

⁷*Estate of Stephenson*, 243 Neb. at 899, 503 N.W.2d at 547.

⁸As discussed below in the next part of this Comment & Authorities, under the heading Duty, this first element presents a question of law for the judge; it is not a question of fact for the jury.

was damaged by the plaintiff's action or inaction in response to the concealment.⁹

Prior cases had not included the words "or refrain from acting" in the list of the essential elements of this cause of action. That omission had created some confusion, as some lower courts were holding that the defendant must have concealed the material fact intending that the plaintiff would, in response, take affirmative action; others were holding that it was enough if the defendant intended that the plaintiff refrain from acting, that is, if the defendant induced an active decision to refrain from taking further action, that was sufficient to satisfy this element of this tort. In the above quotation the Court italicized those four words in order to clearly delineate which words were being added to the list of essential elements.¹⁰

In the elements in the paragraphs numbered 5, 6, and 7, the language of N.J.I2d Civ. 9.02 is, and has been, broad enough to encompass concealment with the intention that the plaintiff act or refrain from acting.

III. DUTY

The list of elements in the pattern instruction is a complete list of the elements that the jury must find. It is not a complete list of all of the elements of fraudulent concealment; it does not include the first element from the lengthy quotation above in this Comment & Authorities. The element in that quotation that is not in this instruction reads, "a plaintiff must show that . . . the defendant had a duty to disclose a material fact."¹¹ The question of whether the defendant had a duty is a question of law.¹² The case does not get to the jury unless the judge has found that there was a duty. And the jury does not revisit the judge's

⁹*Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 927, 791 N.W.2d 317, 334 (2010) (emphasis in original).

¹⁰The following cases support the elements stated above, but do not contain the words "to refrain from acting." *Brummels v. Tomasek*, 273 Neb. 573, 581, 731 N.W.2d 585, 592 (2007); *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 589, 605 N.W.2d 110, 118 (2000); *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 361, 518 N.W.2d 910, 916 (1994); *Wilson v. Misko*, 244 Neb. 526, 541-42, 508 N.W.2d 238, 249-50 (1993); *Nelson v. Cheney*, 224 Neb. 756, 762, 401 N.W.2d 472, 476-77 (1987); *Christopher v. Evans*, 219 Neb.

51, 54-55, 361 N.W.2d 193, 195-96 (1985); *Linton v. Sheldon*, 98 Neb. 834, 839, 154 N.W. 724, 725-26 (1915). "A party seeking rescission on the ground of fraudulent concealment must also allege and prove the same elements." *Platte Valley Fed. Sav. & Loan Ass'n v. Gray*, 226 Neb. 135, 138, 409 N.W.2d 617, 619 (1987).

¹¹*Streeks v. Diamond Hill Farms*, 258 Neb. 581, 589, 605 N.W.2d 110, 118 (2000).

¹²"In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury." *Streeks*, 258 Neb. at 594, 605 N.W.2d at 121. In *Streeks*, "[t]he jury

decision but must accept it as true. Therefore, this element of the case is not, and has no place, in the jury instructions.¹³

The question of fact for the jury is whether that duty was breached. When the judge finds that a duty existed, he or she must give an instruction that states the duty.¹⁴ This must be done so that, if the jury determines that the defendant concealed a material fact, it can determine whether that concealment breached that duty.¹⁵

“Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.”¹⁶

Duty in the context of fraudulent concealment is the subject of much discussion in *Streeks*.¹⁷ *Streeks* is a vendor/purchaser case. In such a case, the contractual relationship between the vendor and the purchaser creates the duty to disclose.¹⁸

IV. “CONCEALED”

“Conceal means to hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of.”¹⁹

V. INTENT AS AN ELEMENT

Note that intent is an element in this cause of action: Defendant

was properly instructed that a party to a business transaction has a duty to disclose facts basic to the transaction when the other party would reasonably expect a disclosure.” *Id.* at 595, 604 N.W.2d at 121.

¹³For a broad ranging discussion of duty in a negligence, including a discussion of duty as a question of law, see N.J.I.2d Civ. 3.02, Comment & Authorities.

But see Zawaideh v. Nebraska Dept. of Health and Human Servs. Reg. and Licensure, 280 Neb. 997, 792 N.W.2d 484 (2011). Though it is not a vendor/purchaser case, *Zawaideh I* is a fraudulent concealment case and it states that there may be circumstances where “there are disputed facts bearing on the existence of the duty.” In such a case, those facts, “are to be determined by the trier of fact under appropriate instructions.” The factual inquiries that might arise, and might require “appropriate instruc-

tions,” vary according to the circumstances of each case. The required “appropriate instructions” will have to be drafted to fit the particular case at bar.

¹⁴*Id.*

¹⁵*Streeks*, 258 Neb. at 595, 605 N.W.2d at 121.

¹⁶*Griffith v. Drew’s LLC*, 290 Neb. 508, 516, 860 N.W.2d 749, 758 (2015) (discussing when one has a duty to disclose).

¹⁷*Streeks*, 258 Neb. at 591-95, 605 N.W.2d at 118-21.

¹⁸*Id.* at 588-89, 605 N.W.2d at 117-18.

¹⁹In re Estate of Stephenson, 243 Neb. 890, 899, 503 N.W.2d 540, 547 (1993) (multiple quotation marks omitted) (quoting *Christopher v. Evans*, 219 Neb. 51, 55, 361 N.W.2d 193, 196 (1985) (quoting *Black’s Law Dictionary* 261 (5th ed. 1979))).

must have with the intent to deceive the plaintiff This is different from an action for fraudulent misrepresentation where recovery is possible from a defendant who, "although not making a misstatement of a material fact with a 'bad motive,' nevertheless made it so recklessly, without having proper knowledge from a reasonable inquiry, that '[t]he fact that the defendant deceives, itself, establishes scienter even though the defendant may have been unaware of the deception,' "²⁰

NJI2d Civ. 9.03

DEFINITION OF MATERIAL FACT

A material fact is one that is either:

- 1. Likely to change a reasonable person's mind regarding entering into a contract; or**
- 2. For some reason known to the defendant, likely to change the plaintiff's mind regarding entering into a contract.**

COMMENT & AUTHORITIES

See the Comment & Authorities to NJI2d Civ. 9.01, 9.02, and 15.09.

NJI2d Civ. 9.04

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Before the plaintiff can recover against the defendant [on (his, her, its) claim of intentional infliction of emotional distress], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

- 1. That the defendant engaged in the following conduct: (here insert description of conduct);**
- 2. That this conduct was intentional or reckless;**
- 3. That this conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community;**

²⁰Nelson v. Cheney, 224 Neb. 756, 271, 388 N.W.2d 840, 846 (1986)). *See* 761, 401 N.W.2d 472, 476 (1987) (quoting Nielsen v. Adams, 223 Neb. 262, Authorities thereto.

4. That this conduct caused the plaintiff emotional distress so severe that no reasonable person should be expected to endure it;
5. That this conduct was a proximate cause of some damage to the plaintiff; and
6. The nature and extent of that damage.

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. THE ELEMENTS OF THE TORT
- III. THE CLAIM SURVIVES THE DEATH OF THE VICTIM
- IV. CONSENT
- V. THIS TORT AS A WAY AROUND A BAR TO ANOTHER TORT
- VI. BYSTANDER RECOVERY
- VIII. NEGLIGENT INFLICTION OF MENTAL DISTRESS
- VIII. MISCELANEA

I. IN GENERAL

This is the general Burden of Proof instruction to be used in a tort action for intentional infliction of emotional distress. Use only those subparagraphs of this instruction that are put in issue by the pleadings and the evidence. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model.

II. THE ELEMENTS OF THE TORT

The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.¹

The third element of the tort as numbered in the pattern instruc-

9.04

¹Pick v. Fordyce Co-op Credit Ass'n, 225 Neb. 714, 720, 408 N.W.2d 248, 253 (1987). *Accord* Roth v. Wiese, 271 Neb. 750, 761, 716 N.W.2d 419, 431 (2006); Heitzman v. Thompson, 270 Neb. 600, 604-05, 705 N.W.2d 426,

430-31 (2005); Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 656, 624 N.W.2d 604, 620-21 (2001); Iwanski v. Gomes, 259 Neb. 632, 637, 611 N.W.2d 607, 611 (2000); Foreman v. AS Mid-America, Inc., 255 Neb. 323, 346, 586 N.W.2d

tion is that the conduct sued on must have been “outrageous” and “extreme.” For conduct to be outrageous and extreme, “[t]he facts must be such that when heard, an average member of the community would resent the actor and exclaim, ‘Outrageous!’ . . . [M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct.”²

The fourth element of the tort as numbered in the pattern instruction is that the “emotional distress . . . [must be] so severe that no reasonable person could be expected to endure it.”³

“Although outrageous conduct and severe emotional distress are separate elements of the tort of intentional infliction of emotional distress, the two are related in that the extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct.”⁴

The requirement that the emotional distress be “‘outrageous’ and ‘extreme,’” “so severe that no reasonable person could be expected to endure it,” does not apply when a plaintiff claims emotional distress as an element of damages but only when a plaintiff sets forth a separate cause of action for intentional or negligent infliction of emotional distress.⁵

290, 306 (1998); *Brandon v. County of Richardson*, 252 Neb. 839, 845, 566 N.W.2d 776, 781 (1997); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d 907, 910 (1993) (involving a sexual relationship between plaintiff and her counselor); *Nichols v. Busse*, 243 Neb. 811, 817, 503 N.W.2d 173, 179 (1993); *Dale v. Thomas Funeral Home, Inc.*, 237 Neb. 528, 531, 466 N.W.2d 805, 808 (1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 60, 464 N.W.2d 769, 778 (1991); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 360, 363 N.W.2d 373, 377 (1985). *Gall* includes an extensive discussion of the development of Nebraska law on this subject.

²*Heitzman v. Thompson*, 270 Neb. 600, 605, 705 N.W.2d 426, 430 (2005) (paragraph break and citations omitted). *Accord Roth v. Wiese*, 271

Neb. 750, 762-63, 716 N.W.2d 419, 431-32 (2006) (citing and discussing cases); *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 657-63, 624 N.W.2d 604, 621-25 (2001).

³*Heitzman v. Thompson*, 270 Neb. 600, 606, 705 N.W.2d 426, 431 (2005). *Accord Roth v. Wiese*, 271 Neb. 750, 763, 716 N.W.2d 419, 432 (2006) (citing and discussing cases) (“[T]he endurance of the distress is a factual question for the jury . . .”); *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 657-63, 624 N.W.2d 604, 621-25 (2001).

⁴*Roth v. Wiese*, 271 Neb. 750, 763-64, 716 N.W.2d 419, 432-33 (2006).

⁵*Wendeln v. The Beatrice Manor, Inc.*, 271 Neb. 373, 392, 712 N.W.2d 226, 242 (2006).

III. THE CLAIM SURVIVES THE DEATH OF THE VICTIM

A claim for intentional infliction of emotional distress survives the death of the victim.⁶

IV. CONSENT

Consent is ordinarily a bar to recovery for intentional infliction of emotional distress.⁷ Consent and the intentional tort of battery is discussed at *Wulf v. Kunnath*.⁸

V. THIS TORT AS A WAY AROUND A BAR TO ANOTHER TORT

The tort of intentional infliction of emotional distress is not available to one seeking to recover for the burdens of a parent-child relationship that were imposed upon him by a misrepresentation that he was the biological father of the child in question. In addition, this tort is not available to recover for the distress of the threatened destruction of a parent-child relationship by the revelation that there is no biological relationship between the child and the man he knew as his father. Such actions are contrary to public policy.⁹

⁶*Brandon v. County of Richardson*, 252 Neb. 839, 844-45, 566 N.W.2d 776, 780-781 (1997). *See also* *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 656, 624 N.W.2d 604, 621 (2001).

⁷*Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 720-21, 508 N.W.2d 907, 912-13 (1993) (finding consent as matter of law the Court upheld the trial court's order sustaining a demurrer; note that effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer, *see* *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 123, 691 N.W.2d 508, 515 (2005), which states that "[a] rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer."; Lanphier, J., dissenting, found that consent is a fact question and an affirmative defense, *Schieffer*, 244 Neb. at 728, 508 N.W.2d at 916, and would reverse). Stated more broadly: "In tort law, consent ordinarily bars recovery for intentional interferences with person or property." *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d

907, 911 (1993)." *Reavis v. Slominski*, 250 Neb. 711, 719, 551 N.W.2d 528, 537 (1996) (plurality opinion) (discussing consent at length and citing authorities).

⁸*Wulf v. Kunnath*, 285 Neb. 472, 479-80, 827 N.W.2d 248, 254-55 (2013). *See* *NJI2d Civ. 3.02, Comment & Authorities*, for citations to other cases involving the intentional tort of battery.

⁹*Day v. Heller*, 264 Neb. 934, 940, 653 N.W.2d 475, 480 (2002) (holding that fraud and assumpsit causes of action based on these facts are also contrary to public policy).

Additionally, the tort of alienation of affection, sometimes called criminal conversion, is not available as a substitute; it has been abolished in Nebraska. *See* Neb. Rev. Stat. § 25-21,188 (Reissue 1989). *See also* *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 720-21, 508 N.W.2d 907, 912-13 (1993) (holding that neither is an action in loss of consortium available as substitute for an action in alienation of affection or criminal conversion); *Speer v. Dealy*, 242 Neb.

VI. BYSTANDER RECOVERY

There can be bystander recovery for emotional distress suffered by the bystander as a result of the defendant's intentional acts towards another. In *Nichols v. Busse*¹⁰ the "bystander" was the mother of the victim. The Court held that in order for the mother to make a case she did not have to contemporaneously observe the defendant's acts. The key is not the plaintiff's presence in the "zone of danger," but the foreseeability of the harm suffered.¹¹ In an intentional infliction of emotional distress case where a plaintiff may recover because of what was done to a third-party victim, there is no requirement that the plaintiff must contemporaneously observe the injury to the third-party victim.¹²

Bystander recovery for negligent infliction of mental distress is limited to two classes of persons. First, a person who, "based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence" "is a reasonably foreseeable 'bystander' victim."¹³ Second, a person who "was a 'direct victim' of the defendant's negligence because [he or she] was within the zone of danger of the negligence in question,"¹⁴ that is, persons "clearly foreseeable plaintiffs to the negligent actor insofar as they have been placed at unreasonable risk of immediate bodily harm by the actor's negligence."¹⁵

542, 543, 495 N.W.2d 911, 913 (1993) (holding the same with action in intentional interference with contract).

¹⁰*Nichols v. Busse*, 243 Neb. 811, 819, 503 N.W.2d 173, 180 (1993).

¹¹*Id.* at 420, 503 N.W.2d at 181.

¹²*Id.* at 819, 503 N.W.2d at 180.

¹³*Catron v. Lewis*, 271 Neb. 416, 420, 712 N.W.2d 245, 248 (2006).

¹⁴*Id. Accord Kaiser v. Union Pacific RR. Co.*, 303 Neb. 193, 927 N.W.2d 808 (2019) ("Claims for negligent infliction of emotional distress are cognizable under FELA [the Federal Employers' Liability Act]." *Id.* at 200, 927 N.W.2d at 814. "[T]he zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 200, 927 N.W.2d at 814 (brackets in *Kaiser*) (quoting *CONRAIL Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct.

2396 (1994)). This includes persons coming into the zone of danger while responding to the injuries of another. *Kaiser*, 303 Neb at 204, 927 N.W.2d at 816).

¹⁵*Id.* at 421, 712 N.W.2d at 249. *Accord*; *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 245 Neb. 485, 513 N.W.2d 870 (1994); *Andreasen v. Gomes*, 244 Neb. 73, 76-77, 504 N.W.2d 539, 542 (1993) (holding that bystander recovery for negligent infliction of mental distress requires "marital or familial relationship" and "extreme" emotional distress, with "extraordinary" psychological or physical manifestation, and that here bystander recovery was not available because these children were too young to have "life experiences required" to appreciate consequences of a stillbirth); *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). *See also* *Haselhorst v. State*, 240 Neb. 891, 903, 485 N.W.2d 180, 189 (1992).

VII. NEGLIGENT INFLICTION OF MENTAL DISTRESS

On related matters: Regarding negligent infliction of mental distress, *see* the cases footnoted here.¹⁶

VIII. MISCELANEA

Regarding mental distress as a basis for recovery under the tort of bad faith, *see Braesch v. Union Ins. Co.*¹⁷

*Also see Braesch v. Union Ins. Co.*¹⁸ for Nebraska's general rule that damages for mental anguish are not recoverable in a breach of contract action.

Regarding emotional stress and anxiety as an element of damages in a cause of action on tort, *see* NJI2d Civ. 4.00 and 4.01.

NJI2d Civ. 9.10

MALICIOUS PROSECUTION—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of malicious prosecution], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant caused a civil or criminal proceeding to be filed against the plaintiff;
2. That the defendant did not have probable cause for causing the proceeding to be filed;

¹⁶Hamilton v. Nestor, 265 Neb. 757, 659 N.W.2d 321 (2003) (including a thorough discussion of negligent infliction of emotional distress in the courts of Nebraska); Sell v. Mary Lanning Memorial Hosp. Ass'n, 243 Neb. 266, 498 N.W.2d 522 (1993); Schleich v. Archbishop Bergan Mercy Hosp., 241 Neb. 765, 769-71, 491 N.W.2d 307, 309-11 (1992) and the cases cited therein. *See also* Fackler v. Genetzky, 257 Neb. 130, 139-40, 595 N.W.2d 884, 891-92 (1999) (holding that mental suffering is not a legitimate measure of damages for negligent destruction of personal property, including the death of animals).

When the only injury alleged is emotional, the action is one for infliction of mental distress. This is the

conclusion in Hamilton v. Nestor, 265 Neb. 757, 659 N.W.2d 321 (2003), where the Court wrote the following: "[W]hile it is true that the negligence alleged in this case involved the operation of a motor vehicle, the injury which is claimed to have resulted from such negligence is purely an emotional one. This, then, is an action for negligent infliction of emotional distress." *Id.* at 761, 659 N.W.2d at 325.

Emotional distress as an element of damages rather than a separate cause of action is discussed at NJI2d Civ. 4.00 and 4.01.

¹⁷Braesch v. Union Ins. Co., 237 Neb. 44, 59, 464 N.W.2d 769, 778 (1991).

¹⁸*Id.*

3. That the defendant was motivated by malice;
4. That the proceeding was a proximate cause of some damage to the plaintiff; and
5. The nature and extent of that damage.

COMMENT & AUTHORITIES

I. IN GENERAL

This is the Burden of Proof instruction to be used in a tort action for malicious prosecution. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model.

A police informant may be liable for malicious prosecution.¹

II. THE ELEMENTS OF THE TORT

A. THE TORT APPLIES TO THE MALICIOUS PROSECUTION OF A CIVIL OR CRIMINAL ACTION

This instruction is based on the proposition that the gravamen of the malicious prosecution action may be either a civil action or a criminal prosecution. Want of "probable cause for instituting proceedings is an essential . . . element of an action for the malicious prosecution of either a civil or a criminal action."² More directly, though not so recently, the court stated: "[I]t is no longer an open question in this state that an action may be maintained for the malicious prosecution of a civil suit, even where there has been no restraint of the person or seizure of property."³

In the case just quoted, the Court also "assume[ed] but d[id] not decide, that an action for the malicious prosecution of a civil suit may be brought by a person not a party to the suit, but whose property or business was affected by the proceeding."⁴

B. THE ELEMENTS OF THE TORT

In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecu-

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¹Holmes v. Crossroads Joint Venture, 262 Neb. 98, 117, 629 N.W.2d 511, 526-27 (2001).

²Leisy v. Lisco State Bank, 223 Neb. 946, 949, 395 N.W.2d 517 (1986) (quoting Brumbaugh v. Frontier Refining Co., 173 Neb. 375, 385, 113 N.W.2d 497, 503 (1962)).

³Cobbey v. State Journal Co., 77 Neb. 626, 629, 113 N.W. 224, 225 (1907).

⁴Id. For this point and the one just above, see generally W. Page Keeton, et al., Prosser and Keeton On the Law of Torts § 120 (5th ed. 1984); Restatement (Second) of Torts §§ 674-81 (1977).

tion of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards, resulting to plaintiff.⁵

● *Probable cause*: Probable cause in the context of this instruction is defined at N.J.I2d Civ. 9.11, below.

● *Bona fide termination in favor of the present plaintiff*: The plaintiff in a malicious prosecution action must show that the original proceeding—the one that is the subject of the current cause of action—resulted in a “bona fide termination in favor of the present plaintiff.” Although that is an element of the plaintiff’s case, it is not included in the instruction. It is not included because it is not a jury question. The court decides whether there was such a “bona fide termination” of the original proceeding.

The following discussion of the law regarding “bona fide termination” is offered to assist the court in making that decision. The words “bona fide” are used to express the idea that the result of the first action must reflect on the innocence or absence of liability with regard to the defendant in the first action (who is the plaintiff in the malicious prosecution action). In some contexts, “bona fide” has to do with whether or not the first action was dismissed on technical grounds, such as a defect in the petition or complaint, lack of jurisdiction, suppression of evidence, or the flight of the defendant; that is not a “bona fide” termination in his or her favor. In some contexts, it seems to have to do with whether the proceedings were terminated in a way that is inconsistent with the liability or guilt of the plaintiff. In some contexts, “bona fide” conveys the idea that “the termination was not bargained for or obtained by the accused upon a promise of payment or restitution.”⁶

Bona fide means good faith. In this situation, “bona fide” is used

⁵Same quotation: *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 116–17, 629 N.W.2d 511, 526 (2001); *Prokop v. Hoch*, 258 Neb. 1009, 1014, 607 N.W.2d 535, 540 (2000). The same quotation, but with only the male pronoun appears in *Johnson v. First Nat’l Bank & Trust Co.*, 207 Neb. 521, 526, 300 N.W.2d 10, 14 (1980); *Cimino v. Rosen*, 193 Neb. 162, 164, 225 N.W.2d 567, 569 (1975); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 351, 215 N.W.2d 105, 109 (1974). *Accord McKinney v. Okoye*, 287 Neb. 261, 271–72, 842 N.W.2d 581, 592 (2014) (discussing the elements of the tort

and the liability of one who provides false information to a prosecutor; *id.* at 272–79, 842 N.W.2d at 592); *Gordon v. Community First State Bank*, 255 Neb. 637, 647, 587 N.W.2d 343, 351 (1998) (noting that abuse of process and malicious prosecution are separate and distinct torts); *Kersenbrock v. Security State Bank of Osmond*, 120 Neb. 561, 567, 234 N.W. 419, 421 (1931); *Linn v. Garcia*, 531 F.2d 855, 862 (8th Cir.1976).

⁶*Union Oil of Cal. v. Watson*, 468 So.2d 349, 353 n. 3 (Fla. Dist. Ct. App. 1985).

with the idea that if the defendant in the first lawsuit, by some action of his or her own, escaped a determination on the merits, there is an aspect of bad faith in that same person becoming the plaintiff in an action for malicious prosecution.

In *Cimino v. Rosen*,⁷ for example, defendant had entered a complaint against plaintiff for issuing an insufficient fund check, and plaintiff had been arrested. The complaint had been dismissed when plaintiff paid the check. "[T]he plaintiff procured the dismissal of the charge by paying the check and receiving the benefit of the doubt on the question of fraudulent intent. The termination of the prosecution under such circumstances will not sustain an action for malicious prosecution."⁸

On the subject of the termination of the proceedings, *see generally*, e.g., the Restatement (Second) of Torts and Am.Jur.2d, *Malicious Prosecution*.⁹

Malice: "Malice must be shown."¹⁰ Malice in the context of this instruction is defined at NJI2d Civ. 9.12.

See generally Chapter 21 of W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* (5th ed. 1984) and Chapters 29 and 30 of the Restatement (Second) of Torts (1977).

III. DAMAGES

Damages are discussed in the cases footnoted here.¹¹ If there was more than one prosecution and it is possible for the jury to find that some but not all were malicious and without probable cause, then the jury must be instructed to limit any award of damages to those damages resulting from the particular prosecutions where the plaintiff has met the burden of proof.¹²

⁷*Cimino v. Rosen*, 193 Neb. 162, 225 N.W.2d 567 (1975).

⁸*Id.* 165, 225 N.W.2d at 570.

⁹Restatement (Second) of Torts §§ 658-661 and § 674, comment j (1977); 52 Am.Jur.2d, *Malicious Prosecution* §§ 29, et seq. (1970 & Cum. Supp. 1999).

¹⁰*Schmidt v. Richman Gordman, Inc.*, 191 Neb. at 353, 215 N.W.2d at 110. In this context, "malice . . . is any purpose other than that of bringing an offender to justice." *McKinney*,

287 Neb. at 279, 842 N.W.2d at 596 (2014) (further defining malice). *See also Clausen v. Omaha Loan & Bldg. Ass'n*, *supra*; NJI2d Civ. 9.12 and the Comment and Authorities thereto.

¹¹*Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Stoecker v. Nathanson*, 5 Neb. (Unoff.) 435, 98 N.W. 1061 (1904) (involving loss of employment); *Miles v. Walker*, 66 Neb. 728, 92 N.W. 1014 (1902).

¹²*Linn v. Garcia*, 531 F.2d 855, 863 (8th Cir.1976).

IV. THE STATUTE OF LIMITATIONS

The statute of limitations is one year from the date the underlying case is terminated.¹³

V. ABUSE OF PROCESS

Abuse of process and malicious prosecution are separate and distinct torts. Abuse of process is discussed in *Gordon v. Community First State Bank*.¹⁴

VI. FALSE IMPRISONMENT

False imprisonment is discussed in *Holmes v. Crossroads Joint Venture*.¹⁵

NJI2d Civ. 9.11

PROBABLE CAUSE DEFINED

The defendant had probable cause if, based on what (he, she) knew or should have known at the time the (prior proceeding) was filed, a reasonable person would have believed that the plaintiff (here insert an appropriate statement of what the defendant must have believed at the time of the commencement of the proceeding that is the subject of this litigation).

COMMENT & AUTHORITIES

Where the instruction says "(proceeding)," insert the word or words most likely to aid the jury. Possibilities include "proceeding," "suit against the plaintiff," "prosecution," or whatever else fits best given the words used at trial.

To sustain a cause of action for malicious prosecution, whether the original proceeding was a civil or a criminal action, the plaintiff must prove that there was not probable cause for the institution of that original proceeding.¹ "Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty

¹³Prokop v. Hoch, 258 Neb. 1009, 1014, 607 N.W.2d 535, 539 (2000).

¹⁴Gordon v. Community First State Bank, 255 Neb. 637, 646-51, 587 N.W.2d 343, 350-53 (1998).

¹⁵Holmes v. Crossroads Joint Venture, 262 Neb. 98, 118-19, 629

N.W.2d 511, 527-28 (2001) (citing cases).

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¹Leisy v. Lisco State Bank, 223 Neb. at 949, 395 N.W.2d at 519 (quoting Brumbaugh, v. Frontier Refining Co., 173 Neb. 375, 385, 113 N.W.2d 497

. . . . The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced”² See generally the Restatement (Second) of Torts §§ 662-667 and 675 (1977). See also the Comment and Authorities to N.J.I2d Civ. 9.10.

Probable cause for the institution of the original proceeding is not measured “from the perspective of the nonparty prosecuting officials,” but from that “of the defendant in the action.”³

In such an action, “probable cause is a question of law for the court to determine where there is sufficient undisputed evidence to show probable cause. However, it is for the jury to determine what facts are proved. Thus, if there is insufficient undisputed evidence to show probable cause as a matter of law, the question of probable cause is a mixed question of fact and law.”⁴

In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant; this is so even when some of the facts supporting probable cause were disputed.⁵

The “should have known” language refers to the rule that one who fails to make an investigation that a reasonable person would have made is chargeable with knowledge of facts that such inquiry would have disclosed. The knowledge with which the defendant is charged,

503 (1962), which in turn quoted 54 C.J.S., *Malicious Prosecution* § 18, p. 970; *Rose v. Reinhart*, 194 Neb. 478, 481-82, 233 N.W.2d 302, 304 (1975); *Cimino v. Rosen*, 193 Neb. 162, 164, 225 N.W.2d 567, 569 (1975); *Clausen v. Omaha Loan & Bldg. Ass’n*, 131 Neb. 666, 671, 269 N.W. 517, 520 (1936). *Brumbaugh* and *Rose v. Reinhart*, both *supra*, also state that even if a prosecution is malicious, an action for malicious prosecution cannot be sustained if there was sufficient probable cause for the institution of the underlying prosecution. See also N.J.I2d Civ. 9.11 and the Comment and Authorities thereto.

²*Cimino v. Rosen*, 193 Neb. 162, 164, 225 N.W.2d 567, 569-70 (1975) (paragraph break omitted) (quoting *Brumbaugh*, 173 Neb. at 384, 113 N.W.2d at 503; *Leisy v. Lisco State*

Bank, 223 Neb. 946, 395 N.W.2d 517 (1986); *Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975); *Kersenbrock v. Security State Bank of Osmond*, 120 Neb. 561, 234 N.W. 419 (1931). *Brumbaugh*, above, contains a lengthy discussion of probable cause in a malicious prosecution action.

³*McKinney*, 287 Neb. at 277, 842 N.W.2d at 595 (2014) (discussing probable cause at length).

⁴*McKinney*, 287 Neb. at 276-77, 842 N.W.2d at 592 (2014). (footnotes omitted).

⁵*Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Brumbaugh*, above; *Kersenbrock*, above; *Clausen*, above.

however, must be such that it would alter the opinion produced by what was already known.⁶

"As a general rule 'one who, before instituting a criminal prosecution, makes a full, fair, and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon [the attorney's] advice, will not be liable in an action for malicious prosecution.'"⁷

The plaintiff having been once fairly convicted of the crime . . . , it can hardly be claimed, in the absence of special circumstances, that the prosecution was instituted and carried on without probable cause. The presumption of probable cause arising from conviction is not, however, an indisputable presumption; it may be rebutted by evidence which destroys the natural probative force of the finding or verdict upon which the sentence is based.⁸

See also the Comment and Authorities to NJI2d Civ. 9.10.

NJI2d Civ. 9.12

MALICE DEFINED

Malice means (causing a civil proceeding to be filed for a purpose other than securing the proper adjudication of the claim on which it is based, causing a criminal proceeding to be filed primarily for a purpose other than that of bringing an offender to justice).

COMMENT & AUTHORITIES

On the subject of malice, *see generally* the Restatement (Second) of Torts §§ 668–669A and 676 (1977). "To subject a person to liability for malicious prosecution, the proceeding must have been initiated primar-

⁶White v. Chicago, Burlington & Quincy R.R., 417 F.2d 941 (8th Cir. 1969); Bechel v. Pacific Exp. Co., 65 Neb. 826, 91 N.W. 853 (1902). *See also* Walton Trust Co. v. Taylor, 2 F.2d 342 (8th Cir. 1924); W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts* § 119, at 876–82 (5th ed. 1984).

⁷Clausen 131 Neb. at 670–71, 269 N.W. at 520 (quoting Duffy v.

Scheerger, 91 Neb. 511, 515, 136 N.W. 724, 726 (1912) (in turn quoting "the familiar principle")). Advice of an attorney is no protection if the jury finds that the information the defendant provided to the attorney was false. Miles v. Walker, 66 Neb. 728, 731, 92 N.W. 1014, 1016 (1902).

⁸Maynard v. Sigman, 65 Neb. 590, 594, 91 N.W. 576, 578 (1902).

ily for a purpose other than that of bringing an offender to justice.”¹ To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.²

“Malice must be shown, as well as want of probable cause, but it may be deducible from the facts and circumstances surrounding the transaction and is inferable from the absence of probable cause.”³ Malice might be inferred from lack of probable cause; and malice in a criminal prosecution might be inferred from a purpose other than to vindicate the law and punish crime.⁴ “[W]anton and reckless disregard for the rights of others may imply malice.”⁵ If, however, “the accused is in fact guilty of the offense charged” in the original proceeding, then that is a complete defense to the action for malicious prosecution.⁶

9.12

¹Restatement (Second) of Torts § 668 (1977).

²Restatement (Second) of Torts § 676 (1977).

³Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 353, 215 N.W.2d 105, 110 (1974).

⁴Hackler v. Miller, 79 Neb. 209, 114 N.W. 274 (1907). *See also* Miles v.

Walker, 66 Neb. 728, 733, 92 N.W. 1014, 1016 (1902).

⁵Leisy v. Lisco State Bank, 223 Neb. 946, 395 N.W.2d 517 (1986); Johnson v. First Nat. Bank & Trust Co. of Lincoln, 207 Neb. 521, 527, 300 N.W.2d 10, 14 (1980).

⁶Miles, 66 Neb. at 733, 92 N.W. at 1014.

CHAPTER 10

NEGLIGENCE—COMMON CARRIERS

TABLE OF INSTRUCTIONS

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10.01	Definition of Common Carrier
10.02	Common Carrier—Definition of Passenger
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10.08	Duty of Common Carrier to Protect Business Visitors and Licensees from Injury
10.09	Common Carrier—Conduct of Passengers—Carrier's Right to Eject

NJI2d Civ. 10.01

DEFINITION OF COMMON CARRIER

A common carrier is a carrier of persons or freight (who, that) holds (himself, herself, itself) out as available for hire by anyone who wishes to make use of (his, her, its) services.

COMMENTS & AUTHORITIES

I. DEFINITION

"[A]ny person, corporation, or association holding itself out to the public as offering its services to *all persons similarly situated* and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment."

Thompson v. Heineman, 289 Neb. 798, 843, 857 N.W.2d 731, 759 (2015)

(quoting *City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 830, 83 N.W.2d 861, 867 (1957) (emphasis added in *Thompson*) (defining “common carrier” as opposed to “private carrier,” *City of Bayard*, 164 Neb. at 827–32, 83 N.W.2d at 866–68; finding an oil pipeline a common carrier because “it holds itself out as willing to transport oil products for a consideration to all oil producers in the area where it offers transportation services,” *Thompson*, 289 Neb. at 835, 83 N.W.2d at 759).

To be a common carrier the transportation services must be “for hire,” the carrier must be compensated for the service. *City of Bayard*, 164 Neb. at 831, 83 N.W.2d at 868 (citing *e.g.*, *State v. Southern Elkhorn Telephone Co.*, 106 Neb. 342, 183 N.W. 562 (1921); *Citizens’ Bank v. Nantucket Steamboat Co.*, 5 F. Cas. 719, No. 2730 (C.C.D. Mass. 1811) (Story, J.).

One may be a common carrier even if its services are “limited to the transportation of certain classes or kinds of freight, and it may be of service to a limited few who by their peculiar situation or business may have occasion to employ it.” *Thompson*, 289 Neb. at 835, 857 N.W.2d at 759.

With legislative authorization and when the taking is for a public purpose and just compensation is paid, a common carrier can exercise the power of eminent domain. A private carrier cannot. *Thompson*, 289 Neb. at 843–45, 857 N.W.2d at 764. Regarding common carriers and eminent domain, *see* NJI2d Civ. 13.01 (Comment & Authorities).

II. THERE ARE NOT MANY NEBRASKA CASES ON COMMON CARRIER LIABILITY AND MOST OF THE FEW THAT DO EXIST ARE OLDER CASES

A. THERE ARE NOT MANY CASES

There are not many cases on Nebraska’s law on common carriers. In 1969, the first edition of Nebraska’s book of pattern jury instructions stated this: “Research discloses a paucity of Nebraska authority on these questions.” NJI 10.01, Authorities (1969). This is as true today as it was in 1969. It is not clear why this is so.

■ Perhaps cases against common carriers do not get reported because, given the high degree of care applied in some of these cases, they get settled.

■ Perhaps the high degree of care means that those that do not get settled are not appealed as often as other kinds of cases.

■ Perhaps the low number of cases in Nebraska is due to the low rate of use of public transportation in Nebraska and the relatively few local common carriers of passengers. Low ridership would tend to result in a low number of claims of passenger injuries. This is further sup-

ported by the fact that most of the cases in this area are older cases, cases that came in the heyday of common carrier passenger service (and the days before the extensive state and federal legislative regulation of the field that exists today). (In 2006, a student research assistant contacted some of the common carriers serving Nebraska—including, for example, Greyhound—and each one contacted was not surprised there is a low number of reported cases because they are not aware of very many claims of passenger injuries in Nebraska.)

■ Perhaps the low number of cases has to do with the fact that many local common carriers of passengers are units of local government and, therefore, are governed by the Nebraska Political Subdivisions Tort Claims Act (PSTCA). Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 2012). The somewhat more restrictive procedural requirements for filing suits under the PSTCA may result in fewer lawsuits than there would otherwise be. (This Act and these requirements are discussed below in this Comment & Authorities and are the subject of NJI2d Civ. 8.72.)

■ Perhaps cases against national common carriers get tried in federal courts outside of Nebraska, where plaintiffs might believe they will get more favorable treatment. (No such cases have been found, however.)

■ Perhaps part of the reason for so few cases has to do with federal preemption.

The Carmack Amendment to the Interstate Commerce Act: The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706 (2000) governs common-carrier liability for loss of or damage to goods being shipped interstate. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); In this regard, *see also* *Chicago, St. Paul, Minneapolis, & Omaha R. Co. v. Latta*, 226 U.S. 519, (1913) (the lawsuit in this case was filed in state court in Nebraska and removed to federal court); *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915); *Hoskins v. Bekins Van Lines*, 343 F.3d 760 (5th Cir. 2003); *Rini v. United Van Lines, Inc.*, 104 F.3d 502 (1st Cir. 1997); *Moriarity v. Augustin*, No. A-00-684, 2001 WL 1174000, at *3 (Neb. Ct. App. Sep. 25, 2001) (unpublished opinion; Carmack Amendment governs the liability of common carriers for lost or damaged goods being shipped interstate).

The Carmack Amendment provides an express private right of action to shippers against motor carriers for damage occurring during the interstate shipment of property and it generally precludes special damages in an action for breach of contract. *Moriarity v. Augustin*, No. A-00-684, 2001 WL 1174000, at *3 (Neb. Ct. App. Sep. 25, 2001). (Regarding special damages, *see* particularly NJI2d Civ. 4.59.). Regarding lost or damaged goods being shipped interstate “[a] common carrier . . . is an insurer against loss from whatever cause, except an act of

nature, of the public enemy, or of the owner of the goods.” *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 834 434 N.W.2d 17, 20 (1989) (while *Fisher Corp.* does not cite the Carmack Amendment, its statement of Nebraska law is consistent with the law of the Carmack Amendment; see, e.g., *Tayloe v. Kachina Moving & Storage, Inc.*, 16 F.Supp.2d 1123 (D. Ariz. 1998)). When the defendant is “an insurer against loss from whatever cause, except an act of nature, of the public enemy, or of the owner of the goods” there will be fewer trials over lost or damaged property.

Though there are no Nebraska cases that apply federal common law, several other courts have held that the liability of an interstate common carrier for the loss, damage, or delay of goods in transit is determined by federal common law. *First Pennsylvania Bank v. Eastern Airlines Inc.*, 731 F.2d 1113, 1115 (3d Cir.1984). See also *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir.1985); *McCall-Thomas Engineering Co. v. Federal Express Corp.*, 81 F.3d 28, 30 (4th Cir.1996); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *Uniden v. Federal Express Corp.*, 642 F.Supp. 263, 265 (M.D.Pa.1986); *Commodities Recovery Corp. v. Emery Worldwide*, 756 F.Supp. 210, 212 (D. N.J.1991); *St. Paul Fire & Marine Ins. v. Federal Express Corp.*, 145 Misc.2d 801, 548 N.Y.S.2d 422, 424 (1989); *Burlington Air Express Inc. v. Georgia Pacific Corp.*, 211 Ga. App. 113, 438 S.E.2d 97, 98 (1993). See also *Husman v. Purolator Courier*, 832 F.2d 459, 461 (8th Cir.1987) (applying “released value doctrine” under federal common law, which enables the carrier to limit its liability for actual damages resulting from its negligence). But see *Hoskins v. Bekins Van Lines*, 343 F.3d 760 (5th Cir. 2003) (the Carmack Amendment preempts any federal common-law remedies involving a motor carrier).

The Airline Deregulation Act: There is an ongoing debate about the extent to which the Airline Deregulation Act preempts state-law actions against air carriers. Airline Deregulation Act of 1978, 49 U.S.C. § 40101 et. seq. (2000). The Act contains the following preemption provision: “[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . .” 49 U.S.C. § 41713(b)(1). Many courts have held that this preempts various state law actions against air carriers. *Power Standards Lab, Inc. v. Federal Express Corp.*, 26 Cal.Rptr.3d 202 (Cal. Ct. App. 2005) (breach of contract and breach of warranty claims preempted); *Williams v. Midwest Airlines, Inc.*, 321 F.Supp.2d 993 (E.D. Wis. 2004) (state law tort claims related to ejection preempted). At least one court has even found common law negligence claims against an airline to be preempted. *Miezin v. Midwest Express Airlines, Inc.*, 701 N.W.2d 626 (Wis. Ct. App. 2005).

In *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995), the Supreme Court of the United States held that the Act’s preemption provision bars state-imposed regulation of air carriers, but allows judicial enforcement of contract terms set by the parties themselves. Although

the majority did not specifically address whether personal injury claims would be preempted, both concurrences suggested they would not be, *id.* at 242 (O'Connor, J., concurring in part and dissenting in part); *id.* at 235-36 (Stevens, J., concurring in part and dissenting in part), and the majority implicitly agreed, *id.* at 234, n.9. Following *Wolens*, several courts have held that the Act does not include the dispensing of food, flight attendant assistance and the like, so passengers personal injury claims are not preempted. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). For an exhaustive examination of the debate, see Eric E. Murphy, *Federal Preemption of State Law Relating to an Air Carrier's Services*, 71 U. Chi. L. Rev. 1197 (2004).

In *Pioneer Airways, Inc. v. City of Kearney*, 199 Neb. 12, 256 N.W.2d 324 (1977), the Supreme Court of Nebraska held that the Nebraska Public Service Commission lacks jurisdiction over *intrastate* flights of commuter air carriers engaged in *interstate* commerce because the *intrastate* segments are so interwoven with the *interstate* segments that effective control of *interstate* commerce by Congress indirectly controlled the *intrastate* segments. *Id.* It is not clear whether the Court would find state-law negligence claims preempted by the Act.

Once again, most of the cases in this area are older cases. Not only were they filed in the heyday of common carrier passenger service, but also in the days before the extensive state and federal legislative regulation of the field that we see today.

(The Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(a) (2000): While on the subject of preemption and common carriers, federal authority over the transportation of passengers is governed by 49 U.S.C. § 14501(a) (2000). This section limits state law with respect to scheduling, rate changes, and the authority to provide interstate or intrastate charter bus transportation, but it does not restrict the states' regulatory authority with respect to the safety of vehicles or carriage, their authority to impose highway route controls or limitations based on the size or weight of the vehicle, or their authority to regulate carriers with respect to minimum amounts of financial responsibility. Regarding this Act's preemption of state regulation, see *Rowe v. New Hampshire Motor Trans. Ass'n*, 552 U.S. 364 (2008). Regarding carriage of passengers, see generally 14 AM.JUR.2d *Carriage of Persons* §§ 541, 856 (2005).)

■ It may also mean that, as a practical matter, trial and appellate courts are no longer treating this as a special branch of tort law. Though this does not seem to be the case in Nebraska (for reasons discussed throughout this chapter), Prosser and Keeton *On the Law of Torts* states the following:

[T]hose who accept an unusual responsibility are required to act in accordance with it. Common carriers, who enter into an undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to

protect passengers entrusted to their care; and this has been described as “the utmost caution characteristic of very careful prudent [people],” or “the highest degree of vigilance, care, and precaution.” . . .

Although the language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should logically call for any departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.

Prosser and Keeton On the Law of Torts § 34 (W. Keeton gen. ed. 5th ed. 1984). *See also* the Authorities to NJI2d Civ. 10.04, below.

If it is true that the Court is no longer treating this as a special branch of tort law, it may not be so much that cases espousing special common carrier rules are being ignored. Rather, it may be that the court is recognizing that some of the common carrier rules stated and discussed in this chapter are not so special. For example, the common carrier’s general duty regarding passenger safety is one of reasonable care. NJI2d Civ. 10.04. On the other hand, not all Nebraska common-carrier cases are negligence cases. In fact, in Nebraska a common carrier *may have* three different duties, depending on the particular facts involved—“may have,” because of the uncertainty regarding the meaning of the standard expressed in NJI2d Civ. 10.05; *see* NJI2d Civ. 10.05, Special Note. The three duties are:

- (1) A duty to exercise reasonable care. NJI2d Civ. 10.04.
- (2) Strict liability. NJI2d Civ. 10.07.
- (3) A duty “to exercise the utmost skill, diligence, and foresight consistent with the business in which [it is] engaged,” making it “liable for the slightest negligence proximately causing injury to a passenger.” NJI2d Civ. 10.05.

The paragraph introducing these three duties says that “in Nebraska a common carrier *may have* three different duties.” The first two of these duties—reasonable care and strict liability—are typical duties, relatively easy to understand and to apply. The third, on the other hand, is not so easy. It is not clear what it means. How, if at all, is it different from reasonable care, on the one hand, or strict liability, on the other? This is discussed at NJI2d Civ. 10.05, Special Note.

B. MOST OF THE CASES THAT DO EXIST ARE OLDER CASES

In addition to the “paucity of Nebraska authority,” NJI 10.01,

Authorities (1969), most of the Nebraska authority that does exist, most of the cases cited in the Comments and Authorities in this chapter, pretty old cases. Despite their age, they state the current law both in Nebraska and in a majority of American jurisdictions. The few Nebraska cases applying the law of common carrier liability which have been decided within the last twenty-five years still cite the same older cases as the law of Nebraska.

A review of the law from other jurisdictions and secondary sources indicates the law in Nebraska is also representative of the law of common carriers in most jurisdictions. Some other jurisdictions even cite cases from Nebraska as authoritative. In this area of the law, citation of authority that is fifty or even a hundred years old is not uncommon. Frequently courts follow a similar pattern of relying on authority involving old streetcar and railway cases intermixed with modern cases involving mostly buses, taxis, and mass transit trains in those cities that have them. Finding analogous facts seems to be more important than using the most recent case.

Virtually every point of law in the older Nebraska cases has recently been renewed in some other jurisdiction and a few points of law have been renewed in the few recent Nebraska cases. The law of common carrier liability appears to be alive in Nebraska and elsewhere, even if not dynamic. (Signs of life: A California court recently determined that an amusement park ride was a common carrier even though the “passenger” alighted at the same point at which she boarded. *Gomez v. Superior Court*, 113 P.3d 41 (Cal. 2005).)

C. THE FEW APPELLATE COURT CASES IN NEBRASKA SINCE 1980

Since 1980, there have only been five Nebraska appellate court cases involving injury to common-carrier passengers. Four involved common carriers that are units of local government. These are the four Political Subdivisions Tort Claims Act (PSTCA) cases cited just below in this Comment & Authorities.

The fifth is *Sikyta v. Arrow Stage Lines, Inc.*, 238 Neb. 289, 470 N.W.2d 724 (1991), which involves injury to a passenger of a privately owned common carrier. *Sikyta* is discussed more extensively as it applies to individual instructions throughout this chapter. For now, the trial court in *Sikyta* noted the importance of the fact that the defendant is a common carrier. Before deciding the merits, it observed that the trial was disposed of on the basis that the defendant was a common carrier and that the dispositional basis was unchallenged on appeal. *Sikyta v. Arrow Stage Lines, Inc.*, 238 Neb. 289, 296, 470 N.W.2d 724, 729 (1991). The trial court’s statement that this is a common-carrier case (and perhaps the fact that the Supreme Court took note of same) recognizes the importance of the status of common carrier and supports the statement that the law in this chapter has continued vitality as a distinct area of tort law.

These cases reinforce the conclusion that the law expressed in this chapter is still the law regarding common-carrier liability, that this chapter has continued vitality as a distinct area of tort law. (And the first four support the conclusion that this law applies to common carriers sued under the PSTCA).

III. THE POLITICAL SUBDIVISION TORT CLAIMS ACT

Claims against common carriers that are units of local government are governed by the Nebraska Political Subdivisions Tort Claims Act (PSTCA). Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 2012). The PSTCA is discussed at N.JI2d Civ. 8.72. (Suits under the Act are tried to the court, without a jury. *Id.* at § 13-907. This does not explain the “paucity of Nebraska authority,” but it does explain the lack of any such cases on the subject of jury instruction.)

On the subject of the “paucity of Nebraska authority,” since 1980 there have been only four opinions—three published and one unpublished—involving injuries to passengers exiting or boarding municipally operated carriers. Of those, only two reach issues related to liability. *Anderson v. Transit Auth. of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992); *Shramek v. Metro Area Transit*, No. A-92-572, 1994 WL 33296 (Neb. Ct. App. Feb. 8, 1994) (unpublished opinion). The other two focus on whether the plaintiff had given proper notice under the PSTCA. *Malzahn v. Transit Auth. of Omaha*, 244 Neb. 425, 507 N.W.2d 289 (1993); *City of Lincoln v. Willis*, 232 Neb. 533, 533, 441 N.W.2d 846, 847 (1989).

In *Shramek*, a passenger who alighted from city bus was injured when the bus ran over her legs. She sought recovery from the municipally owned carrier, Metro Area Transit. *Shramek*, 1994 WL 33296, at *4. The Court of Appeals explicitly relied on older common-carrier cases to determine the duty MAT owed to its passengers. *Id.*

In *Anderson*, a passenger was injured in a fall off of a city bus. The fall was caused by snow on the steps of the bus. The Court stated that “common carriers such as the defendant are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and are liable for the slightest negligence proximately causing injury.” *Anderson*, 241 Neb. at 774-75, 491 N.W.2d at 314. In the process, the Court cited *Ware v. Yellow Cab, Inc.*, 193 Neb. 159, 225 N.W.2d 565 (1975) and *Pruitt v. Lincoln City Lines*, 147 Neb. 204, 22 N.W.2d 651 (1946).

These two cases reinforce the conclusion that the law expressed in this chapter is still the law regarding common-carrier liability and that it applies to common carriers sued under the PSTCA.

As a final note on PSTCA cases and common carriers, political

subdivision ownership of the carrier does not change the substantive law, but it does change the procedures one must go through before one can file suit. As with many cases involving political subdivisions, the carrier cases often turn on whether the plaintiff has substantially complied with notice requirements of the Political Subdivision Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007). *Malzahn* and *Willis* both involved notice. In *Willis*, for example, the plaintiff was a passenger injured while boarding a city bus; the court did not reach the substantive issue because the plaintiff had not substantially complied with the written notice requirement of the PSTCA. *City of Lincoln v. Willis*, 232 Neb. at 539, 441 N.W.2d at 850.

IV. ACTION IN TORT OR CONTRACT

Though this does not seem to be the case in Nebraska, there are some cases from other jurisdictions that hold that because of the particular relationship between a carrier and its passengers, an injured passenger suing to recover for personal injury caused by the negligence of a common carrier may sue in either tort or contract. *E.g.*, *Heredia v. Safeway Trails, Inc.*, 369 So.2d 418, 420 (Fla. Ct. App. 1979) (*citing* *Doyle v. City of Coral Gables*, 159 Fla. 802, 33 So.2d 41 (1947)); 14 Am.Jur.2d *Carriage of Persons* § 1126 (2005).

There are no Nebraska common-carrier cases directly on point. The nearest case is one that recognizes that a passenger holding a ticket, who is ejected from a train, may maintain an action in either contract or tort. *Chicago, B. & Q.R. Co. v. Spirk*, 51 Neb. 167, 70 N.W. 926, 929 (1897).

As a general proposition, however, in Nebraska the nature of the cause of action is determined by the nature of the grievance. NJI 2d Civ. 15.01, Comment. *Also see generally* 14 AM.JUR.2d *Carriage of Persons* § 1127 (2005). It would seem, then, that a personal injury action against a common carrier would be an action in tort, unless the claim is clearly based in the contract. For an example from another jurisdiction, in *Hunt v. Sun Valley Co., Inc.*, 561 F.2d 744 (9th Cir. 1977), the court of appeals determined that the breach of a carrier's duty to supply safe carriage is limited to claims sounding in tort for negligence rather than in breach of warranty sounding in contract. *See also* *Slentz v. Am. Airlines*, 817 S.W.2d 366 (Tex. 1991) (Texas law does not impose on common carriers an implied warranty of safe carriage and does not recognize a cause of action for breach). There are no Nebraska cases allowing a claim for injury under the contract for carriage.

Whether a suit against a common carrier is one in tort or contract could affect the measure of damages, venue in a case against a state agency, and the length of the statute of limitations. NJI 2d Civ. 15.01, Comment. Regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D, Comment & Authorities, and cross-references therein. It could also affect whether or not there is federal preemption. Regarding the

latter point, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) held that the Airline Deregulation Act preempts state-imposed regulation of air carriers but allows room for court enforcement of contract terms set between the carrier and its customer. In a wide variety of contexts, this may stimulate litigation that is based on the contractual nature of the carrier's relationship with the litigant. (This Act and this case are discussed in part I of this Comment & Authorities, above.)

V. COMMON-LAW AND STATUTORY AUTHORITY FOR THIS INSTRUCTION

"[A]t common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately."

Ferguson Trucking Co. v. Rogers Truck Line, 164 Neb. 85, 96, 81 N.W.2d 915, 922 (1957) (citations omitted). *See also* Prosser and Keeton *On the Law of Torts* § 34 (W. Keeton gen. ed. 5th ed. 1984).

A section of the Nebraska Statutes regulating motor carriers, and in reference to the regulation of intrastate motor carriers, defines "common carrier" as follows:

Common carrier shall mean any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state.

Neb.Rev.Stat. § 75-302(5) (Reissue 2009).

VI. COMMON CARRIERS INCLUDE (AND DO NOT INCLUDE)

Under Nebraska's definition, common carriers include at least railroads, buses, taxicabs, airlines, and elevators:

Railroad: *Sanders v. Chicago, B. & Q. R. Co.*, 138 Neb. 67, 292 N.W. 35 (1940).

Bus: *Giffen v. Lincoln Traction Co.*, 118 Neb. 459, 225 N.W. 232 (1929).

Taxi: *Yellow Cab & Baggage Co. v. Publix Cars*, 126 Neb. 138, 253 N.W. 80 (1934).

Airlines: "Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier." *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333,

338B39, 37 N.W.2d 502, 506 (1949). *See also* Arrow Aviation v. Moore, 266 F.2d 488, 490-91 (8th Cir.1959) (allowing jury to find air transporter was common carrier under Nebraska law). *Cf.* Siemsen v. Sky Harbor Air Serv., Inc., 183 Neb. 504, 161 N.W.2d 867 (1968).

Elevator: Quimby v. Bee Bldg. Co., 87 Neb. 193, 127 N.W. 118 (1910). The syllabus by the court in Grimmel v. Boyd, 94 Neb. 246, 142 N.W. 893 (1913), quotes the syllabus by the court in Quimby v. Bee Bldg. Co., 87 Neb. 193, 127 N.W. 118, 138 Am.St.Rep. 477 (1910) as follows: "One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers." This instruction does not take elevators into account.

In other jurisdictions with similar definitions, courts have interpreted the definition to include ambulances, Bricks v. Metro Ambulance Serv., Inc., 177 Ga.App. 62, 63-64, 338 S.E.2d 438, 440 (Ga. Ct. App. 1985); Nazareth v. Herndon Ambulance Serv., 467 So.2d 1076, 1079-80 (Fla.Dist.Ct.App.1985), and even though the purpose of the ride is entertainment and the ride takes the passenger from one place back to the exact same place, roller coasters, Gomez v. Superior Court, 113 P.3d 41 (Cal. 2005).

If the carrier uses its own transportation system to transport its own product and does not transport product for others, then it is not a common carrier, but a private carrier. Thompson v. Heineman, 289 Neb. 798, 834-35, 857 N.W.2d 731, 758 (2015) (gas pipeline).

VII. WHEN TO USE THIS INSTRUCTION

This instruction is to be used only when there is an issue of fact as to whether one of the parties was a common carrier. Otherwise, the fact that a party was a common carrier will be stated as an admitted, agreed upon, or judicially determined fact. *See* NJI2d Civ. 10.04 and NJI2d Civ. 2.01.

NJI2d Civ. 10.02

COMMON CARRIER—DEFINITION OF PASSENGER

A person is a passenger of a common carrier when (he, she) intends in good faith to be a passenger, the carrier consents to (his, her) being a passenger, and (he, she) has expressly or impliedly placed (himself, herself) in the carrier's charge, within a reasonable time before the departure of the (plane, bus, taxicab, conveyance, et cetera) (he, she) intends to take.

A person is a passenger of a common carrier when (he, she) intends in good faith to be a passenger, the carrier consents to (his,

her) being a passenger, and (he, she) is riding or being transported in the (plane, bus, taxicab, conveyance, et cetera).

A person is a passenger of a common carrier when (he, she) intends in good faith to be a passenger, the carrier consents to (his, her) being a passenger, and, while in route to (his, her) destination, (he, she) has temporarily left the (plane, bus, taxicab, conveyance, et cetera), for a reasonable and usual purpose and with the consent of the carrier.

The consent of the carrier may be express or implied.

A person remains a passenger until (he, she) has left the (plane, bus, taxicab, conveyance, et cetera). If a passenger (gets out of, gets off of, et cetera) the (plane, bus, taxicab, conveyance, et cetera) on the premises of the common carrier, then (he, she) remains a passenger until (he, she) has left or had a reasonable opportunity to leave the carrier's premises.

COMMENT & AUTHORITIES

See NJI2d Civ. 10.01, Comment & Authorities.

This instruction is to be used only when there is an issue of fact as to whether one of the parties was a passenger of a common carrier. Otherwise, if it matters whether the party was a passenger or not, that fact should be stated as an admitted, agreed upon, or judicially determined fact. In that situation, it may be appropriate to add that fact to NJI2d Civ. 10.04. The fact may also be stated in NJI2d Civ. 2.01.

This instruction includes all of the possibilities. Rarely, if ever, will all of them be involved. Use only those parts of this instruction as are called for under the pleadings and the evidence.

The following lengthy quotation is from the Authorities to NJI 10.01 (1969):

The definition of a common carrier passenger encompasses the answers to the following questions:

1. When does a person become a passenger on a common carrier?
2. Under what circumstances does the relationship continue?
3. When does the relationship end?

Research discloses a paucity of Nebraska authority on these questions . . .

In answering Question No. 1, Nebraska agrees that a common carrier passenger is a person who intends in good faith to be a passenger with the directly stated or implied consent of the carrier. In the commissioner's opinion in the case of *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N.W. 1033 (1904), it is stated (101 N.W. at p. 1037):

"The general rule seems to be that where a person intending to take passage upon a train goes into a station within a reasonable time prior to the hour of departure of the train, in a proper manner, and there, either by a purchase of a ticket or in some other manner, indicates to the carrier his intention to take passage, from that time on, while waiting for his train he is entitled to all the rights and privileges of a passenger."

And further (101 N.W. at p. 1039):

"The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge."

The *Hagblad* case was modified on rehearing, 72 Neb. 773, 106 N.W. 1041 (1906), but the law announced . . . was unchanged. Although the case arose under a statute applying only to railroads[,] which [statute] was repealed in 1951, it is the opinion of the committee that it is ruling case law in the state today.

In considering the answer to Question No. 2, it is assumed that no authority need be cited to support the proposition that the carrier-passenger relationship continues while the person is being transported to his [or her] destination by the vehicle of conveyance of the carrier. But if a person temporarily disembarks prior to reaching his [or her] destination, must that person leave the label of "passenger" . . . on the conveyance and reassume it only upon [returning to the conveyance]? The majority rule appears to be that a person who temporarily leaves the carrier's conveyance for reasonable cause, without intention to abandon [the] journey, retains [the] status [of] a passenger. In Nebraska this rule is supported by *Chicago, R.I. & P. Ry. Co. v. Sattler*, 64 Neb. 636, 90 N.W. 649 (1902) and *Jones v. Chicago, R.I. & P. Ry. Co.*, 260 Fed. 929 (8th Cir.1919). See also 14 Am.Jur.2d, Carriers § 773, p. 246, and C.J.S., Carriers § 566(b), p. 1075. [The just cited AM.JUR. and C.J.S. sections are out of date. The current citations are 14 AM.JUR.2d Carriers §§ 745-49 (2005) and 13 C.J.S. Carriers § 506 (2005).]

Question No. 3 has a dual answer, depending upon where

the passenger leaves the carrier's conveyance. If [the passenger terminates the] journey on the carrier's premises, the authorities seem to be in accord with the rule as stated in C.J.S., Carriers § 565, p. 1073, as follows:

"The relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle by its invitation at a place selected by the carrier at the point of destination, but continues until the passenger has had a reasonable opportunity to leave the carrier's station premises, and what is a reasonable time or a reasonable delay within this rule is to be determined from all the circumstances, and includes a reasonable time to see after his baggage and prepare for his departure." [A modern, slightly differently worded version of this quotation appears at 13 C.J.S. § 506 (2005).]

[The *Hagblad* case, *supra*, supports this rule. See also 14 Am.Jur.2d, §§ 777-8, pp. 250-1.]

If, however, the passenger's destination is at a place other than the carrier's premises, the relationship ceases after [the passenger] has left the conveyance in a safe place. *Odom v. Willms*, 177 Neb. 699, 131 N.W.2d 140 (1964); *Saab v. Omaha & Council Bluffs St. Ry. Co.*, 170 Neb. 198, 102 N.W.2d 59 (1960).

It should be noted that in all Nebraska cases cited in which the carrier's premises were concerned, the premises were the terminal facilities which are in common use by several carriers, often owned by a non-carrier, such as an airline terminal building The rule seems to be that such common use, coupled with common ownership or several lease-hold, does not affect the passenger-carrier relationship, and the law above stated is applicable. [14 AM.JUR.2d Carriers 859 (2005).]

More recent support for part of that lengthy quotation is found in a 1994 unpublished opinion from the Nebraska Court of Appeals. This opinion states that the carrier's duty to a disembarking passenger includes allowing the passenger a reasonable period of time to move a safe distance away from the vehicle of carriage, here a bus. *Shramek v. Metro Area Transit*, No. A-92-572, 1994 WL 33296, *4 (Neb. Ct. App. Feb. 8, 1994) (unpublished opinion). *Shramek* cites *Odom v. Willms*, 177 Neb. 699, 131 N.W.2d 140 (1964) and *Saab v. Omaha C.B. St. Ry. Co.*, 170 Neb. 198, 102 N.W.2d 59 (1960) for the proposition that a carrier is under no duty to guard or protect a passenger once the passenger has alighted and states that those cases were correct statements of the law as it applied to the facts of those cases.

The question of the carrier's premises is also the subject of NJI 2d Civ. 10.03 and its Comment & Authorities.

The "paucity of Nebraska authority" referenced in the lengthy

quotation above is discussed at NJI2d Civ. 10.01, Comment & Authorities.

NJI2d Civ. 10.03

COMMON CARRIER—DEFINITION OF CARRIER'S PREMISES

A common carrier's premises include (stations, facilities, property, et cetera) owned, controlled, or used by the carrier for its passengers.

COMMENT & AUTHORITIES

See NJI2d Civ. 10.01 and 10.02, Comment & Authorities.

This instruction is to be used only when there is an issue of fact as to whether the premises involved were a carrier's premises. Otherwise, the fact that the premises were those of a common carrier will be stated as an admitted, agreed upon, or judicially determined fact.

"[A] carrier's premises is defined as stations and facilities owned by others and used by the carrier for its own passengers. 14 Am.Jur.2d, Carriers, § 749, p. 229; 161 Minn. 281, 201 N.W. 410, 41 A.L.R. 1291. See also *Tankersley v. Lincoln Traction Co.*, 104 Neb. 24, 175 N.W. 602, 10 A.L.R. 1510 (1919)." Authorities, NJI 10.01 (1969).

The quotation in the above paragraph from the 1969 version of this pattern jury instruction book contains an erroneous (probably outdated) citation to Am.Jur.2d. The relevant current section is 14 AM.JUR.2d *Carriers* § 963 (2005). This section notes that a common carrier is under a duty to maintain its stations, waiting rooms, and platforms, and the approaches thereto, in a reasonably safe condition. A carrier's failure to do so renders it liable to those who enter upon the premises, in response to an implied invitation, and suffer an injury as a result of such neglect. *Id.* This duty of a carrier with respect to the safety of its station extends to all parts of the premises to which passengers may properly resort, or where it may reasonably be anticipated that they will go, but does not extend to places where it is not reasonably anticipated that passengers will go and as to which passengers should have no proper occasion to go.

Many of the instructions in this chapter contain the word "premises" in parentheses. When it aids clarity, substitute for "premises" either a different word or phrase generally describing the premises, such as "property," "land," "building," "home," et cetera, or a word or phrase specifically describing the particular premises involved.

The Comment & Authorities to NJI2d Civ. 10.02 has a more

complete discussion (quoted from NJI Civ. (1969)) of the carrier's premises.

NJI2d Civ. 10.04

DUTY OF COMMON CARRIER—GENERAL DUTY TO PASSENGERS

[(Name of carrier) is a common carrier.] [Except as stated in Instructions No. ____ and ____, (*the references here are to NJI2d Civ. 10.05 and NJI2d Civ. 10.07*)] (A, a) common carrier is negligent if it fails to use reasonable care to protect its passengers from (injury, damage).

COMMENT

The 1969 edition of this work: defined passenger and gave a partial definition of premises; stated special duties applicable to common carriers; and stated the carrier's duty of reasonable care as it applies to a number of different specific situations. The 1969 edition did not define common carrier. These instructions: define common carrier, passenger, and carrier's premises; state the general duty of reasonable care that the common carrier owes to passengers on its premises; and state what may be two exceptions to that general duty of reasonable care. Rather than repeat the reasonable care instruction as it applies to a variety of situations, these instructions state it once, as applicable to all of the carrier's relationships with passengers on its premises, and with a reference to what may be two exceptions. (Regarding whether there really are two exceptions, or only one, *see* the Special Note to NJI2d Civ. 10.05, below).

The above instruction treats NJI2d Civ. 10.05 as an exception to the general duty of reasonable care. As the Special Note to that instruction explains, that might be incorrect; if that is the case, the reference to NJI2d Civ. 10.05 should be deleted from the above instruction.

Regarding the carriage of freight, *see* NJI2d Civ. 10.01, Comment & Authorities.

AUTHORITIES

Regarding a common carrier's duty to use reasonable care to select a safe place for a person to wait for, meet, board, and alight from its vehicle of conveyance, the following is quoted from the Authorities to NJI 10.03 (1969) (citations from C.J.S. *Carriers* omitted) and is generally supported by 13 C.J.S. *Carriers* § 532 (2005):

In actions by a passenger against a carrier for personal

injury, the court must properly instruct the jury as to the duty or degree of care required by the carrier under the particular circumstances. The care required of a carrier in keeping its premises safe for passengers is commonly held to be only reasonable or ordinary care. In general, it is the duty of the carrier to provide and maintain a convenient and reasonably safe place at which its vehicles can stop for passengers to get on board or alight. Street railway carriers have the duty of seeing that the place selected for passengers to board or alight from street cars is safe for that purpose.

The duty of the street railway company in such cases is merely to select a reasonably safe place for its passengers to board or alight. *See Lieb v. Omaha & C.B. St. Ry. Co.*, 119 Neb. 222, 228 N.W. 364 (1929) [(must stop long enough to permit passenger to alight in safety); *Jacobson v. Omaha & C.B. St. Ry. Co.*, 109 Neb. 356, 191 N.W. 327, 31 A.L.R. 563 (1922) (when reasonable to do so, must discharge passenger at place free from defects or obstructions).] . . .

In *Union Pac. R.R. Co. v. Sue*, 25 Neb. 772, 41 N.W. 801 (1889), . . . it was held that railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers taking passage on their cars would naturally or ordinarily be likely to go. A railroad is bound to provide such safeguards as will protect from injury passengers in the exercise of ordinary care.

. . . If there are dangers in the condition of the street at the place of alighting, known to the company and not known to the passenger, it is its duty to warn the passenger against these dangers. [*Jacobson v. Omaha & C.B. St. Ry. Co.*, 109 Neb. 356, 191 N.W. 327, 31 A.L.R. 563 (1922) (alighting passenger struck by passing motorcycle).]

The *Jacobson* case considers such questions as the duties of street railways and railroads; the duty to protect passengers against independent agencies in the street; the duty to warn alighting passengers of danger of passing vehicles; the exceptions where an alighting passenger is old, infirm, or young, and the employee knows the passenger is unaware of danger; and the passenger becoming a pedestrian.

In *Saab v. Omaha & C.B. St. Ry. Co.*, 170 Neb. 198, 102 N.W.2d 59 (1960), a passenger alighted from a city bus and fell while stepping over a snow ridge. The court indicated a *prima facie* case of negligence is not made in a case of injury to a passenger on leaving a vehicle of transportation where the passenger has been given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his destination and becomes a pedestrian.

Odom v. Willms, 177 Neb. 699, 131 N.W.2d 140 (1964) involved an eight-year-old alighting from a bus in the middle of the block. She ran behind it into the path of an approaching auto. The relation of carrier and passenger ordinarily terminates when the passenger alights from the bus safely on the curb. The court stated that it is the general rule that the discharge of passengers on the shoulder of a road is a discharge at a safe place. Also, the court found there was no negligence in the fact that children were discharged in the middle of the block.

In an unpublished opinion, the Nebraska Court of Appeals has stated that a common carrier has a duty to select a reasonably safe place for the passenger to alight. *Shramek v. Metro Area Transit*, No. A-92-572, 1994 WL 33296, *4 (Neb. Ct. App. Feb. 8, 1994) (unpublished opinion). The carrier owes the passenger the duty to allow her a reasonable period of time to move a safe distance away from the bus after alighting. *Id.* at *5. In addition, 13 C.J.S. *Carriers* § 543 (2005) states a carrier is under a duty to see that the place at which passengers are invited to board or alight from vehicles of the carrier is safe for that purpose.

In addition, the majority of jurisdictions have determined the duty of a carrier to keep in a safe condition all portions of its platforms and the approaches leading thereto to which the public resorts, or is reasonably likely to go upon, has been extended to impose a similar duty upon a carrier using the station or terminal facilities of another for its own passengers. 14 Am.Jur.2d *Carriers* § 968 (2005). This duty cannot be avoided by operating contracts with other corporations. *Tankersley v. Lincoln Traction Co.*, 104 Neb. 24, 175 N.W. 602 (1919).

An air carrier is required only to use reasonable or ordinary care with respect to the safe condition of the carrier's premises and facilities for passengers and those who accompany them. 2A C.J.S. *Aeronautics & Aerospace* § 244 (2005). An airline owes no duty to a passenger who is injured in an area of the airport which is not used, leased, owned, maintained, or controlled by such airline. 8A AM.JUR.2d *Aviation* § 102 (2005).

Under *Leon v. Chicago, B. & Q. R. Co.*, 102 Neb. 537, 167 N.W. 787 (1918), a carrier owes a non-passenger only a duty of reasonable or ordinary care, even when that party is entering or alighting from the conveyance.

See *Union Pacific Ry. v. Evans*, 52 Neb. 50, 71 N.W. 1062 (1897) (while buying ticket, passenger slipped and fell on an incline; railroad's duty is ordinary care).

Regarding a common carrier's duty to use reasonable care to protect its passengers from injuries resulting from the conduct of persons who

are neither its passengers nor its employees, *see* the Authorities to NJI 10.05 (1969).

Regarding a common carrier's duty to use reasonable care to protect its passengers from wrongful acts of other passengers, *see* the Comment to NJI2d Civ. 10.06, below.

NJI2d Civ. 10.05

COMMON CARRIER—DUTY TO PASSENGER BOARDING, TRAVELING IN, OR GETTING OFF OF VEHICLE OF CARRIAGE

[When a passenger is (getting into, boarding), traveling in, or getting (off, out) of its (here state the type of vehicle of carriage involved),] (A, a) common carrier is negligent if it fails to use the utmost skill, diligence, and foresight, consistent with the business in which it is engaged.

SPECIAL NOTE

This instruction states the law as expressed by the Supreme Court of Nebraska. The problem here is that the Court has never stated what this higher standard of care means.

When a court instructs on reasonable care, it defines that concept for the jury. *See* NJI2d Civ. 3.02. This instruction, NJI2d Civ. 10.05, contains a standard of care that says "a common carrier is required to exercise the utmost skill, diligence, and foresight, consistent with the business in which it is engaged." The jury is not told, however, what this standard of care means. The Committee has not included such a definition in these instructions because the Committee does not know what the definition is.

The Committee's research, however, leads to the conclusion that the standard of care expressed in this instruction has one of the following two meanings. It is either:

1. An awkward way of stating that the duty is to exercise reasonable care (as always, under the circumstances); or
2. A genuine third standard of care that lies somewhere between reasonable care and strict liability.

The first of these two possible meanings is suggested by Prosser and Keeton *On the Law of Torts*, which states:

[T]hose who accept an unusual responsibility are required to act in accordance with it. Common carriers, who enter into an

undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care; and this has been described as "the utmost caution characteristic of very careful prudent men," or "the highest degree of vigilance, care, and precaution." . . .

Although the language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should logically call for any departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.

Prosser and Keeton On the Law of Torts § 34, at 209 (W. Keeton gen. ed. 5th ed. 1984). *See also* the Authorities to NJI2d Civ. 10.02, above.

The duty stated in this instruction is "the utmost skill, diligence, and foresight *consistent with the business in which it is engaged*." Prosser and Keeton suggests that this is simply an awkward way of stating that the duty is reasonable care; and, as always, what care is reasonable depends upon the circumstances; and one of the circumstances here is the greater danger to a passenger boarding, traveling in, or alighting from a common carrier. Perhaps Prosser and Keeton's words apply to Nebraska's statements of a common carrier's duty to a passenger boarding, traveling in, or alighting from its vehicle of carriage:

Although the language . . . seems to indicate that a special standard is being applied, . . . none of these cases . . . logically call for any departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.

Prosser and Keeton On the Law of Torts, quoted more extensively *supra*.

If this is what NJI2d Civ. 10.05 means, then it is both an awkward and a confusing way to state the applicable duty. A jury given this instruction and a reasonable care instruction can be expected to conclude that the standard expressed here is different from reasonable care; otherwise, why would the two be stated differently?

If this explanation of NJI2d Civ. 10.05 is the correct one, then there are two possible solutions: One solution is to omit NJI2d Civ. 10.05 from these instructions and rewrite NJI2d Civ. 10.04 to remove its reference to NJI2d Civ. 10.05. There is no need for NJI2d Civ. 10.05 because NJI2d Civ. 10.04 covers the situation. This first solution is the one preferred by the Committee. The second solution is to rewrite NJI2d Civ. 10.05 in some way similar to the following suggestion:

“(The defendant, An airline, A bus company, A taxicab company, A common carrier, et cetera) has the duty to exercise reasonable care for the safety of passengers who are boarding, traveling (in, on), or getting (out, off) of its (plane, bus, taxicab, conveyance, et cetera). This reasonable care must be consistent with the business in which (the defendant, the airline, the bus company, the taxicab company, the common carrier, et cetera) is engaged. (At this point state what it is about the business of the common carrier involved that calls for some more instruction than is had by following the first solution, above.) Therefore, greater caution and vigilance may be required in this particular business than are required in dealing with ordinary affairs of life and business.”

When written in the late 1980's, this suggested solution was based on the Wisconsin pattern jury instruction then found at Wis. JI-Civil 1002 (1986). The Wisconsin instruction was changed in 1989. *See* Wis. JI-Civil 1025 (1989).

If, on the other hand, NJI2d Civ. 10.05 does state a different standard of care, then an additional, definitional instruction should be drafted and given. “[T]he utmost skill, diligence, and foresight consistent with the business in which [the carrier] is engaged” will have to be defined and the definition will have to be worked up as an instruction. The Committee has found one jury instruction, from another jurisdiction, that defines “utmost skill, diligence, and foresight,” and offers this adaptation of that instruction for the reader's consideration:

“The phrase ‘the utmost skill, diligence, and foresight’ means that degree of care that a very careful person would use under similar circumstances.”

Adapted from Missouri Approved Instructions 11.01 (1991). This “very careful person,” of course, contrasts with NJI2d Civ. 3.02's “reasonably careful person.” *See also* 65 C.J.S. *Negligence* §§ 116 to 118 (2005) (addressing great, extraordinary, and utmost care, § 116, slight care, § 117, and ordinary or reasonable care, § 118).

Other jurisdictions have made more of an effort to explain the higher duty of care. Explaining a heightened duty to passengers, the Supreme Court of California explained that carriers have long been subject to a heightened duty of care that stems from the English common law rule that common carriers of goods were absolutely responsible for the loss or damage of goods. *Gomez v. Superior Court*, 113 P.3d 41, 43 (Cal. 2005) (citation omitted). *See also* *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 834 434 N.W.2d 17, 20 (1989) (regarding goods being transported, a freight carrier is essentially an insurer against loss from whatever cause).

Gomez noted that the extension of the heightened duty of care for carriers of goods to the carriers of persons likely followed from *Stokes v.*

Saltonstall, 38 U.S. 181, 191 (1839), in which the Supreme Court decided that while a coach driver does not warrant the safety of the passengers, at all events, the driver shall possess competent skill and transport passengers as far as human care and foresight will go. *Id.* This standard required the driver to act with reasonable skill, and the utmost prudence and caution. *Id.* Therefore, if the accident was occasioned by the least negligence or want of care, skill or prudence on the part of the driver, the driver would be liable. *Id.*

Shades of this standard are evident in one of the earliest incarnations of Nebraska's heightened standard of care for common carriers. In *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803, 58 N.W. 434, 436 (1894), Court stated that common carriers of passengers should be held to the strictest accountability, and be required to exercise the highest degree of care and forethought of which the human mind is capable. Noting this was the rule at both common law and under the statutes, the Court stated the rule was founded on principles of public policy, and enforced by the courts for the protection of the traveling public. *Id.*

While this possibly explains the origin of the rule, it is not clear that it helps define the standard of care. No modern Nebraska case has explained the higher standard of care that applies to common carriers, but the court has reiterated that the higher standard still applies. In *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 774-75, 491 N.W.2d 311, 314 (1992), the Supreme Court of Nebraska acknowledged that common carriers are required to exercise utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and are liable for the slightest negligence proximately causing injury. But the Court also acknowledged that common carriers are not held to strict liability of insurers. *Id.*

The Court also stated that even though a carrier did not have to remove any and all slush that may accumulate on the steps of a bus during operation, the carrier did have a duty to diligently attempt to remove excessive accumulations of slush or snow which may pose an unreasonable risk to the safety of its passengers. *Id.* at 776, 491 N.W.2d at 314-15. The Court further stated that the carrier had a duty to warn passengers of a known dangerous condition. *Id.* at 776, 491 N.W.2d at 315 (citing *Brooks v. Bi-State Dev. Agency*, 787 S.W.2d 713 (Mo. 1990)).

By contrast, the Supreme Court of Texas has defined the higher standard of care to which common carriers transporting passengers are held as that degree of care that would be exercised by a very cautious and prudent person under the same or similar circumstances. *Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210 (Tex. 2003).

COMMENT

I. USE OF THIS INSTRUCTION

Use this instruction without the bracketed clause, when it is true

as a matter of law that the passenger involved was getting into, riding in, or getting off of the vehicle of carriage. Use the instruction with the bracketed clause and in combination with 10.04 when there is a question of fact as to whether the passenger was a member of the class of those passengers getting into, riding in, or getting off of the vehicle of carriage, on the one hand, or in the class that contains all other passengers, on the other hand. For a carrier's duty regarding a place for passengers to wait for, board, and alight from its vehicles, and its duty regarding a place for others to meet its vehicles, see NJI2d Civ. 10.04.

II. ELEVATORS

The syllabus by the court in *Grimmel v. Boyd*, 94 Neb. 246, 142 N.W. 893 (1913), quotes the syllabus by the court in *Quimby v. Bee Building Co.*, 87 Neb. 193, 127 N.W. 118, 138 Am.St.Rep. 477 (1910) as follows: "One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers." In *Grimmel*, the plaintiff was entering an elevator. The Court found that the duty imposed on the defendant was the duty of a common carrier. This instruction does not take elevators into account.

III. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK

Contributory negligence and assumption of the risk do apply in cases where passengers are injured while in transit, entering, or leaving common carriers:

A carrier is entitled to an instruction on contributory negligence if there is some evidence upon which a jury could find that the plaintiff departed from an objective standard of reasonable care. *Washington Metropolitan Area Transit Auth. v. Cross*, 849 A.2d 1021, 1024-25 (D.C. 2004). Omission of such an instruction is not harmless. *Id.* However, evidence that a passenger merely stood on a moving bus does not entitle a carrier to an instruction on contributory negligence. *Greater Richmond Transit Co. v. Massey*, 268 Va. 354, 601 S.E.2d 609 (2004) (citing *Sikyta v. Arrow Stage Lines, Inc.*, 238 Neb. 289 470 N.W.2d 724 (1991)).

In *Sikyta v. Arrow Stage Lines, Inc.*, 238 Neb. 289, 299, 470 N.W.2d 724, 731 (1991), the Supreme Court of Nebraska held that an instruction that a passenger who rose from her seat on a moving bus to use the on-board restroom was negligent merely for standing while the bus was moving was prejudicial to her claim of negligent operation of the bus and constituted reversible error. The Court further determined that evidence that the passenger was injured when she stood on a bus just as the driver suddenly applied the brakes was insufficient to support a submission of assumption of risk to the jury. *Id.* at 305, 470 N.W.2d at 734.

In examining the issue of contributory negligence, the Court noted

a plaintiff is contributorily negligent if (1) the plaintiff fails to protect him- or herself from injury; (2) the plaintiff's conduct concurs and cooperates with the defendant's actionable negligence; and (3) the plaintiff's conduct contributes to the plaintiff's injuries as a proximate cause. *Id.* at 297, 470 N.W.2d at 734 (*citing* *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 850, 438 N.W.2d 485, 490 (1989)). The Court determined the existence of a bathroom on the bus implicitly invited the passenger to use the bathroom which required her to arise from her seat. *Sikyta*, 238 Neb. at 299, 470 N.W.2d at 730-31. As such, the court concluded the passenger's act of standing on a moving bus could not be negligence as a matter of law. *Id.* Any finding of contributory negligence would have to be supported by reference to attendant circumstances. *Id.*

With respect to assumption of risk, the Court noted before the defense of assumption of risk is submissible to a jury, evidence must show the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damages. *Id.* at 302, 470 N.W.2d at 732 (*quoting* *Mandery v. Chronicle Broad. Co.*, 228 Neb. 391, 398, 400, 423 N.W.2d 115, 120 (1998)). Applying this standard, the Court determined there was no evidence that the passenger knew and understood that sudden application of the bus' brakes was imminent. *Sikyta*, 238 Neb. at 304, 470 N.W.2d at 733. As the passenger's general awareness of traffic conditions was insufficient to support an inference that she knew of the imminent danger, the trial court erred in submitting assumption of risk to the jury. *Id.* at 305, 470 N.W.2d at 734.

In reaching its decision, the *Sikyta* Court cited *Coffey v. Omaha & C.B. Street R. Co.*, 79 Neb. 286, 112 N.W. 589 (1907), in which the Court determined that a common carrier that permits the use of its platforms and steps for the carrying of passengers is bound as a common carrier to use proper precaution for the protection of passengers riding on those platforms or steps. The Court also stated a passenger in such a position is not negligent per se for riding there. *Id.* The *Sikyta* Court also relied on *Jacobs v. Milwaukee & Suburban Transport Corp.*, 41 Wis.2d 661, 666, 165 N.W.2d 162, 164 (1969) which indicates this is valid authority as well.

Further demonstrating its validity, *Sikyta* is cited as persuasive authority in *Greater Richmond Transit Co. v. Massey*, 268 Va. 354, 601 S.E.2d 609 (2004), a case in which the Supreme Court of Virginia held that evidence that a passenger on a city bus arose from her seat before the bus came to a complete stop did not entitle the city transit authority to a jury instruction on contributory negligence.

The general idea of passengers acting for their own self-protection is supported by *Wright v. New York City Transit Auth.*, 633 N.Y.S.2d 393 (N.Y. App. Div. 1995). In *Wright*, the court determined that placing a body part outside the window of a moving train was so obviously fraught with danger that it evinces a wanton disregard for the actor's own safety or wellbeing. As such, a passenger who entered and opened

an unlocked a compartment on a subway and stuck his head out the window caused a superseding event as a matter of law that severed any causal connection there may have been between the occurrence of the accident and the alleged negligence in leaving the compartment unlocked.

■ *Boarding a common carrier*: *Grimmel v. Boyd*, 94 Neb. 246, 251–52, 142 N.W. 893, 896 (1913) (plaintiff was entering an elevator; duty imposed on defendant was same as duty imposed upon common carriers; plaintiff's negligence allowed as a defense). *See also* *Omaha St. Ry. Co. v. Martin*, 48 Neb. 65, 66 N.W. 1007 (1896) (contributory negligence allowed as a defense, but plaintiff sued bus company on theory of straight negligence).

■ *Riding in a common carrier*: *Jacobs v. Milwaukee & Suburban Transport Corp.*, 41 Wis.2d 661, 666, 165 N.W.2d 162, 164 (1969) (passenger on bus required to use ordinary care for own safety). *See also* *Swanson v. Minneapolis St. Ry. Co.*, 252 Minn. 484, 487, 90 N.W.2d 514, 516–17 (1958) (no liability on part of bus company when passenger falls in bus for no apparent reason; passengers expected to protect themselves against unexpected lurches due to normal operation of bus).

■ *Leaving a common carrier*: *Chicago, B. & Q.R. v. Winfrey*, 67 Neb. 13, 93 N.W. 526 (1903) (train stopped; passenger prepared to alight; while passenger on steps, train started up, plaintiff stepped off and was injured; contributory negligence applies and presents a question for the jury); *Chicago, R.I. & P. Ry. Co. v. Sattler*, 64 Neb. 636, 639–40, 90 N.W. 649, 650–51 (1902) (passenger leaving train must usually assume all the ordinary risks incident to such action); *Williams v. Fidelity & Cas. Co.*, 442 F.Supp. 455 (E.D.La.1977) (passenger slipped, fell, and died while walking down metal stairs leaving aircraft; contributory negligence allowed as defense for airline). *See also* *Haight v. Omaha & C.B. St. Ry. Co.*, 101 Neb. 841, 166 N.W. 248 (1917) (apparent dicta discussing contributory negligence of one leaving a carrier and the proper instruction of that issue).

For other cases, *see*, under Carriers, West's Key Numbers 323–49.

IV. RES IPSA LOQUITUR

Under Nebraska law, there is no presumption of negligence when a passenger claims injury as the result of a collision involving a common carrier. *Ware v. Yellow Cab, Inc.*, 193 Neb. 159, 225 N.W.2d 565 (1975). This is consistent with the majority view that the mere fact that an injury has occurred will not make out a *prima facie* case or create a presumption of negligence under the doctrine of *res ipsa loquitur*. 13 C.J.S. *Carriers* § 580 (2005).

AUTHORITIES

Common carriers of passengers for hire are required to exercise the utmost skill, diligence, and foresight for the protec-

tion of their passengers, consistent with the business in which they are engaged. They are liable for the slightest negligence but they are not held to the strict liability of insurers.

Ware v. Yellow Cab, Inc., 193 Neb. 159, 161, 225 N.W.2d 565, 567 (1975) (citations omitted). *See also, e.g.*, the cases cited therein and Anderson v. Transit Auth. of City of Omaha, 241 Neb. 771, 774–76, 491 N.W.2d 311, 313–14 (1992) (carrier not required to remove any and all slush or snow accumulating on steps of bus, but does have “duty to diligently attempt to remove excessive accumulations of slush or snow which may pose an unreasonable risk to the safety of its passengers”); Siciunas v. Checker Cab Co., 191 Neb. 766, 769, 217 N.W.2d 824, 826 (1974); Pruitt v. Lincoln City Lines, 147 Neb. 204, 206–07, 22 N.W.2d 651, 653 (1946); Whittaker v. Omaha & C.B. St. Ry. Co., 137 Neb. 800, 804, 291 N.W. 275, 278–79 (1940).

The above instruction is not entirely supported by a literal reading of the above quotation. Were the instruction a literal recitation of the above quotation, there would be an inconsistency between this instruction and the previous instruction, NJI2d Civ. 10.04: This instruction, when combined with the definition of passenger from NJI2d Civ. 10.02, would apply a higher standard of care regarding the entire carrier-passenger relationship; NJI2d Civ. 10.04 would apply a lower standard of care to part of that same relationship. When the cases from all of the jurisdictions imposing this higher standard are studied, it is apparent that where this higher duty does apply, it applies only to passengers who are getting on, getting off of, or actually riding on the vehicle of transportation. *See, e.g.*, Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1537 (11th Cir.1985); Federal Insurance Co. v. Bonilla Colon, 392 F.2d 662, 665 (1st Cir.1968); Vincenty v. Eastern Air Lines, 528 F.Supp. 171, 174–75 (D.P.R.1981). In each of these cases the court said that this higher degree of care applies only to passengers who are traveling in, boarding, or alighting from the vehicle of carriage, and not to those persons on the carrier’s premises generally. In the *Federal Insurance Co.* and *Vincenty* cases, the court went on to say that “the overwhelming majority rule is that [the higher degree of care] does not apply to carriers premises generally.”

That the higher duty stated in this instruction, NJI2d Civ. 10.05, runs only to the passenger who is boarding, alighting, or traveling as a passenger in the vehicle of carriage and that the duty stated in NJI2d Civ. 10.04 runs to all other passengers (as defined in NJI2d Civ. 10.02) is also supported by a comparison of the cases cited in support of this instruction with those cited in support of NJI2d Civ. 10.04:

■ Regarding 10.05: Ware v. Yellow Cab, Inc. 193 Neb. 159, 225 N.W.2d 565 (1975) and Siciunas v. Checker Cab, Co., 191 Neb. 766, 217 N.W.2d 824 (1974) each applied the “highest standard” where a passenger was injured while riding in a taxi. In Jackson v. Omaha & C.B. St. Ry. Co., 101 Neb. 456, 163 N.W. 838 (1917) the “highest standard” was applied where a passenger was injured when a street car pulled

away while the passenger was boarding. *Kruger v. Omaha & C.B. St. Ry. Co.*, 80 Neb. 490, 114 N.W. 571 (1908) and *Omaha & R.V.R. Co. v. Chollette*, 33 Neb. 143, 49 N.W. 1114 (1891) each applied this duty where a passenger was injured while leaving the vehicle of transportation. *Chicago, B. & Q.R. Co. v. Troyer*, 70 Neb. 287, 97 N.W. 308, *aff'd*, 70 Neb. 293, 103 N.W. 680 (1905) applied this greater duty where a passenger was injured while transferring from one train to another.

■ Regarding 10.04: See the cases cited and explained in the Authorities to that instruction.

As in Nebraska, under Iowa law, a common carrier does owe the duty to protect passengers as far as human care and foresight will go and is liable for slight negligence, but is not an insurer of a passenger's safety. *Burton v. Des Moines Metropolitan Transit Auth.*, 530 N.W.2d 696, 699 (Iowa 1995). In *Burton*, a child was hit by another vehicle as he attempted to cross the street after leaving a city bus. *Id.* at 697. The Supreme Court of Iowa noted that the general law among American jurisdictions holds that a carrier has an affirmative duty to discharge a passenger in a reasonably safe place. *Id.* However, since the rationale for the rule was that after the passenger had alighted the passenger was in a better position to guard against the dangers of moving vehicles, the court determined a carrier is not liable for injuries suffered after the passenger safely alighted from the bus. *Id.*

That a carrier does not generally owe a duty to the passenger once that passenger has safely disembarked is also supported by *Angulo v. Szklover*, 746 So.2d 562 (Fla. Ct. App. 1999). In *Angulo*, the court stated bus passengers have a duty to exercise due care when alighting from a bus and attempting to cross a road. *Angulo*, 746 So.2d at 563. However, since the bus company had undertaken a duty to provide curb-to-curb transportation services, to discharge the passengers on the same side of the street of their residence, and to assist passengers to the curbside, the breach of those duties supported the jury finding the carrier negligent even though the passenger was contributorily negligent in alighting from the bus and attempting to cross the road. *Id.* at 564. See also *Shelley v. United Airlines, Inc.*, 925 P.2d 991, 992 (Wash. Ct. App. 1996) (common carrier's duty of care ends when the passenger disembarks, unless the carrier's employees have actual knowledge of the passenger's incapacity and particular risk of harm resulting from that incapacity); 14 AM.JUR.2d *Carriers* § 916 (2005) (special care for passenger with known disability).

The unpublished opinion in *Shramek v. Metro Area Transit*, No. A-92-572, 1994 WL 33296 (Neb. Ct. App. Feb. 8, 1994) may also be relevant to this issue. The Nebraska Court of Appeals stated that a common carrier has a duty to select a reasonably safe place for the passenger to alight, *id.* at *4, and it owes the passenger a duty to allow her a reasonable period of time to move a safe distance away from the bus after alighting, *id.* at *5. Obviously, there is a close relationship be-

tween the duty owed to a passenger leaving the conveyance and the termination of the passenger-carrier relationship. The line between one who is disembarking from a carrier and one who is waiting in a terminal is not always perfectly clear. In *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1537 (11th Cir.1985), for example, the court noted that if a common carrier unloads passengers into a terminal that is dangerous and, just after departing from the vehicle of carriage, the passenger is injured, some courts would still apply the "higher standard." Where this line is drawn in Nebraska is not clear; in such a case, further instruction on this point may be required.

NJI2d Civ. 10.06

COMMON CARRIER—DUTY TO PROTECT PASSENGERS FROM OTHER PASSENGERS

Recommend no separate instruction.

COMMENT & AUTHORITIES

I. THE DUTY TO PROTECT PASSENGERS FROM OTHER PASSENGERS

The 1969 edition of this work contained an instruction for this situation that told the jury that if a common carrier knew or should have known of wrongful acts on the part of one or more of its passengers, it had "the duty . . . to exercise the highest degree of care, consistent with the practical operation of its business as a common carrier, to protect its [other] passengers from [those] wrongful acts." The authorities cited for that instruction do not support the instruction. The Committee concluded that the 1969 instruction misstated the carrier's duty.

Although there are no Nebraska cases on point, it seems that with regard to passengers being injured by other passengers, the carrier's duty is reasonable care. A sampling of support for this rule follows:

■ Encyclopedia: "A carrier has a duty to take reasonable precautions to protect a passenger from reasonably foreseeable injury by a third person." 13 C.J.S., Carriers § 515(a) (1990).

■ Iowa: In some situations Iowa law requires that a common carrier exercise more than reasonable care for the protection of its passengers. A taxicab company has the duty "to exercise a high degree of care for the safety of its passengers. Its duty stops just short of insuring their safety." *Tiemeyer v. McIntosh*, 176 N.W.2d 819, 822 (Iowa 1970). Regarding passengers injured by other passengers, however, the carrier's duty is one of reasonable care: "A carrier is required to take reasonably appropriate steps to minimize likely harm from fellow

passengers.” *Ravreby v. United Airlines, Inc.*, 293 N.W.2d 260, 266 (Iowa 1980).

■ Wisconsin: In *Boynton Cab Co. v. Department of Industry, Labor and Human Relations*, 96 Wis.2d 396, 291 N.W.2d 850 (1980) the court said that, as a common carrier, a taxicab company owed its passengers the duty to exercise the highest degree of care reasonably to be expected from human vigilance and foresight. In *Finken by Gutknecht v. Milwaukee Cty.*, 120 Wis.2d 69, 77, 353 N.W.2d 827, 831 (1984), however, the court stated: “[The carrier’s] duty, briefly, is to use reasonable care to prevent an act by a passenger if that carrier can reasonably anticipate that the passenger might injure another by that act.”

■ See also the cases C.J.S. cites in support of its statement.

The common carrier’s duty to protect passengers from other passengers is covered by NJI2d Civ. 10.04.

II. THE DUTY TO PROTECT PASSENGERS FROM INTRUDERS OR OTHER THIRD PARTIES

There are some older cases addressing the duty to protect passengers from intruders or other third parties. *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 105 N.W. 635 (1905); *Sanders v. Chicago, B. & Q. R. Co.*, 138 Neb. 67, 292 N.W. 35 (1940).

Generally, these cases seem to indicate a duty to protect the passenger from acts that could have reasonably been foreseen and guarded against. In *Bevard*, the Court stated a carrier is not liable for injuries received by a person traveling on one of its cars unless the negligence of its servants, either alone, or in concurrence with the negligence of other persons, was the proximate cause of the injury. *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 105 N.W. 635 (1905).

However, as may be indicated by the text in this instruction, the language in *Bevard* supports the idea that a carrier owes a passenger a duty to exercise extraordinary care and the utmost skill, diligence, and human foresight, and is liable for the slightest negligence even with respect to actions by third parties. *Id.* at 805, 105 N.W.2d at 636. The plaintiff in *Bevard* claimed the higher standard of care applied to her injuries caused by fireworks being placed on the track by unknown third parties. *Id.* In response, the Court acknowledged the principles asserted by the plaintiff were “undoubtedly the law of the state.” *Id.* The Court then determined the carrier was not liable because even such a high standard of care required an element of negligence on the part of the carrier—and the Court found no such negligence under the circumstances. *Id.*

As a general rule, the carrier’s duty appears to be the same whether another passenger or a third party causes the passenger’s injury and

whether the third party's act is negligent or intentional. 13 C.J.S. *Carriers* § 515 (2005). The carrier's liability must rest on the carrier's own negligence, not upon vicarious liability for the acts of the third person. *Id.* *Accord* *Bevard v. Lincoln Traction Co.*, 74 Neb. 802, 105 N.W. 635, 636 (1905). The duty to protect passengers from the foreseeable acts of third parties arises from the special relationship between a common carrier and its passengers. *Id.*; *See generally*, *Smith ex rel. Ross v. Lagow Const. & Developing Co.*, 642 N.W.2d 187 (S.D. 2002) citing *Restatement (Second) of Torts* § 314A (1965). Section 314A states,

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

Despite the duty of the highest degree of care to passengers, as a general rule, a common carrier is not required to take measures to protect its passengers from the unforeseen intentional misconduct or criminal acts of third persons. *Tortes v. King Cty.*, 84 P.3d 252 (Wash. Ct. App. 2003).

Common carriers owe a duty to take affirmative action to protect their passengers from an assault by a third party if certain conditions are present. *Todd v. Mass Transit Admin.*, 373 Md. 149, 816 A.2d 930 (Md. 2003). First, the existence of the duty depends on whether the carrier, in the exercise of proper care, knew or should have known that an assault was imminent. *Id.* Second, even if the carrier had the requisite knowledge, its duty to take protective action does not arise unless that duty arose well enough in advance of the assault so that it could have prevented assault with the force in its command. *Id.*

In *Miller v. City of New York*, 717 N.Y.S.2d 198 (Sup. Ct. App. Div. 2000), the court determined the city transit authority was not liable in negligence action by subway passenger who was stabbed by fellow passenger, where motorman upon learning of altercation promptly alerted police, who responded to the scene, and there was no evidence authority violated its own regulations or common standards of behavior.

A Texas court recently determined a bus sufficiently fit the definition of premises to be subject to that state's factors for determining foreseeability of criminal activity for purposes of a premises liability claim. *Gibbs v. ShuttleKing, Inc.*, 162 S.W.2d 603 (Tex. Ct. App. 2005).

An air carrier is also under a duty to prevent harm to its business invitees from its other passengers. 2A C.J.S. *Aeronautics & Aerospace* § 243 (2005). At least one court has held this duty requires the air car-

rier to protect passengers from the risk of terrorists. *Stanford v. Kuwait Airways Corp.*, 89 F.3d 117 (2d Cir. 1996). *See also* *In re September 11 Litigation*, 280 F.Supp.2d 279 (S.D.N.Y. 2003) (Under New York law, duty of airlines to secure aircraft against terrorists extended to ground victims of the crashes of hijacked aircraft; crashes were foreseeable hazard even though terrorists had not before deliberately flown aircraft into buildings).

III. CAVEAT

The above indicates that no special instruction is needed when a common carrier knew or should have known of wrongful acts by non-passengers and that this situation is covered by the reasonable care instruction found at NJ12d Civ. 10.04. The complicating case is *Bevard*. That case states:

The plaintiff bases her right to recover upon the general principle that a street railway company is a common carrier of passengers, and therefore *bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence*. It is argued that the defendant, though knowing the likelihood of dynamite and explosives being placed upon the track, did nothing to protect the passengers; that it did not patrol the track, nor provide a sweep, nor fasten down the trap in the floor of the car; and that any one of these precautions would have prevented the injury to the plaintiff. *The principles thus asserted as governing the liability of street railway companies to their passengers are undoubtedly the law in this state, and this is conceded by the defendant.* If the defendant had, in the exercise of the greatest care, reasonable grounds to believe that violent explosions would occur such as were liable to frighten its passengers to such a degree that under the influence of a temporary loss of self-control thus caused the operation of the car might cause them injury, *it would be negligence* upon the part of the company to omit to take all reasonable precautions to protect its passengers against the probability of such injury.

Bevard v. Lincoln Traction Co., 74 Neb. 802, 105 N.W. 635, 636 (1905) (emphasis added). *Bevard* states that in a case where a passenger alleges that the common carrier was negligent in anticipating that an act by a non-passenger might injure passengers, then the standard is this: the carrier is "bound to exercise extraordinary care, and the utmost skill, diligence and human foresight, and is liable for the slightest negligence." *Id.* If the carrier fails to fulfill this duty, then it is negligent if it does not "take all reasonable precautions to protect its passengers." *Id.* *Bevard* seems to state two standards of care, one governing what the carrier should know—a negligence standard—and the other governing what it must do when the first standard is met—a standard of "extraordinary care and the utmost skill, diligence, and human foresight, [making the carrier] liable for the slightest negligence." The

first duty tracks NJI2d Civ. 10.05 and the second tracks NJI2d Civ. 10.04. This may mean that the reasonable care instruction in NJI2d Civ. 10.04 is not enough.

NJI2d Civ. 10.07

COMMON CARRIER—DUTY TO PROTECT PASSENGERS FROM ASSAULT OR INTENTIONAL HARM BY EMPLOYEES

A common carrier is liable for any injury caused to its passengers by (an assault upon, intentional harm to) them by any of its employees (then on duty).

COMMENT & AUTHORITIES

This instruction is taken from NJI 10.07 (1969). The Authorities thereto read:

A common carrier of passengers is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons. *St. Joseph & G.I.R. Co. v. Hedge*, 44 Neb. 448, 62 N.W. 887 (1895); C.J.S., *Carriers* § 691, p. 1280; 10 Am.Jur. 263-265, *Carriers*, §§ 1447-48; and 53 A.L.R.2d 720.

Regarding the quotation just above, the modern encyclopedia citations are 14 AM.JUR.2d *Carriers* 1222 (2005) and generally 13 C.J.S. *Carriers* 571 (2005). The *St. Joseph & G.I.R. Co.* case cited in the above indented quotation seems, still, to be good law, but the most recent citation of this case for this point was in 1929. *Griffen v. Lincoln Traction Co.*, 118 Neb. 459, 463-64, 225 N.W.2d 232, 234 (1929).

An air carrier is liable for an injury to a passenger caused by the negligence or wrongful conduct of its employee occurring when the employee is action within the scope of her employment. 2A C.J.S. *Aeronautics & Aerospace* 242 (2005).

NJI2d Civ. 10.08

DUTY OF COMMON CARRIER TO PROTECT BUSINESS VISITORS AND LICENSEES FROM INJURY

Recommend no separate instruction.

COMMENT & AUTHORITIES

The title that appears above was the title to NJI 10.08 (1969). The

actual instruction, however, related only to the duty a proprietor of a business owes to an invitee. The instruction did not mention licensees or common carriers. And the one authority cited for the instruction did not deal with common carriers.

It appears that the drafters of the title to NJI2 10.08 (1969) meant to say “invitees” rather than “licensees.” In any event, NJI2d Civ. 10.08 is unnecessary. The instructions in Chapter 8, and particularly NJI2d Civ. 8.21 and NJI2d Civ. 8.22, read in conjunction with the Special Note to NJI2d Civ. 8.11, handle the problem of the non-passenger business visitor and the licensee on the premises of a common carrier. And other instructions in this chapter, Chapter 10, handle the problem of the business visitor who is a passenger.

NJI2d Civ. 10.09

COMMON CARRIER—CONDUCT OF PASSENGERS—CARRIER’S RIGHT TO EJECT

A. ISSUES

In defense to the plaintiff’s claim [here insert a statement of plaintiff’s claim, a statement such as: “for wrongful ejection”], the defendant claims (here insert a statement of the claimed defense, a statement such as: “that it had a right to eject the plaintiff from its (here identify type carrier, *e.g.*, taxicab, bus, airplane, et cetera) and that, in doing so, it did not use any more force than was reasonably required”).

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. STATEMENT OF LEGAL RULES

A person riding in (type of carrier) must abide by the usual standards of conduct of a reasonable passenger. (He, She) must also comply with such reasonable rules and regulations of the (type of company) as are designed to provide for the safety and comfort of passengers and the proper management of the (type of company).

(A, An) (type of company) does not have to give its passengers actual notice of its rules and regulations. Passengers are subject to all reasonable rules and regulations with which they are or should be familiar. It is enough if the public was given general notice of the rules and regulations for such length of time as to make it reasonably certain that all passengers exercising due diligence would have become aware of them.

If a passenger does not conduct (himself, herself) in the manner described above, then the employees of the (type of carrier) may request that (he, she) leave the (type of carrier). If (he, she) refuses to leave, they may remove (him, her), and they may use reasonable force to do so. What force is reasonable depends on the circumstances, including the place and any danger to other passengers.

C. BURDEN OF PROOF

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

Alleged Violation of Rules and Regulations

1. That the defendant published the rules and regulations in question in such a way and for such a length of time as to make it reasonably certain that passengers exercising due diligence would be aware of them;
2. That these rules and regulations (are, were) reasonable;
3. That the plaintiff (violated, did not comply with, et cetera) these rules and regulations;
4. That the defendant's employees requested that the plaintiff leave the (type of carrier), and the plaintiff refused to do so;
5. That any force used by employees of the (type of company), to get the plaintiff (off, out) of the (type of carrier) was reasonable.

Alleged Violation of Usual Standards of Conduct

1. That the plaintiff did not abide by the usual standards of conduct of a reasonable passenger;
2. That the defendant's employees requested that the plaintiff leave the (type of carrier), and the plaintiff refused to do so;
3. That any force used by employees of the (type of company), to get the plaintiff (off, out) of the (type of carrier) was reasonable.

D. EFFECT OF FINDINGS

If the defendant *has* met this burden of proof, then your verdict [on (here identify appropriate claim)] must be for the defendant.

If the defendant *has not* met this burden of proof, then you must disregard this particular defense in reaching your decision in this case.

COMMENT & AUTHORITIES

This instruction has been modified from the 1969 version of NJI and written as an affirmative defense. It is the Committee's opinion that this is an affirmative defense: it imposes a burden on the defendant; and it may not be raised under a general denial. If that is incorrect, then the instruction will have to be rewritten. For a model, see NJI2d Civ. 11.46, below, which is drafted alternatively as an affirmative defense instruction and otherwise.

Use only those parts of this instruction as are appropriate to the pleadings and the evidence in the case.

"It is . . . well settled that, as a rule, a passenger who has been wrongfully ejected from a common carrier's conveyance may bring an action ex contractu against the carrier for wrongful ejection." 14 Am.Jur.2d *Carriers* § 1129 (1964). "It has been held that in an action against a carrier for damages for wrongful ejection, the carrier may assert by way of defense proper grounds for the ejection, even though at the time the passenger was ejected on grounds which were untenable." *Id.* at § 1143. Additionally, the 1957 version of *Am.Jur. Pleading & Practice Forms* treated this as an affirmative defense. 5 Am.Jur.Pl. & Prac. Forms (Rev.), Forms §§ 76-79, at 622-24 (1957). Today, see 5 Am.Jur.Pl. & Prac. Forms (Rev.) §§ 89-92, at 503-05 (1998).

Where a streetcar passenger refuses to refrain from annoying disturbances, the conductor may remove him from the car and may use such reasonable force as is necessary for that purpose. *Sorensen v. Lincoln Traction Co.*, 94 Neb. 91, 142 N.W. 703 (1913).

A passenger upon a common carrier may not remain on the carrier without paying the established fare and the employee of the carrier in charge of the vehicle may request the nonpaying passenger to leave and insist that he do so, even to the point of using such force as may be reasonably necessary to accomplish the eviction. *People v. Ibom*, 25 Ill.2d 585, 593, 185 N.E.2d 690, 695 (1962).

The following lengthy quotation is from the Authorities to NJI 10.09 (1969):

A carrier may adopt rules and regulations for the management of its business provided they are not unreasonable or in violation of law. *B. & M.R.R. v. Rose*, 11 Neb. 177, 8 N.W. 433 (1881); *Post v. Chicago & N.W.R. Co.*, 14 Neb. 110, 15 N.W. 225 (1883); *Jones v. Omaha & C.B. St. Ry. Co.*, 95 Neb. 798, 146 N.W. 959 (1914).

Before such a regulation is enforced notice thereof must be given, but actual notice to a passenger is not required. It is sufficient if a suitable general notice to the public be given for

such a length of time as to make it reasonably certain that all passengers in the exercise of due diligence would become aware of it. *B. & M. R. R. v. Rose*, 11 Neb. 177, 8 N.W. 433 (1881). However, the terms of a ticket or transfer slip are conclusive and a passenger failing to comply therewith may be ejected. *Jones v. Omaha & C.B. St. R. Co.*, 95 Neb. 798, 146 N.W. 959 (1914).

A passenger failing to comply with a reasonable rule or regulation may be requested to leave, and on resisting may be ejected with the use of such force as may be reasonably required for such purpose. *B. & M. R. R. v. Rose*, 11 Neb. 177, 8 N.W. 433 (1881); *Haman v. Omaha Horse Ry. Co.*, 35 Neb. 74, 52 N.W. 830 (1892); *Pledger v. Chicago, B. & Q.R.Co.*, 69 Neb. 456, 95 N.W. 1057 (1903); *Sorenson v. Lincoln Traction Co.*, 94 Neb. 91, 142 N.W. 702 (1913); *Jones v. Omaha & C.B. St. R. Co.*, *supra*. [*Reed v. Chicago, B. & Q.R. Co.*, 84 Neb. 8, 120 N.W. 442 (1909).]

Expulsion may be resorted to at any reasonable place under existing circumstances. *B. & M. R. R. v. Rose*, 11 Neb. 177, 8 N.W. 433 (1881). But unnecessary force may not be used nor may a passenger be expelled at a dangerous place or while the vehicle is moving at a dangerous rate of speed. *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb. 456, 95 N.W. 1057 (1903).

The general law pertaining to this subject may be found in [14 Am.Jur.2d *Carriers* §§ 1089–1217 (2005) and 13 C.J.S., *Carriers* §§ 591–95 (2005).] It appears that a carrier of passengers has power to make and to enforce reasonable rules and regulations for the carriage of its passengers and the general transaction of its business, and particularly such regulations as will insure the safety and comfort of its passengers, but such regulations must be reasonable in their requirements and executed in a reasonable and proper manner. Passengers are required to comply with such regulations.

A rule or regulation is deemed reasonable if it is necessary to enable the carrier to perform the duties it has undertaken to secure its just rights and to conserve the safety, convenience, and comfort of its passengers.

As with most other problems, “reasonableness” may be either a question of law or fact, or both.

The existence of the rule or regulation must be brought home to the passenger, but “actual notice” is not required provided notice is given in such manner that it should reach all persons affected by it, and the question of notice is generally one for a jury to determine.

In order to enforce such rules and regulations the carrier’s

employees may request the violating party to leave the train, bus or premises of the carrier, and on meeting with resistance may use such force to eject such party as is reasonably necessary under the circumstances, but such ejection must be made at a reasonable place and under reasonable circumstances.

Cases from neighboring states which may be of interest are as follows: *Johnson v. Chicago, R.I. & P.R. Co.*, 51 Iowa 25, 50 N.W. 543 (1879) holds that it is the duty of a carrier's employee to remove a disorderly person on [that person's] refusal to leave, using only such force as is reasonably necessary. *Campbell v. Milwaukee Elec. Ry. & Light Co.*, 169 Wis. 171, 170 N.W. 937, 6 A.L.R. 628 (1919) provides that a carrier may adopt reasonable rules and regulations for the government of its business and use the necessary amount of force to secure their observance, and *Hartough v. Safeway Lines, Inc.*, 288 Mich. 471, 285 N.W. 561 (1939), modified 288 Mich. 703, 288 N.W. 307 (1939) holds that a carrier may request a disorderly passenger to leave, and on his [or her] refusal to do so employ suitable means and sufficient force to eject [the passenger].

"[A] rule or order of an administrative agency is [generally] treated like a statute. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous." *In re Petition of Golden Plains Servs. Transp.*, 297 Neb. 105, 108 (2017).

See generally, the Comments to NJI2d Civ. 2.01 and NJI2d Civ. 2.02A.

CHAPTER 11

LIABILITY OF SUPPLIERS OF PERSONAL PROPERTY FOR DAMAGES CAUSED BY THE CHATTEL SUPPLIED

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11.02	Liability of Donor or Lender of Personal Property, for Damage Caused by That Property—Burden of Proof
B.	NEGLIGENCE LIABILITY IN TORT—LIABILITY OF MANUFACTURER OR SUPPLIER
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**A. LIABILITY OF LESSOR, LENDER, OR
DONOR OF PERSONAL PROPERTY**

NJI2d Civ. 11.01

**LIABILITY OF LESSOR OF PERSONAL
PROPERTY—LIABILITY FOR DAMAGE CAUSED BY
THE RENTAL PROPERTY**

I. ISSUES

This case involves (here state date, place, and nature of occurrence, identify the plaintiff and the defendant, and state their claims and admissions and the court's findings, if any. See NJI2d Civ. 2.01 for a model.)

II. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant (rented, leased, furnished, supplied, et cetera) the (property) to (here insert name of person to whom the property was supplied, or insert a word such as "another") for compensation;

2. That, at the time of the (insert descriptive word such as occurrence, accident, collision, et cetera), the (property) was being used in the manner for which it was (supplied);

3. That, at the time of the (occurrence, accident, collision, et cetera), the (property) was used by a person for whose use it was (supplied);

4. That the defendant knew or had reason to know that the (property) was, or was likely to be, dangerous for the use for which it was (supplied);

5. That the defendant had reason to believe that (the plaintiff, those for whose use (he, she) was (supplying) the (property)) would not realize the danger;

6. That the defendant failed to exercise reasonable care to inform (the plaintiff, those to whom (he, she) (supplied) the (property)) of the danger;

7. That the plaintiff is the person to whom the defendant (supplied) the (property), or someone the defendant should have expected would use the (property) with the consent of the person to whom it was (supplied), or someone the defendant should have expected would be endangered by the probable use of this (property);

8. That (here insert a specific statement of the danger) was a proximate cause of some damage to the plaintiff; and

9. The nature and extent of that damage.

[With respect to paragraph 4, the defendant had reason to know that the (property) was likely to be dangerous if (he, she) could have discovered the danger by reasonable inspection or by such tests of the (property) as the use for which it was (supplied) would normally suggest.]

III. EFFECT OF FINDINGS

(Insert a statement of the effects of findings, using NJI2d Civ. 2.01 as a model.)

COMMENT

This instruction applies to the liability of one who rents out personal property for compensation, for damage allegedly caused by the rental property. Regarding loaned or donated personal property, *see* NJI2d Civ. 11.02. Regarding rented real property, *see* NJI2d Civ. 8.31, *et seq.* Regarding the liability of a bailee for loss or injury of property while in his or her hands, *see* G. Michael Fenner, *About Presumptions in Civil Actions*, 17 Creighton L.Rev. 307, 315-16 (1984). This instruction is not for use in cases involving breach of warranty under the Uniform Commercial Code; regarding those cases, *see* NJI2d Civ. 11.40, *et seq.*

Take particular care to use only those elements of the burden of proof as the pleadings and the evidence put in issue.

Where there is a jury question as to whether the transaction was

for compensation, NJI2d Civ. 11.01 and 11.02 may be worked together as follows:

1. Instruct the jury on the issues.
2. Then instruct the jury as follows:

“You must decide whether the defendant (rented, leased, furnished, supplied, et cetera) the (property) to (here insert name of person to whom the property was supplied, or insert a word such as ‘another’) for compensation or whether (he, she, it) (loaned, donated, furnished, supplied, et cetera) the (property) to (here insert name of person to whom the property was supplied, or insert a word such as ‘another’) without compensation.

“If you decide that the defendant (supplied) the (property) to (another) for compensation, then, before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

“[At this point, insert as many of subparagraphs 2 through 9 of part II of NJI2d Civ. 11.01 as are in issue.]”

“If you decide that the defendant (supplied) the (property) to (another) without compensation, then, before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

“[At this point, insert as many of subparagraphs 2 through 7 of NJI2d Civ. 11.02 as are in issue.]”

This instruction is written for use in the situation where both parties to the rental transaction are natural persons. Where that is not the case, the appropriate changes will have to be made. For example, the beginning of the instruction can be changed to read: “A company that rents (property)”

The word “property” is in parentheses. If it aids clarity, substitute a more specific word or phrase.

This instruction describes the danger under litigation in a general way, rather than as a dangerous condition or as a defect. Because of this, the instruction will work in the case of property that is either inherently dangerous or defective.

In subparagraph number 6, the defendant's duty is described as a duty to warn. The duty described in NJI 11.01 (1969) is the duty to provide property in a reasonably safe condition unless the one to whom

it is provided is warned. *See also* Restatement (Second) of Torts § 388 (1965). That seems to translate into a duty to warn. It may be, however, that in some cases there is an independent duty to exercise reasonable care to make the property safe for its probable use. *See, e.g.,* Restatement (Second) of Torts § 408 (1965). If that is the case, then either substitute the following for subparagraph number 6 of the above instruction:

“6. That the defendant failed to exercise reasonable care to make the (property) safe for the use for which it was supplied;” or rewrite subparagraph number 6, so that it includes both concepts, as follows:

“6. That the defendant failed to exercise reasonable care to do one of the following:

a. to make the (property) safe for the use for which it was supplied;

b. or to inform (those to whom (he, she) rented the (property), the plaintiff) of either the (property’s dangerous condition or of the facts that made the (property) likely to be dangerous;”

In cases involving “scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any . . . structure,” consult Neb. Rev. Stat. § 48-425 (Reissue 2010); *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 867–68, 689 N.W.2d 327, 336–37 (2004); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 10–11, 443 N.W.2d 596, 602–03 (1989).

In the opinion of the Committee, the issues raised by an open and obvious defect are aspects of either contributory negligence, in which case NJI2d Civ. 2.02A applies, or assumption of the risk, in which case NJI2d Civ. 2.02B applies. Regarding “open and patent” defects and the gratuitous bailor, *see* NJI2d Civ. 11.02, Comment & Authorities. On the related subject of known defects as a defense in a strict liability case, *see* NJI2d Civ. 11.26. Regarding open and obvious defects in leased real property, *see* NJI2d Civ. 8.31, Comment. Regarding open and obvious defects and trespassers, licensees, and invitees, *see* NJI2d Civ. 8.26; *see also* 8.12, *et seq.*, and 8.22, *et seq.*; in those situations, this issue is a part of the plaintiff’s case, rather than defendant’s.

Nebraska law bars any action based on strict liability in tort brought against the lessor of a defective or unreasonably dangerous product unless the lessor is also the manufacturer of the product. Neb. Rev. Stat. § 25-21,181 (Reissue 2016); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 842, 509 N.W.2d 603, 616 (1994).

See generally the Comment and the Authorities to NJI2d Civ. 2.01.

AUTHORITIES

Restatement (Second) of Torts § 388 (1965); NJI 11.01 (1969);

Herman v. Midland AG Serv., Inc., 200 Neb. 356, 375, 264 N.W.2d 161, 171 (1978); Baer v. Schaap, 168 Neb. 578, 588-90, 97 N.W.2d 207, 214-15 (1959) (citing authorities), *appeal dismissed*, 172 Neb. 414, 109 N.W.2d 724 (1961), *rev'd on rehearing, on other grounds, and original opinion withdrawn*, 171 Neb. 347, 106 N.W.2d 468 (1960).

The transaction must have been for compensation. Herman v. Midland AG Serv., Inc., 200 Neb. 356, 375, 264 N.W.2d 161, 171 (1978) states that the 1969 version of NJI 11.10, which includes "for compensation," "properly describes the duty of care which a bailor for compensation owes to the bailee." This does not necessarily mean that the duty owed by a bailor without compensation is different. Added to that case, however, is the general rule that the obligation of gratuitous lenders and bailors is different from the obligation where compensation is involved. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 104, at 717 (5th ed. 1984).

NJI 11.01 (1969) used the words "had knowledge, or should have had knowledge, or . . . could have discovered by reasonable inspection . . ." That instruction can be traced largely to the Restatement of Torts § 388 (1934). Section 388 of the successor work, the Restatement (Second), uses the words "knows or has reason to know." The comment to Restatement (Second) of Torts § 334 (1965), which is quoted and discussed in the Comment to NJI2d Civ. 8.02, explains why the Second Restatement uses those particular words, and not "knew or should have known." The above instruction follows the Restatement and uses the words "knew or had reason to know."

NJI2d Civ. 11.02

LIABILITY OF DONOR OR LENDER OF PERSONAL PROPERTY, FOR DAMAGE CAUSED BY THAT PROPERTY—BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant (loaned, donated, furnished, supplied, et cetera) the (property) to (here insert name of person to whom the property was supplied, or insert a word such as "another") without compensation;
2. That the (property) was dangerous for its intended use;
3. That the danger was known to the defendant;
4. That the defendant failed to exercise reasonable care to inform (those to whom (he, she) (loaned) the (property), the plaintiff) of the danger;

5. That the plaintiff is the person to whom the defendant (loaned) the property, or someone the defendant should have expected would use the (property) with the consent of the person to whom it was (loaned), or someone the defendant should have expected would be endangered by the probable use of the (property);

6. That (here insert a specific statement of the danger) was a proximate cause of some damage to the plaintiff; and

7. The nature and extent of that damage.

COMMENT & AUTHORITIES

See NJI2d Civ. 11.01, Comment and Authorities. See also the Authorities to NJI 11.02 (1969), which state: "It is believed that the Nebraska Supreme Court would follow this rule, since it has followed an analogous rule in the landlord and tenant cases. See *Davis v. Manning*, 98 Neb. 707, 154 N.W. 239 (1915) . . ."

This is the Burden of Proof part of the Statement of the Case instruction dealing with the liability of gratuitous lenders and bailors for damage caused by defects in loaned or bailed property. For the Issues and Effects of Findings parts of the instruction, see NJI2d Civ. 11.01 and 2.01 for models. When the transaction is for compensation, see NJI2d Civ. 11.01. If the fact of compensation is a jury question, and both NJI2d Civ. 11.01 and 11.02 must be given, see the Comment to NJI2d Civ. 11.01 for how they are to be worked together.

This instruction is written for use in the situation where both parties to the loan are natural persons. Where that is not the case, the appropriate changes will have to be made. For example, the first sentence of the instruction might be changed as follows: "(A company, An organization) that lends (property)" Or for a more generic change, as follows: "One who lends (property) to another"

Bailment is defined as follows:

The delivery of personal property for some particular purpose or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it or otherwise dealt with according to that person's directions or kept until reclaimed, as the case may be.

Peterson v. Homesite Ind. Co., 287 Neb. 48, 58, 840 N.W.2d 885, 893 (2013) (quoting *Gerdes v. Klindt*, 253 Neb. 260, 268, 570 N.W.2d 336, 342 (1997)). "The law of bailment generally applies to 'the delivery and acceptance of custody or personal property for safekeeping, transportation, or storage.'" *Peterson*, 287 Neb. at 58, 840 N.W.2d at 893.

Under a bailment, the person delivering the property for a

specific purpose (the bailor) has the “right to have the bailed property returned to him or her strictly in accordance with the terms of the bailment contract.” If the bailee “fails or refuses to return the property in the manner expressly required by the contract,” he or she “may be liable for conversion or breach of contract.” In Nebraska, a bailee who handles bailed property in a manner that is in breach of the bailment agreement—that is, in a manner other than required by the contract—commits conversion. Conversion is any unauthorized or wrongful act of dominion exerted over another’s property which deprives the owner of his property permanently or for an indefinite period of time.

Peterson, 287 Neb. at 59, 840 N.W.2d at 894 (citations omitted).

As a general rule, the donor or lender of personal property does not have a duty to inspect the property for unknown defects: The donor or lender must have known; should have known is not enough. This is true unless the property is inherently dangerous, in which case there is a duty to examine. Restatement (Second) of Torts §§ 338, 405 (1965); 8A AM.JUR.2d, *Bailments* § 103 (2010). In the case of an “inherently dangerous instrumentality,” an instruction will have to be prepared; it can be adapted from NJI2d Civ. 11.01. Restatement (Second) of Torts § 405 (1965). (*Deck v. Sherlock*, 162 Neb. 86, 91, 75 N.W.2d 99, 102 (1956) states that “[a] motor vehicle is not an inherently dangerous instrumentality.” Regarding negligent entrustment of a motor vehicle, see NJI2d Civ. 7.22.)

Additionally, *Prosser and Keeton* state that “the [gratuitous] bailor may be liable if he entrusts the chattel to a person whom he knows or should know to be incompetent to use it safely.” W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 104, at 717 (5th ed. 1984). If appropriate, this instruction can be adapted to handle this kind of case.

“A gratuitous bailor is not required to give notice of defects that are open and patent to the borrower” 8A AM.JUR.2d, *Bailments* § 100 (2010). In the opinion of the Committee, this is an aspect of either contributory negligence, in which case NJI2d Civ. 2.02A applies, or assumption of the risk, in which case NJI2d Civ. 2.02B applies. For reference to related topics, see NJI2d Civ. 11.01, Comment.

B. NEGLIGENCE LIABILITY IN TORT— LIABILITY OF MANUFACTURER OR SUPPLIER

NJI2d Civ. 11.10

NEGLIGENCE LIABILITY OF MANUFACTURER OR SUPPLIER—FAILURE TO USE REASONABLE CARE TO SEE THAT THE GOODS ARE SAFE FOR INTENDED USE—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim that the defendant failed to use reasonable care to see that (his, her, its) (goods) were safe for the use for which they were (made, supplied, sold, distributed)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the goods were (manufactured, supplied, sold, distributed) by the defendant;
2. That the plaintiff is (here insert appropriate description; as discussed in the Comment, below);
3. That the defendant failed to use reasonable care to see that the (goods) were safe for the use for which they were (made, supplied, sold, distributed);
4. That this failure to use reasonable care to see that the (goods) were safe for the use for which they were (made, supplied, sold, distributed) was a proximate cause of some damage to the plaintiff; and
5. The nature and extent of that damage.

COMMENT & AUTHORITIES

This is the Burden of Proof part of the Statement of the Case instruction for cases involving negligence liability predicated upon the alleged failure of a manufacturer or supplier to use reasonable care to see that the goods manufactured or supplied are safe for the intended use. For the Issues and Effects of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model. Regarding negligence liability alleging that the manufacturer or supplier failed to warn users that the goods may be dangerous when put to the use for which they were manufactured or supplied, see NJI2d Civ. 11.11. Regarding a manufacturer's strict liability, see NJI2d Civ. 11.20, *et seq.*

Use only those paragraphs of this instruction as are put in issue by the pleadings and the evidence.

The essential difference between a products liability cause of action based on negligence, on the one hand, and one based on strict liability, on the other hand, has been stated as follows:

In a products liability cause of action based on negligence, the manufacturer's conduct is at issue, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury.

... In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous.

Jay v. Moog Auto., 264 Neb. 875, 880–81, 652 N.W.2d 872, 879 (2002). *Accord*, e.g., *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 119, 903 N.W.2d 432, 447 (2017) ("The central question in any claim based on strict liability in tort is whether the product was defective."); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 609, 667 N.W.2d 244, 253 (2003); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 829, 509 N.W.2d 603, 609 (1994); *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 438, 412 N.W.2d 56, 68 (1987).

For a plaintiff to recover in a products liability action under a negligence theory, the plaintiff must establish a duty, a breach, causation, and damages. *Jay*, 264 Neb. at 880, 652 N.W.2d at 879; *Rahmig*, 226 Neb. at 463–63, 412 N.W.2d at 81; *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 69, 382 N.W.2d 310, 313 (1986); *Morris v. Chrysler Corp.*, 208 Neb. 341, 343, 303 N.W.2d 500, 502 (1981); *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 834–35, 104 N.W.2d 431, 447–48 (1960).

Even though this action is a negligence action, this instruction does not use the word negligence. It does not state that the plaintiff must prove that the defendant was negligent and then, in a second instruction, define negligence. Instead, it specifies the allegations of negligence. In the process, defendant's duty to use reasonable care to make or supply safe products is defined in terms of what the plaintiff is required to prove, and it is accomplished in one instruction instead of two.

The defendant's duty, if any, is not changed by the fact that the defendant did not supply the product in question directly to the plaintiff or the person using the product when the plaintiff was allegedly injured. See NJI2d Civ. 11.30, Comment & Authorities.

"A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied."

Morris v. Chrysler Corp., 208 Neb. 341, 343–44, 303 N.W.2d 500, 502–03 (1981) (quoting Restatement (Second) of Torts § 395 at 325 (1965) and citing *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979)); *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 826–27, 104 N.W.2d 431, 444 (1960)).

Subparagraph number 2 of this instruction says: “. . . the plaintiff is (here insert appropriate description as discussed in the Comment, below).” That is in contrast to Section 395 of the Restatement (Second) of Torts (1965), quoted above, which says that the plaintiff must be among “those who use it for a purpose for which the manufacturer should expect it to be used [or] those whom he should expect to be endangered by its probable use.” The Committee wanted subparagraph 2 of the instruction to contain a general description of who the plaintiff must be, one that would serve as a pattern to be used in all cases, and considered adapting the words of the Restatement. The Committee considered: “. . . the plaintiff is either the one to whom the (goods) were (supplied, sold, et cetera) or someone the defendant should reasonably have expected would be endangered by the probable use of the (goods).” The Committee was concerned, however, about the use of “or someone the defendant should reasonably have expected would be endangered by the probable use of the (goods).” Part of the Committee’s concern comes from a reading of comment i to Section 395 of the Restatement (Second). Comment i reads:

The words “those whom he should expect to be endangered by its probable use” may likewise include a large group of persons who have no connection with the ownership or use of the chattel itself. Thus the manufacturer of an automobile, intended to be driven on the public highway, should reasonably expect that, if the automobile is dangerously defective, harm will result to any person on the highway, including pedestrians and drivers of other vehicles and their passengers and guests; and he should also expect danger to those upon land immediately abutting on the highway. Likewise the manufacturer of a cable to be used in the transmission of high voltage electric current should reasonably anticipate that if its insulation is defective its use may endanger even persons miles away from the cable itself.

The phrase “or someone the defendant should reasonably have expected would be endangered by the probable use of the (goods),” does not seem to adequately and completely define all of the potential plaintiffs really contemplated by the Restatement, as explained in comment i. It seems to the Committee that from the words “or someone the defendant should reasonably have expected would be endangered by the probable use of the (goods),” a defendant automobile-manufacturer (to continue with the Restatement’s example) could successfully argue that its reasonable expectation was that the product was safe as manufactured and would be safe in its probable uses and that no one would be endangered. This is why the Committee is calling for the insertion of the particular fact

or facts that need to be proved in a particular case. (In addition, the Committee expects that in almost all cases this issue will be resolved as a question of law, and this subparagraph of the instruction will not be given at all.)

“As a matter of law, [glass bottles] are not so inherently or potentially dangerous that a manufacturer could be found to be negligent for marketing its product in glass bottles.” *Gruenemeier By and Through Gruenemeier v. Seven-Up Co.*, 229 Neb. 267, 271, 426 N.W.2d 510, 513 (1988).

A plaintiff may plead “theories of recovery under strict liability for specific product defects [and] assert a theory of recovery based on negligence.” *Aimee Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 577, 618 N.W.2d 827, 845 (2002) (there is, nonetheless, a significant distinction between a manufacturer’s liability for negligent manufacture, where the question involves whether the manufacturer’s conduct was reasonable, and its liability for the manufactured product on account of strict liability, where the question involves the quality of the product and whether it was unreasonably dangerous). *See also Jay*, 264 Neb. at 880, 652 N.W.2d at 879.

Regarding state-of-the-art as an affirmative defense, *see* NJI2d Civ. 11.31.

Regarding the statute of limitations for products liability actions, whether in negligence or strict liability, *see* NJI2d Civ. 11.20, Comment. Regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D, Comment & Authorities, and cross-references therein.

NJI2d Civ. 11.11

NEGLIGENCE LIABILITY OF MANUFACTURER OR SUPPLIER—FAILURE TO WARN REASONABLY FORESEEABLE USERS—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim that the defendant failed to warn (him, her, it) that the (product) was dangerous], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the goods were (manufactured, supplied, sold, distributed) by the defendant;
2. That the plaintiff is (here insert appropriate description; as discussed in the Comment & Authorities, below);
3. That the defendant [knew or] had reason to know that (his, her, its) (product) was [or was likely to be] dangerous when put to the use for which it was (made, supplied, sold, distributed);

4. That the defendant [knew or] had reason to know that those for whose use the (product) was (made, supplied, sold, distributed) would not realize the danger;

5. That the defendant failed to provide reasonably foreseeable users of the product with adequate warning of that danger;

6. That this failure to warn reasonably foreseeable users of the product of the danger was a proximate cause of some damage to the plaintiff; and

7. The nature and extent of that damage.

COMMENT & AUTHORITIES

This is the Burden of Proof part of the Statement of the Case instruction for cases involving negligence liability predicated upon the alleged failure of a product's manufacturer or supplier to warn of dangers associated with the use of the product. For the Issues and Effects of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model. Regarding negligence liability predicated upon the alleged failure of a manufacturer or supplier to use reasonable care to see that the goods manufactured or supplied are safe for their intended use, *see* NJI2d Civ. 11.10. Regarding a manufacturer's strict liability, *see* NJI2d Civ. 11.20, *et seq.*

Use only those paragraphs of this instruction as are put in issue by the pleadings and the evidence.

Authorities include: Restatement (Second) of Torts § 388 (1965); *Erickson v. U-Haul Intern., Inc.*, 274 Neb. 236, 242-47, 738 N.W.2d 453, 460-63 (2007); *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 886, 347 N.W.2d 99, 108 (1984); *Waegli v. Caterpillar Tractor Co.*, 197 Neb. 824, 827, 251 N.W.2d 370, 372 (1977) ("no duty to warn of a known danger"); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 800, 205 N.W.2d 523, 529 (1973); *Driekosen v. Black, Sivalls & Bryson, Inc.*, 158 Neb. 531, 64 N.W.2d 88 (1954); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465 (5th Cir.1976). *See also* Bausch, *Products Liability: Article 6, "Recent Developments in the Law of Products Liability in Nebraska"* (NCLE, Inc. 1984).

"[W]e have recognized a duty on the part of the manufacturer or other seller of a product to adequately warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the product it sells." *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 609, 667 N.W.2d 244, 253 (2003) (multiple quotation marks omitted).

The duty of a supplier to warn extends to third persons who are foreseeable users of the chattel and "not just to those in privity of

contract with the supplier of the chattel." *Erickson v. U-Haul Intern., Inc.*, 274 Neb. 236, 245, 738 N.W.2d 453, 461 (2007);

In *Strong v. E.I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 686–87 (8th Cir.1981), the Eighth Circuit Court of Appeals was called upon to interpret Nebraska law. The court held that in negligence cases there is no duty to warn when the user knew or should have known of the potential danger, especially when the user is a professional who should be aware of characteristics of the product. Likewise, the court stated that in strict liability cases, there is no duty to warn of dangers within the professional knowledge of the user. *Id.* at 687. The court continued: "If, despite deficient warnings by the manufacturer, a user is fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury." *Id.* at 688.

Regarding the reference to this Comment in subparagraph 2 of this instruction, see NJI2d Civ. 11.10, Comment & Authorities.

Neither the manufacturer nor the supplier was under a duty to anticipate such improper use and warn against [its] possible dangers

. . . . A seller is not liable when he delivers a product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed

A manufacturer has a duty to use reasonable care in the design of goods to protect the consumer from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could reasonably be expected. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974) [T]he failure . . . to follow . . . instructions was not a use which could reasonably be expected. The manufacturer was not obligated to design a product safe for an unforeseeable misuse.

Erickson v. Monarch Indus., Inc., 216 Neb. 875, 888–89, 347 N.W.2d 99, 109–10 (1984).

The defendant's duty, if any, is not changed by the fact that the defendant did not supply the product in question directly to the plaintiff or to the person using the product when the plaintiff was allegedly injured. This is true unless the nature of the product makes it improbable that the person to whom defendant supplied it would have resold it or allowed others to use it, or unless it was made to special order for the peculiar use of a particular person. See NJI2d Civ. 11.30, Comment & Authorities.

See also NJI2d Civ. 11.10, Comment & Authorities.

NJI2d Civ. 11.12

NEGLIGENCE LIABILITY OF MANUFACTURER OR
SUPPLIER—MISUSE

Recommend no separate instruction.

COMMENT & AUTHORITIES

A seller has a right to expect that his or her instructions will be followed and is not liable for injury resulting from them not being followed. *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 887, 347 N.W.2d 99, 109 (1984). "Failure to follow plain and unambiguous instructions is a misuse of the product." *Id.* See generally W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 102 (5th ed. 1984). "In the law of products liability, misuse . . . is the use of a product in a way not reasonably foreseeable by the supplier or manufacturer." *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 500, 618 N.W.2d 637, 646 (2000).

Although the Nebraska Supreme Court has never specifically so ruled, it seems that, in a case involving negligence liability on the part of the manufacturer or supplier, misuse is one kind of contributory negligence. Misuse is a failure to exercise due care, from which the defendant may raise the issue of contributory negligence: "[C]ontributory negligence implies the failure of the plaintiff to exercise due care." *Landrum v. Roddy*, 143 Neb. 934, 947, 12 N.W.2d 82, 89 (1943). See also NJI2d Civ. 2.02A Comment and Authorities.

In Nebraska, contributory negligence is an affirmative defense and the burden is on the defendant to establish such defense. *Hancock v. Paccar*, 204 Neb. 468, 485, 283 N.W.2d 25, 37 (1979) and other cases cited and discussed in the Comment and the Authorities to NJI2d Civ. 2.02A. See also *Kaspar v. Schack*, 195 Neb. 215, 218–20, 237 N.W.2d 414, 417 (1976) (medical malpractice; failure to follow physician's instructions as contributory negligence, with burden of proof on defendant).

If the above is true, then when the plaintiff is the alleged misuser, the issue is contributory negligence; when the plaintiff is not the user, the issue is superseding cause. To the extent that misuse is a question of contributory negligence, NJI2d Civ. 2.02A will serve as a model instruction. To the extent that it is a question of superseding cause, NJI2d Civ. 3.43 will serve as a model. (Were it a question of proximate cause, NJI2d Civ. 2.01 would cover it, and were it some other kind of affirmative defense, NJI2d Civ. 2.02D would be the appropriate model.)

In a strict liability action, misuse is an affirmative defense. See NJI2d Civ. 11.25.

"This court has not ruled upon the issue of whether third-party

misuse is a defense to strict liability in Nebraska, although we note that several jurisdictions have recognized third-party misuse to be an affirmative defense.” *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 500, 618 N.W.2d 637, 646 (2000) (here misuse cannot be raised because it was not pleaded).

C. STRICT LIABILITY IN TORT—LIABILITY OF MANUFACTURER

NJI2d Civ. 11.20

STRICT LIABILITY OF MANUFACTURER—ISSUES AND BURDEN OF PROOF

I. ISSUES

This case involves (here state date, place, and nature of occurrence).

The plaintiff[, insert name,] claims (here insert a statement of the plaintiff’s claims against the defendant, including a statement of the claims regarding the product’s defects and a statement that the plaintiff claims to have suffered damages as a result of the alleged defect). The plaintiff seeks a judgment against the defendant for (his, her, its) damages.

The defendant admits (here state what the defendant admits, by pleading or otherwise, if anything).

The defendant denies (here state what defendant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state any facts so determined).]

II. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant placed the (product) in question on the market;
2. That, at the time the (product) left the defendant’s possession, it was defective in one or more of the ways claimed by the plaintiff;

3. That this defect made the (product) unreasonably dangerous for its intended use, or for any use the defendant could have reasonably foreseen;

4. That this defect was a proximate cause of some damage to the plaintiff; and

5. The nature and extent of that damage.

III. EFFECT OF FINDINGS

(Insert a statement of the effects of findings, using NJI2d Civ. 2.01 as a model.)

SPECIAL NOTE

Before using this instruction read part V of this Comment & Authorities.

COMMENT & AUTHORITIES

- I. GENERAL COMMENTS
- II. THE DIFFERENCE BETWEEN NEGLIGENCE AND STRICT LIABILITY
- III. STRICT LIABILITY IS BASED ON POLICY CONSIDERATIONS
- IV. GENERAL AUTHORITIES
- V. LANGUAGE FROM SOME CASES THAT IS NOT IN THIS INSTRUCTION
 - A. DEFENDANT KNEW OR SHOULD HAVE KNOWN THE PRODUCT WOULD BE USED WITHOUT INSPECTION FOR DEFECTS
 - B. THE PRODUCT'S INTENDED USE
- VI. ADMISSIBILITY OF EVIDENCE
 - A. OTHER SIMILAR ACCIDENTS
 - B. SUBSEQUENT REMEDIAL MEASURES
- VII. DEFENDANT IS THE APPARENT, BUT NOT THE ACTUAL, MANUFACTURER
- VIII. CIRCUMSTANTIAL EVIDENCE—THE "MALFUNCTION THEORY"
- IX. AFFIRMATIVE DEFENSES
 - A. IN GENERAL
 - B. CONTRIBUTORY NEGLIGENCE
- X. PRIVITY
- XI. DAMAGE OTHER THAN TO THE ALLEGEDLY DEFECTIVE PRODUCT ITSELF
- XII. A SELLER OR LESSOR WHO IS NOT THE MANUFACTURER

XIII. STATUTES OF LIMITATIONS AND REPOSE

- A. STATUTE OF LIMITATIONS
- B. STATUTE OF REPOSE
- C. LIMITATIONS AND REPOSE

I. GENERAL COMMENTS

The form of this instruction follows that of NJI2d Civ. 2.01. *See* the Comment to NJI2d Civ. 2.01 for a discussion of general rules regarding statement-of-the-case instruction. Use only those paragraphs of the above instruction as are appropriate to the case at hand.

For the definition of “defective condition,” *see* NJI2d Civ. 11.21, 11.22, and 11.23.

Regarding the somewhat related matter *res ipsa loquitor*, *see* NJI2d 2.13. For a discussion of the general rule that negligence is never presumed from the fact of an accident or injury, *see*, NJI2d Civ. 2.01

II. THE DIFFERENCE BETWEEN NEGLIGENCE AND STRICT LIABILITY

The essential difference between a products liability cause of action based on negligence and one based on strict liability has been stated as follows:

In a products liability cause of action based on negligence, the manufacturer’s conduct is at issue, that is, whether the manufacturer’s conduct was reasonable in view of the foreseeable risk of injury.

In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous.

Jay v. Moog Auto., 264 Neb. 875, 880, 881, 652 N.W.2d 872, 879 (2002). *Accord*, e.g., *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 119, 903 N.W.2d 432, 447 (2017) (“The central question in any claim based on strict liability in tort is whether the product was defective.”). *See also* NJI2d Civ. 11.10, Comment & Authorities for the same quotation and additional cases.

III. STRICT LIABILITY IS BASED ON POLICY CONSIDERATIONS

Strict liability is based on policy considerations. “One reason for adopting strict liability in tort regarding products liability claims is exoneration of a claimant from what is frequently an insurmountable burden of proof.” *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 457, 412 N.W.2d 56, 78 (1987). “[I]n many instances, the dealer or manufacturer

has either purposefully or inadvertently tampered with the evidence. [And in some cases] examination of the product unit is impossible because the unit is lost or destroyed after the harm-causing incident” *Pitts v. Genie Indus.*, 302 Neb. 88, 107–08, 921 N.W.2d 597, 613 (2019). *See also Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 92, 793 N.W.2d 445, 449 (2011) (“The concern of tort law in the area of products liability has focused on the need to protect the purchaser[s] or consumer[s], who often [are] not in a position to withstand the financial impact if [they are], or [their] property, is damaged by a defective product.”).

IV. GENERAL AUTHORITIES

In Nebraska, a manufacturer of a product or a part thereof is strictly liable for personal injury and, to an uncertain extent, property damage, when the manufacturer places in the market a product that is unreasonably dangerous. This strict liability applies only against the manufacturer (*see* Neb. Rev. Stat. § 25-21,181 (Reissue 2016)) and only when the product is unreasonably dangerous. *See generally Pitts v. Genie Indus.*, 302 Neb. 88, 107-08, 921 N.W.2d 597, 613 (2019); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244, 257 (2003); *Jay v. Moog Auto.*, 264 Neb. 875, 880, 881, 652 N.W.2d 872, 879 (2002); *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 457, 412 N.W.2d 56, 78 (1987); *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); and other cases and authorities cited and discussed below.

This pattern instruction was based in part on the relevant instructions from *Erickson, supra*, and *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

“In a products liability case against a manufacturer the plaintiff must show that the offending condition existed when the product left defendant’s control.” *Sundet v. Olin Mathieson Chem. Corp.*, 179 Neb. 587, 588, 139 N.W.2d 368, 369 (1966). *Accord Stahlecker*, 266 Neb. at 615, 667 N.W.2d at 257; *Rahmig*, 226 Neb. at 463, 412 N.W.2d at 81; *Kohler*, 187 Neb. at 430, 191 N.W.2d at 606—and, of course, that the defect was the proximate cause of the injury. *See also* Restatement (Second) of Torts § 402A, comment g (1965).

See generally W. Page Keeton, et al., *Prosser and Keeton On the Law of Torts*, ch. 13, at 534–83 (5th ed. 1984); Restatement (Second) of Torts § 402A (1965).

V. LANGUAGE FROM SOME CASES THAT IS NOT IN THIS INSTRUCTION

A. DEFENDANT KNEW OR SHOULD HAVE KNOWN THE PRODUCT WOULD BE USED WITHOUT INSPECTION FOR DEFECTS

A number of cases, including *Pitts*, 302 Neb. at 99, 921 N.W.2d at 609; *Stahlecker*, 266 Neb. at 615–16, 667 N.W.2d at 257; *Jay*, 264 Neb.

at 880–81, 652 N.W.2d at 879; and *Kudlacek*, 244 Neb. at 829, 509 N.W.2d at 609 (1994), listed the elements of a claim of strict liability and stated the first element as follows: “ ‘(1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects.’ ” In saying this, *Kudlacek* is quoting the syllabus of the court from the *Rahmig* case. In subsequent cases using this defect-inspection language it is dicta and it all flows from *Rahmig*’s syllabus and through *Kudlacek*.

The part of that quotation that requires that “defendant . . . knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects” is not in the pattern instruction for the following four reasons.

1. There is no controlling authority for putting it in the instruction. Neither *Rahmig*’s syllabus nor subsequent dicta is controlling authority.

2. It seems that this issue rarely comes up in actual litigation and should not be given routinely and, therefore, should not be in the pattern instruction.

3. *Rahmig* and post *Rahmig* cases such as *Pitts*, *Stahlecker*, *Jay*, and *Kohler* that make this statement—“defendant . . . knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects”—make it as dicta and, in the same breath, state they are adopting the test of § 402A of the Restatement (Second) of Torts (1965). And this language is not in § 402A. Section 402A says nothing about defendant’s knowledge regarding the user’s inspection. The only place in § 402A where inspection could be relevant is in its requirement that the product sold be unreasonably dangerous to the user: That is, there might be cases where knowledge that the product will be used without inspection could be relevant to the question of whether there was an “unreasonable danger.” However, many things may make a danger unreasonable, including, but not limited to, the knowledge that it will not be inspected. When instructing the jury, there is no reason to single out, and thereby over emphasize, one possible source of danger. Rather, this is a matter of evidence and argument regarding unreasonable danger.

4. The language “knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects” is not the language of a separate element of a plaintiff’s burden of proof in a case of strict liability; it does not address the quality of the product (see, part II of this Comment & Authorities, above); it is the language of negligence. It is not a part of plaintiff’s burden of proof except to the extent that it may be evidence that the product was “unreasonably dangerous.” And that is a matter of evidence and argument, not a matter of law.

If the Committee is in error, and if the plaintiff/user must specifically prove that the defendant/manufacturee knew or should have known that the product was to be used without inspection for defects, then that language will have to be added to the instruction. If this language is to be added to the instruction, then what about the case where the manufacturer foresaw that the user would give the product some inspection for defects, but did not, and could not, know the extent of the inspection. It may be necessary to carefully craft the instruction to a particular kind of defect-inspection that must have been foreseeable.

And note, as mentioned in part VIII of this Comment & Authorities, below, and as discussed at NJI2d Civ. 11.26, that plaintiff's knowledge of the defect can be an affirmative defense; if a plaintiff did have knowledge of the defect prior to the accident and injury in question, then that plaintiff has no basis for recovery in strict liability.

B. THE PRODUCT'S INTENDED USE

Again, quoting from *Rahmig's* syllabus, *Kudlacek* states the third element as follows: "(3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended." *Kudlacek, supra*. Again, the language "while the product was being used" was picked up from *Rahmig's* syllabus, and *Kudlacek, Stahlecker, Jay*, and other post-*Rahmig* cases continue using this language. In *Rahmig* this quotation is taken from the syllabus and is dicta and it is dicta in those post-*Rahmig* cases as well. This does not necessarily mean that the "while the product was being used" language represents an essential element of plaintiff's cause of action. Furthermore, the inclusion of that language in the above cases was not error because it reflected the undisputed facts of each case.

In addition, the above paragraph aside, the language that seems to make it part of the plaintiff/user's burden of proof to show that the "plaintiff's injury [was] sustained while the product was being used in the way and for the general purpose for which it was designed and intended" is not appropriate for an instruction on the plaintiff/user's burden of proof. This language from the cases in the preceding paragraph can be broken down into two parts: (1) The defect must have been a proximate cause of the plaintiff's alleged injury. This is just the proximate cause instruction that is required in any case in either strict liability or negligence. Proximate cause is in this pattern instruction. (2) The plaintiff's "injury [must have been] sustained while the product was being used in the way and for the general purpose for which it was designed and intended." This is not an appropriate part of a plaintiff's strict liability burden-of-proof instruction. This is not about the quality of the product, see part II of this Comment & Authorities, but about the conduct of the user. This is the language of an affirmative defense

instruction—the affirmative defense of misuse, which is found at N.J.I2d Civ. 11.25. And the first two elements of N.J.I2d Civ. 11.25 are, “1. That the plaintiff used the (product) (in one or more of the ways, as) claimed by the defendant; 2. That the defendant could not reasonably have foreseen such a use of the product[.]” *Id.* (paragraph break omitted)).

VI. ADMISSIBILITY OF EVIDENCE

A. OTHER SIMILAR ACCIDENTS

“A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff. [That is, the plaintiff must show that] “the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers.” *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 126–27, 903 N.W.2d 432, 451 (2017). *See also* *Shipler v. General Motors Corp.*, 271 Neb. 194, 224, 710 N.W.2d 807, 834 (2006). *And see* Nebraska Evidence Rule 401 and 403, Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 2016).

B. SUBSEQUENT REMEDIAL MEASURES

Nebraska’s general rule on the admissibility of evidence of subsequent remedial measures is that they are inadmissible to prove negligence or culpable conduct. That general rule applies in actions based upon a theory of strict liability. That is, it applies in cases alleging “the manufacture or sale of a defective product.” Neb. Evid. R. 407, Neb. Rev. Stat. § 27-407 (Reissue 2016). Regarding Rule 407 and products liability actions, *see generally Rahmig*, 226 Neb. at 444–49, 412 N.W.2d at 71–73. Though not a products liability action, *see also* *Wollenhaupt v. Andersen Fire Equip. Co.*, 232 Neb. 275, 280, 440 N.W.2d 447, 451 (1989) (finding that evidence that there have not been changes is not evidence of subsequent remedial measures).

VII. DEFENDANT IS THE APPARENT, BUT NOT THE ACTUAL, MANUFACTURER

In *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997), plaintiff sued Sears in strict liability for a grill that Sears sold but did not manufacture. Plaintiff relied on the apparent manufacturer doctrine, which stems from the Restatement (Second) of Torts § 400 at 337 (1965), and under which manufacturer’s liability can run to a non-manufacturer who puts a product out as though he or she were the manufacturer. The court noted that it has not adopted this doctrine and it “decline[s] to do so in the instant case because there is no evidence in the record that the Stoneses believed Sears was the manufacturer or that Sears held itself out as the manufacturer of the [product] in question.” *Id.* at 565, 558 N.W.2d at 545.

VIII. CIRCUMSTANTIAL EVIDENCE—THE “MALFUNCTION THEORY”

“The best means of proving a defect is expert testimony pointing to a specific defect. But in lieu of pleading and proving a specific defect,” there is the malfunction theory. *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 120–21, 903 N.W.2d 432, 447–48 (2017).

“The malfunction theory is based on the same principal underlying *res ipsa loquitur*, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of the wrongful act.” *Pitts v. Genie Indus.*, 302 Neb. 88, 106, 921 N.W.2d 597, 613 (2019). This theory sometimes goes by other names: “the indeterminate defect theory or general defect theory.” *Id. Accord, e.g., O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 121, 903 N.W.2d 432, 448 (2017) (involving breach of express warranty). See NJI2d Civ. 2.13 for a discussion of *res ipsa loquitur*.

The Court has long applied the malfunction theory in cases alleging breach of express warranty, see, NJI2d Civ. 11.40, but, until *Pitts*, had not expressly applied this theory to strict liability claims. “We hold that the malfunction theory is applicable in a strict liability manufacturing defect claim.” *Pitts*, 302 Neb. at 108, 921 N.W.2d at 614 (citing Restatement (Third) of Torts: Products Liability § 2(b)). “There is no reason to prohibit the malfunction theory in a strict liability matter when we do not do so for its implied warranty counterpart.” *Pitts*, 302 Neb. at 108, 921 N.W.2d at 614. Of the three cases most cited in this section of these Comments & Authorities, *Pitts* involves strict liability claims and *O’Brien* and *Roskop*, below, involve breach of express warranty.

The malfunction theory is narrow in scope.” Same quotation: *Pitts*, 302 Neb. at 106, 921 N.W.2d at 613; *O’Brien*, 298 Neb. at 120, 903 N.W.2d at 448; *Roskop Dairy, L.L.C. v. GEA Farm Techs., Inc.*, 292 Neb. 148, 174, 871 N.W.2d 776, 796 (2015). “[I]t simply provides that it is not necessary for the plaintiff to establish a specific defect so long as there is evidence of some unspecified dangerous condition or malfunction from which a defect can be inferred.” *Pitts*, 302 Neb. at 107, 921 N.W.2d at 613. It allows a “plaintiff[] to prove an *unspecified* defect.” *O’Brien*, 298 Neb. at 119, 903 N.W.2d at 447. *Accord Pitts*, 302 Neb. at 106, 921 N.W.2d at 613. It allows a plaintiff to “prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as a result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.” Same quotation: *Pitts*, 302 Neb. at 106–07, 921 N.W.2d at 613; *O’Brien*, 298 Neb. at 120, 903 N.W.2d at 447–48; *Roskop Dairy*, 292 Neb. at 174, 871 N.W.2d at 796. “[T]he malfunction itself is circumstantial evidence of a defective condition.” *Pitts*, 302 Neb. at 107, 921 N.W.2d at 613.

“The malfunction theory . . . is not available when specific defects

are alleged.” *O'Brien*, 298 Neb. at 122, 903 N.W.2d at 448-49 (involving breach of express warranty; stating, “A plaintiff cannot simultaneously rely on the malfunction theory to establish an unspecified defect and, at the same time, point to evidence of specific defects.” *Id.*).

Once again, as discussed in part III of this Comment & authorities, above, the malfunction theory is based on policy considerations. Repeating something said above, “One reason for adopting strict liability in tort regarding products liability claims is exoneration of a claimant from what is frequently an insurmountable burden of proof.” *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 457, 412 N.W.2d 56, 78 (1987). “[I]n many instances, the dealer or manufacturer has either purposefully or inadvertently tampered with the evidence. When examination of the product unit is impossible because the unit is lost or destroyed after the harm-causing incident, responsibility for spoliation of evidence may be relevant to the application of the malfunction theory.” *Pitt*, 302 Neb. at 107-08, 921 N.W.2d at 613-14.

Regarding the somewhat related matter *res ipsa loquitor*, see NJI2d 2.13. For a discussion of the general rule that negligence is never presumed from the fact of an accident or injury, see, NJI2d Civ. 2.01

IX. AFFIRMATIVE DEFENSES

A. IN GENERAL

Assumption of the risk can be a defense to strict liability. See, e.g., *Jay v. Moog Auto.*, 264 Neb. 875, 882-83, 652 N.W.2d 872, 880-81 (2002); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 499, 618 N.W.2d 637, 646 (2000); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds* by *Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983); *Sherrill v. Royal Indus., Inc.*, 526 F.2d 507, 510 n. 4 (8th Cir. 1975). See NJI2d Civ. 2.02B for the assumption of risk instruction.

Plaintiff's knowledge of the defect can be a defense. See NJI2d Civ. 11.26.

Misuse of the product is a defense to strict liability. Failure to follow plain and unambiguous instructions is a form of misuse. See NJI2d Civ. 11.25, Comment & Authorities.

That the product conformed to the generally recognized and prevailing state of the art in the industry may be a defense in an action in strict liability. By statute, in a strict liability action based upon “defective design, testing, or labeling,” it can be an affirmative defense that the allegedly defective element “was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person

not engaged in the business of selling such product” Neb. Rev. Stat. § 25-21,182 (Reissue 2016). This point is discussed further in the Comment and the Authorities to NJI2d Civ. 11.31.

B. CONTRIBUTORY NEGLIGENCE

Prior to February 8, 1992, contributory negligence was by statute a defense to a strict liability action. Neb. Rev. Stat. § 25-1151 (Reissue 1979); *Shipler v. General Motors Corp.*, 271 Neb. 194, 212, 710 N.W.2d 807, 826 (2006). Again, by statute, that rule has been changed. For causes of action accruing on or after February 8, 1992, neither contributory nor comparative negligence is a defense to an action in strict liability. *County of Wahoo v. NIFCO, Mech. Sys.*, 306 Neb. 203, 210-11, 944 N.W.2d 757, — (2020); *Shipler v. General Motors Corp.*, 271 Neb. 194, 209-20, 710 N.W.2d 807 (2006) (interpreting and applying Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 2016)). Therefore, Nebraska’s version of comparative negligence (see generally, NJI2d Civ. 5.02–5.05) does not apply to causes of action in strict liability. This is also discussed at some length at NJI2d Civ. 5.04, Comment.

In some cases where a defendant considers alleging contributory negligence as a defense to a cause of action in strict liability, the fact that it is not a defense can be avoided by careful consideration of how to cast the defense. Perhaps what looks like contributory negligence can be presented as, for example misuse. In *Jay v. Moog Auto.*, 264 Neb. 875, 652 N.W.2d 872 (2002), the manufacturer/defendant alleged the contributory negligence of the user/plaintiff. The plaintiff argued that contributory negligence is not a defense to a strict liability theory of recovery in a cause of action governed by Nebraska’s comparative negligence statute, Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016). The Supreme Court determined that the defense actually alleged was not contributory negligence but misuse, which is a defense to a strict liability theory of recovery governed by Nebraska’s comparative negligence statute; therefore, there was no occasion to determine whether or not contributory negligence is a defense. *Jay*, 264 Neb. at 885-86, 652 N.W.2d at 882–83 (“[B]oth prior and subsequent to the 1992 statutory amendments . . . misuse of the product is a defense to a strict liability theory of recovery.”) The judgment was reversed and remanded for other reasons; on remand, held the Court, the contributory negligence instruction should not be given, but if the evidence supports it, then the misuse instruction should be given. See NJI2d Civ. 11.25 for the affirmative defense of misuse as it applies to a strict liability theory of recovery.

While a rule establishing contributory negligence as a defense in a strict liability action is not the general rule, Prosser says that the state of the general rule may be little more than historical accident: “Perhaps if comparative negligence had preceded the development of strict liability, contributory negligence would have been recognized as a defense that would diminish recovery in proportion to the percentage of the plaintiff’s fault. But courts were operating on the all-or-nothing

doctrines of the common law." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 102, at 712 (5th ed. 1984).

In the interest of completeness, regarding contributory negligence, see NJI2d Civ. 2.02A.

X. PRIVACY

The first edition of this book, in its 1975 pocket part, cites *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), as holding "that the person injured does not have to be the buyer, since the plaintiff in that case was a passenger in the car." NJI 11.20 (pocket part, 1975). The Restatement (Second) of Torts § 402A (1965) states: "The Institute expresses no opinion as to whether th[is] rule[] . . . may not apply . . . to harm to persons other than users or consumers." This Committee, likewise, expresses no opinion regarding whether these rules apply to harm to persons other than users or consumers.

Regarding privacy generally, see NJI2d Civ. 11.30, Authorities.

XI. DAMAGE OTHER THAN TO THE ALLEGEDLY DEFECTIVE PRODUCT ITSELF

The plaintiff cannot recover in tort, including strict liability, if the only damage claimed is damage to the allegedly defective product itself. *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 793 N.W.2d 445 (2011).

"The concern of tort law in the area of products liability has focused on the need to protect the purchaser or consumer, who often is not in a position to withstand the financial impact if he, or his property, is damaged by a defective product. The social need to spread the . . . losses across a spectrum of consumers thus increasing the cost of the product, is, however, substantially lessened when the injury is only to the product itself. Furthermore, this kind of loss relates essentially to the purchaser's benefit of the bargain which has been made between himself and the seller. . . . [T]he law of contracts is far better suited to deal with the dissatisfaction on the part of a purchaser under such circumstances."

Dobrovolny, 281 Neb. at 92, 793 N.W.2d at 449 (quoting *Continental Ins. v. Page Eng'g Co.*, 783 P.2d 641, 647 (Wyo. 1989)). "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." *Dobrovolny*, 281 Neb. at 92, 793 N.W.2d at 449 (quoting *East River S.S. Corp v. Transamerica Delaval*, 476 U.S. 858, 871 (1986)). This is the economic loss doctrine.

"We adopt the rule that disallows recovery in tort when the damages are to the product alone. . . . [T]he economic loss doctrine prevents recovery under a products liability theory where the damage is solely to the product." *Dobrovolny*, 281 Neb. at 92-93, 793 N.W.2d at 449-50.

More generally, see Lesiak v. Central Valley Ag Co-op., 283 Neb. 103, 118-19, 808 N.W.2d 67, 80 (2012), which “confront[s] . . . the . . . application and scope” of the economic loss doctrine. The court notes that “[t]he economic loss doctrine, generally stated, is a ‘judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.’” It goes on to state that “it should not be interpreted so broadly as to undermine tort law and preclude tort remedies in situations which, historically, have presented viable tort cases.”

“The underlying purpose of the economic loss rule is to preserve the distinction between contract and tort theories in circumstances where both theories could apply” The concern is that if tort remedies were available where the losses suffered were only economic, then private ordering (contract law) would be less effective. If a party could simply avoid its contractual obligation by suing in tort, which often offers more generous terms of recovery, then the effectiveness of contract law would be reduced. Or, in the words of the U.S. Supreme Court, the doctrine exists to prevent contract law from drowning in a ‘sea to tort.’”

. . . .

We reaffirm the doctrine’s continued application in the products liability context. As applied in that context, the doctrine requires that where a defective product causes harm only to itself, unaccompanied by either personal injury or damage to other property, contract law provides the exclusive remedy to the plaintiff. The reasoning for this proposition is strong: Where the damage done is only to the product itself, the buyer has experienced only a loss of the benefit of its bargain, which is the essence of a warranty action. . . .

Second, the doctrine also applies where the alleged breach is only of a contractual duty, and no independent tort duty exists. Again, restated, the purpose of the doctrine is to preserve the distinction between tort law and contract law. Furtherance of that purpose requires that when the alleged breach is of a purely contractual duty—a duty which arises only because the parties entered into a contract—only contractual remedies are available.

Lesiak, 283 Neb. at 121-22, 808 N.W.2d at 82 (footnotes omitted).

Regarding *Lesiak*, see also NJI2d Civ. 15.01, Comment, and 15.40, Comment.

XII. A SELLER OR LESSOR WHO IS NOT THE MANUFACTURER

“No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of

a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.” Neb. Rev. Stat. § 25-21,181 (Reissue 2016). “[Section] 25-21,181 bars any action based on strict liability in tort brought against the seller or lessor of a defective or unreasonably dangerous product unless the seller is also the manufacturer of the product.” *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 842, 509 N.W.2d 603, 617 (1994).

XIII. STATUTES OF LIMITATIONS AND REPOSE

A. STATUTE OF LIMITATIONS

Nebraska’s statute of limitations for products liability actions is four years after the date of the damage, but in no case more than ten years after the date when the product “was first sold or leased for use or consumption.” Neb. Rev. Stat. § 25-224 (Reissue 2016) (stating that this applies except in actions governed by section five of this subsection, which governs actions over certain kinds of asbestos).

The four-year limitation commences to run when “the party entitled to bring the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the . . . damage.” *Condon v. A.H. Robins Co.*, 217 Neb. 60, 61, 349 N.W.2d 622, 623 (1984). *Accord* *Thomas v. Countryside of Hastings*, 246 Neb. 907, 909, 524 N.W.2d 311, 313 (1994); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 282, 481 N.W.2d 422, 428 (1992). *See* Note, *Discovering a Discovery Rule in Products Liability Actions*—*Condon v. A.H. Robins Co.*, 18 Creighton L.Rev. 531 (1985).

“Discovery refers to the fact that one knows of the existence of an injury or damage and not that one knows who or what may have caused that injury or damage.” *Thomas v. Countryside of Hastings*, 246 Neb. 907, 909, 524 N.W.2d 311, 313 (1994) *Accord* *Andres v. McNeil Co.*, 270 Neb. 733, 743, 707 N.W.2d 777, 786 (2005). The key is knowledge of damage, not knowledge of legal right to redress in court. *Ward v. City of Alliance*, 227 Neb. 306, 309–10, 417 N.W.2d 327, 330–31 (1988).

In 1997, the Unicameral amended the statute governing the trial of statute of limitations issues. Unless waived by all parties, a jury shall determine any factual issues concerning the bar of a statute of limitations. Neb. Rev. Stat. § 25-221 (Reissue 2016). This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first. This amendment is discussed in the Statute of Limitations part of the Comment to *Nebraska Civil* 12.04.

“Procedural amendments to statutes are ordinarily applicable to pending cases. . . . Statutes of limitations are generally considered

procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date.” *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005). *Accord* *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005) (“[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.”).

Regarding statutes of limitations generally, see NJI2d Civ. 2.02D and 12.04, Comment & Authorities, and cross-references therein.

B. STATUTE OF REPOSE

Nebraska’s statute of repose states that suits involving “products manufactured in Nebraska [shall be commenced] within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use of consumption[.]” Neb. Rev. Stat. § 25-224(2)(a)(i). (Reissue 2016) (stating that this applies except in actions governed by section five of this subsection, which governs actions over certain kinds of asbestos).

“For products manufactured outside Nebraska, [the action shall be commenced] within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be the statute of limitations.”

Neb. Rev. Stat. § 25-224(2)(a)(ii) (Reissue 2016). See *Gillam v. Firestone Tire & Rubber Co.*, 241 Neb. 414, 420, 489 N.W.2d 289, 293 (1992). *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 117, 362 N.W.2d 35, 38 (1985) (syllabus of the court) (“‘Any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.’”) (alteration and indentation omitted) (quoting Neb. Rev. Stat. § 25-224 (Cum Supp. 1984) [now found at § 25-224 (Reissue 2016)]).

The products-liability statute of repose for products liability actions, Neb. Rev. Stat. § 25-224(2) (Reissue 2016), does not violate the Due Process or Equal Protection Clauses of the Nebraska or United States Constitution, or the open courts provision of the Nebraska Constitution. *Radke v. H.C. Davis Sons’ Mfg. Co.*, 241 Neb. 21, 23, 486 N.W.2d 204, 205 (1992). *Accord* *Gillam v. Firestone Tire & Rubber Co.*, 241 Neb. 414, 420, 489 N.W.2d 289, 293 (1992).

This statute of repose “is not tolled by a person’s status as a minor.” *Budler v. General Motors Corp.*, 268 Neb. 998, 1004, 689 N.W.2d 847,

851 (2004). (Section 25-213 of the Nebraska Revised Statutes tolls many statutes of limitations and repose when the injured party is younger than 21-years-of-age at the time the cause of action accrues. For reasons of statutory interpretation discussed in *Budler*, that statute does not apply to the products liability statute of repose.

C. LIMITATIONS AND REPOSE

The four-year limitation is a statute of limitations, the ten-year limitation, a statute of repose. The difference, and its significance, is discussed in *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 466 N.W.2d 771 (1991).

Regarding Nebraska's statute of limitations and repose in products liability actions, *see generally*, Note, *The Decline and Rise of Statutes of Repose*, 19 Creighton L. Rev. 509, 527-29 (1986).

NJI2d Civ. 11.21

STRICT LIABILITY OF MANUFACTURER— DEFINITION OF DEFECT—MANUFACTURE

A product is defective in its manufacture if it differs from the manufacturer's intended result or if it differs from apparently identical products from the same manufacturer.

COMMENT & AUTHORITIES

"The notion of a defective product embraces two separate concepts—a manufacturing defect and a design defect. A manufacturing defect is one in which the product differs from the specifications and plan of the manufacturer, while a design defect is one in which the product meets the specifications of the manufacturer, but nonetheless poses an unreasonable risk of danger." *Pitts v. Genie Indus.*, 302 Neb. 88, 100-01, 921 N.W.2d 597, 609-10 (2019). This instruction is the definition of the former. The definition of the design defect is at NJI2d Civ. 11.22.

"A manufacturing defect exists when the product differs from the plan and specifications of the manufacturer." *Freeman v. Hoffman-La Roche, Inc.* 260 Neb. 552, 569, 618 N.W.2d 827, 841 (2000) (citing *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); Restatement (Third) of Torts § 2(a) (1997)). *See also* NJI2d Civ. 11.20, Authorities, and 11.23, Comment & Authorities.

In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a "manufacturing defect," is one in which the product differs from the specifications and plan of the manufacturer.

The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a “design defect.”

Jay v. Moog Auto., 264 Neb. 875, 880, 652 N.W.2d 872, 879 (2002). *Accord Aimee Freeman v. Hoffman-La Roche, Inc.* 260 Neb. 552, 556, 618 N.W.2d 827, 833 (2000) (same quotation but without the internal quotation marks). *See also O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 119, 903 N.W.2d 432, 447 (2017) (“Defects usually fall into one of three categories: design defects, manufacturing defects, or warning defects.”).

“A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff.” *Shipler v. General Motors Corp.*, 271 Neb. 194, 224, 710 N.W.2d 807, 834 (2006). For more on the use of “other similar accidents” evidence, *see* NJI2d Civ. 11.20, part VI(A).

This instruction applies when the claimed defect relates to the manufacture of the product, as opposed to its design or the adequacy of warning or instructions on its use. Regarding design, *see* NJI2d Civ. 11.22. Regarding warning and instructions on use, *see* NJI2d Civ. 11.23. Regarding “unreasonably dangerous,” *see* NJI2d Civ. 11.24. In some cases it might be best to combine into one instruction as many of these instructions as are applicable.

Regarding state-of-the-art as an affirmative defense, *see* NJI2d Civ. 11.31.

No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective. Neb. Rev. Stat. § 25-21,181 (Reissue 2016).

NJI2d Civ. 11.22

STRICT LIABILITY OF MANUFACTURER— DEFINITION OF DEFECT—DESIGN

A product is defective in its design if it fails to perform as safely as an ordinary consumer would expect when it is used in a manner either intended by the manufacturer or reasonably foreseeable by the manufacturer.

COMMENT

See NJI2d Civ. 11.21, Comment & Authorities.

“The notion of a defective product embraces two separate concepts—a manufacturing defect and a design defect. A manufacturing defect is one in which the product differs from the specifications and plan of the manufacturer, while a design defect is one in which the product meets the specifications of the manufacturer, but nonetheless poses an unreasonable risk of danger.” *Pitts v. Genie Indus.*, 302 Neb. 88, 100–01, 921 N.W.2d 597, 609–10 (2019). This instruction is the definition of the latter. The definition of the manufacturing defect is at NJI2d Civ. 11.21.

For a discussion of design defect as it related to the crashworthiness of a vehicle, *see Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 830–32, 509 N.W.2d 603, 610–11 (1994).

“Nebraska no longer requires proof of an alternative design for a claimant to recover under a claim of defective design.” *Kudlacek*, 244 Neb. at, 832, 509 N.W.2d at 611.

As regards the burden of proving damages:

[P]laintiff must show that his injuries were enhanced as a result of the defective design of the vehicle. . . . [One] approach allows the plaintiff to recover where there is an “invisible” injury, if he presents evidence that shows that the alleged defect was a “substantial factor” in causing the enhanced injuries. [Plaintiff need not separate out the additional injury he received because the design was defective, from the injury he would have received anyway had the design not been defective.] Once proximate cause is established, then the burden is on the defendant to show apportionment of damages. However, if the damages cannot be apportioned, then the defendant manufacturer may be held jointly and severally liable with the defendant responsible for the original collision.

Kudlacek, 244 Neb. at, 830–31, 509 N.W.2d 603, at. It is this approach that *Kudlacek* adopts. *Id.* at 833, 509 N.W.2d at 612. *See also* NJI2d Civ. 4.09.

NJI2d Civ. 11.23

STRICT LIABILITY OF MANUFACTURER— DEFINITION OF DEFECT—INSUFFICIENT WARNING

A product is defective if it is not accompanied by sufficient warnings. To be sufficient, a warning must inform a product’s user of any risk of harm not readily recognizable by the ordinary user while using the product in a manner reasonably foreseeable by the manufacturer.

COMMENT & AUTHORITIES

See NJI2d Civ. 11.20, Authorities, particularly, W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 99 (5th ed. 1984) and Restatement (Second) of Torts § 402A comment j (1965).

This instruction applies when the claimed defect relates to insufficient warning, as opposed to a claimed defect that relates to the manufacture or design of the product. Regarding a defect in the manufacture of the product, see NJI2d Civ. 11.21. Regarding a defect in the design of the product, see NJI2d Civ. 11.22.

There is no duty to have a warning on every product: only when without the warning, the product would be unreasonably dangerous. This instruction assumes that some warning was given and the issue is the sufficiency of that warning. This instruction may have to be adapted if: (1) no warning was given and the issue is whether there should have been some warning; or (2) some warning was given, and that warning may not have been sufficient, but, arguably, no warning was necessary in the first place. (Regarding "unreasonably dangerous," see NJI2d Civ. 11.24.)

This instruction applies when the claimed defect relates to insufficient warning. It may also apply, either as written or if adapted, when the claimed defect relates to insufficient instructions on use. That is because, in this context, instructions on use are insufficient if they do not provide sufficient warning. See *Erickson v. Monarch Indus. Inc.*, 216 Neb. 875, 887, 347 N.W.2d 99, 109 (1984); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 99 (5th ed. 1984); Restatement (Second) of Torts § 402A comment j (1965).

Downing v. Overhead Door Corp., 707 P.2d 1027, 1032-33 (Colo. App. 1985) is a typical case. *Downing* collapses any distinction between insufficient warning and insufficient instructions on use, stating that "providing instructions for the installation of the product which lack detail or specificity is no substitute for adequate warnings of the dangers possible where misuse may have disastrous results." *Id.* *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 159 (Iowa 1984) does the same thing:

A manufacturer has a *duty to give proper instructions* where failure to do so would render a product defective and unreasonably dangerous. Restatement (Second) of Torts § 402A, Comment j (1965); 72 C.J.S., *Products Liability* § 29 (Supp. 1975). The Beecks produced expert testimony that the slide was defective and unreasonably dangerous because instructions with it permitted installation where the water depth was only three feet. Experts testified that purchasers should have been instructed to install slides where the water depth was at least eight or nine feet rather than three. They calculated that

a person descending a Queen slide or a look-alike entered the water with approximately the same force as a person coming off a one-meter diving board. Such force would carry a person quickly to a depth of nine feet. The hazard, the experts stated, lies in the fact that a person using a slide, particularly for the first time, as was Beeck, would be *unaware of the danger*.

Beeck, 350 N.W.2d at 159 (emphasis added). *See also* *Lundy v. Whiting Corp.*, 93 Ill. App.3d 244, 251, 48 Ill. Dec. 752, 759, 417 N.E.2d 154, 161 (1981) (“A shortcoming in a product’s specifications is no less a defect than the failure to provide adequate instructions or warnings . . .”); *Frey v. Montgomery Ward & Co., Inc.*, 258 N.W.2d 782 (Minn.1977).

The Supreme Court has adopted the learned intermediary doctrine to a manufacturer’s liability for a warning defect in prescription drug cases. *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 571, 618 N.W.2d 827, 842 (2000). In ordinary product cases, a manufacturer’s duty to warn runs directly to the consumer of the product. Historically, prescription drugs have been treated differently. There, the duty to warn extends only to members of the medical profession, not to the consumer. This is the learned intermediary doctrine. The physician, “‘as a medical expert, . . . is in the best position to evaluate the often-complex information provided by the manufacturer concerning the risk and benefits of its drug or product and to make an individualized medical judgment, based on the patient’s particular needs and susceptibilities, as to whether the patient should use the product.’” *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 569–71, 618 N.W.2d 827, 841–42 (2000) (quoting Annot. 57 A.L.R.5th 1, 26 (1998) and adopting Restatement (Third) of Torts § 6(d) (1997)).

Regarding the state-of-the-art defense, *see* NJI2d Civ. 11.31.

Note the following:

No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.

Neb. Rev. Stat. § 25-21,181 (Reissue 2016).

NJI2d Civ. 11.24

STRICT LIABILITY OF MANUFACTURER— DEFINITION OF UNREASONABLY DANGEROUS

A product is unreasonably dangerous if it creates a risk of harm

beyond that which would be contemplated by the ordinary foreseeable user.

COMMENT & AUTHORITIES

“[S]trict liability is not a no-fault system of compensation.” *Erickson v. Monarch Indus. Inc.*, 216 Neb. 875, 890, 347 N.W.2d 99, 110 (1984) (quoting *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 806, 395 A.2d 843, 845–46 (1978)).

For strict liability to be imposed, a product must be found to be unreasonably dangerous. “‘Unreasonably dangerous’ means that the product has a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer.” *Pitts v. Genie Indus.*, 302 Neb. 88, 99, 921 N.W.2d 597, 608 (2019). *Accord* *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 829–30, 509 N.W.2d 603, 609–10 (1994) (characterizing the user as a member of “the foreseeable class of users”); *Nerud v. Haybuster Mfg., Inc.*, 215 Neb. 604, 614, 340 N.W.2d 369, 375 (1983), *overruled on other grounds by* *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 463, 412 N.W.2d 56, 82 (1987); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 484, 283 N.W.2d 25, 36 (1979); 3 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 82.06 (4th ed. 1987).

Hancock v. Paccar’s definition of unreasonably dangerous states that the product has “a propensity for causing physical harm.” *Id.* at 484, 283 N.W.2d at 37 (emphasis added; internal quotation marks omitted). At the time of that decision, the Court had held that strict liability did not extend beyond personal injury, to permit recovery for property damage, at least not where doing so would conflict with the Uniform Commercial Code. *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 559–63, 209 N.W.2d 643, 653 (1973) *disapproved on other grounds by* *Nat’l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983). Subsequent to *Hancock v. Paccar*, the Court extended strict liability to include, at least, damage to the defective product itself. *Nat’l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 787–89, 332 N.W.2d 39, 43–44 (1983). This is discussed further in the Comment & Authorities to *NJI2d Civ. 11.20.*

“Whether the product is in a defective condition and is unreasonably dangerous to its user are generally questions of fact.” *Pitts*, 302 Neb. at 99, 921 N.W.2d at 609 (footnoting *Rahmig*, 226 Neb. at 441, 412 N.W.2d at 69).

“A product is not . . . unreasonably dangerous merely because it is possible to be injured while using it.” 3 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 82.06 (4th ed. 1987). *See generally* Restatement (Second) of Torts § 402A comment i (1965). (This is also the sense of the final sentence of Instruction No. 25 from *Erickson v. Monarch Indus.* Though the court did not reprint that instruction in its opinion, it did approve the instruction “when read as a whole” with

other specified instructions. *Erickson v. Monarch Indus.*, 216 Neb. at 883, 347 N.W.2d at 107.)

In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.

Rahmig, 226 Neb. at 438, 412 N.W.2d at 67–68. “In a strict liability cause of action it is generally proposed that the focus of the court's inquiry should be on the product itself and not the manufacturer. Thus, a finding that the product poses an unreasonable risk of danger is sufficient.” *Nerud*, 215 Neb. at 611, 340 N.W.2d at 374, *overruled on other grounds by Rahmig, supra*. “The central question in any claim based on strict liability in tort is whether the product was defective.” *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 119, 903 N.W.2d 432, 447 (2017). *Accord* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 99 (5th ed. 1984).

The Nebraska Supreme Court has stated the following about unavoidably unsafe products:

“Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably dangerous* The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.”

. . . .

... An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared, compounded, packaged, and distributed, and accompanied by proper approved directions and warnings, as a matter of law, is not defective nor unreasonably dangerous, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions thereof.

McDaniel v. McNeil Labs., Inc., 196 Neb. 190, 198–201, 241 N.W.2d 822, 827–28 (1976) (quoting Restatement (Second) of Torts § 402A comment k (1965)), *overruled in part* *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 563, 577, 618 N.W.2d 827, 837, 845 (2002)).

That is to say, “[s]ometimes a product cannot be made reasonably safe, but it is nevertheless desirable that the product be manufactured and distributed because of its utility. In such cases, it is the obligation of the manufacturer to give appropriate warnings of any dangerous condition which is likely to be encountered.” 3 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 82.09 (4th ed. 1987). Both the above instruction and NJI2d Civ. 11.23 take care of this point: A necessarily unsafe product with an adequate warning does not have “a tendency to cause physical harm beyond what would be anticipated by a reasonable member of the foreseeable class of users of the product,” for the warning limits the anticipation of the reasonable user.

Freeman v. Hoffman-La Roche, Inc., 260 Neb. 552, 563, 618 N.W.2d 827, 837 (2000) overrules “*McDaniel* to the extent that it applies comment *k* to provide a blanket immunity from strict liability for prescription drugs.” Instead, after *Freeman*, comment *k* is to

be applied on a case-by-case basis and as an affirmative defense in cases involving prescription drug products. Under this rule, an application of the comment does not provide a blanket immunity from strict liability for prescription drugs. Rather, the plaintiff is required to plead the consumer expectations test, as he or she would be required to do in any products liability case. The defendant may then raise comment *k* as an affirmative defense. The comment will apply to except the prescription drug product from strict liability when it is shown that (1) the product is properly manufactured and contains adequate warnings, (2) its benefits justify its risks, and (3) the product was at the time of manufacture and distribution incapable of being made more safe.

Freeman, 260 Neb. at 568, 618 N.W.2d at 840 (the court expressly rejects the approach of Restatement (Third) of Torts § 6 (1997)).

See NJI2d Civ. 11.21, Comment & Authorities. See also NJI2d Civ. 11.20, Authorities.

NJI2d Civ. 11.25**STRICT LIABILITY OF MANUFACTURER—MISUSE
AS A DEFENSE****A. ISSUES**

In defense to the plaintiff's claim, the defendant claims that the plaintiff misused the (product) (here insert a statement of the claimed misuse).

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with this claim that the plaintiff misused the (product), the burden is on the defendant to prove by the greater weight of the evidence each and all of the following:

1. That the plaintiff used the (product) (in one or more of the ways, as) claimed by the defendant;
2. That the defendant could not reasonably have foreseen such a use of the product; and
3. That this misuse by the plaintiff was a proximate cause of (his, her, its) own (injury, damage).

C. EFFECT OF FINDINGS

If the defendant has met this burden of proof, then your verdict must be for the defendant[, and this is true even if you find that the plaintiff has met (his, her, its) burden of proof].

If the defendant has not met this burden of proof, you must disregard the defense of misuse.

COMMENT & AUTHORITIES**I. IN GENERAL**

This instruction applies in cases of strict liability; it does not apply in negligence cases. Regarding misuse in negligence cases, *see* NJI2d Civ. 11.12. If both negligence and strict liability are in issue, and if this instruction (NJI2d Civ. 11.25) is given, make sure that it refers to the strict liability issue only. More generally, if there is more than one the-

ory of recovery and this defense applies to some but not all of these theories, then make sure this instruction reflects that fact.

Specific examples of misuse include “[f]ailure to follow plain and unambiguous instructions.” *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 887, 347 N.W.2d 99, 109 (1984). Where doing so aids clarity, subparagraph 1 of part B of this instruction may be rewritten to state the specific facts the jury must find in order to find misuse. For example, using the statement from *Erickson*, that part of the instruction could be rewritten as follows:

“1. That the plaintiff failed to follow plain and unambiguous instructions regarding the use of the product.”

Although the Committee is not absolutely certain, it seems that in order to constitute an affirmative defense to strict liability, misuse need only be “a” proximate cause of the plaintiff’s damage, and not “the” proximate cause. In many ways, misuse seems to be a specialized application of assumption of risk. When, with knowledge of the danger, you voluntarily expose yourself to that danger, then you assume the risk. Failure to follow plain and unambiguous instructions is a form of voluntary exposure to whatever danger is inherent in such failure to follow instructions. And, though a user may not have specific knowledge of a particular risk, he or she bears the burden of not having discovered the risk if it was to be found in the instructions. And assumption of the risk is a defense if it was “a” proximate cause of the plaintiff’s damage. NJ12d Civ. 2.02B. That misuse need only be “a” proximate cause is supported by the treatment of the issue in other jurisdictions. For example, Wisconsin’s pattern instruction says that if the plaintiff misuses a product “and as a result thereof sustains injury or damage, then there is no breach of warranty.” WJI-Civ. 3207 (1981). (If the Committee is wrong, change “a proximate cause,” in Part B, subparagraph 2 of the instruction, to “the proximate cause” and do not use the bracketed clause in Part C of the instruction.)

The cases make it clear that misuse is a defense to an action in strict liability. See *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 885, 347 N.W.2d 99, 108 (1984), quoted in the Authorities, below. The *Erickson* trial court instructed the jury that a manufacturer “cannot be held liable for the failure of others to take advantage of or follow [its] instructions.” Instruction No. 30 from *Erickson*. It also instructed the jury that if the plaintiff’s injury resulted from misuse of the product, “then the plaintiff cannot recover If you determine that the [product] was being misused, your verdict will be in favor of the defendants . . . and against the plaintiff.” Instruction No. 34 from *Erickson*. “We find no error in [either] of these instructions.” *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 885, 347 N.W.2d 99, 108 (1984). It seems that misuse is a complete affirmative defense, much in the nature of assumption of the risk. It is not an aspect of contributory negligence and, therefore, not a situation calling for the comparison of the negligence of

the plaintiff and the defendant. Regarding misuse as but one aspect of contributory negligence, *see* NJI2d Civ. 11.12, Comment & Authorities.

For the general instruction on the issues and the burden of proof in this area of strict liability of manufacturers, *see* NJI2d Civ. 11.20, and its Comment and Authorities.

II. MISUSE IS A DEFENSE TO STRICT LIABILITY

Misuse is an affirmative defense to a strict liability theory of recovery. The Supreme Court made this perfectly clear in *Jay v. Moog Auto.*, 264 Neb. 875, 652 N.W.2d 872 (2002).

■ *Hawkins Const. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds by* Nat'l Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983), distinguished between contributory negligence and misuse: "[T]raditional 'contributory negligence' . . . is not a defense to a suit in strict tort. . . . Assumption of risk and misuse of the product are." *Hancock* and *Erickson* (*see below*) picked up on this part of *Hawkins* and restated the rule that misuse is a defense to a suit in strict tort.

■ Subsequently, Neb. Rev. Stat. § 25-21,185 (Reissue 2016) became effective. It applied to causes of action accruing before February 8, 1992). It is the comparative negligence statute applicable to causes of action that accrue before February 8, 1992. Though it does not mention the subject of this instruction, misuse, and therefore likely has no effect on whether misuse is an affirmative defense to a suit in strict tort, § 25-21,185 did change part of what was said in *Hawkins*: Section 25-21,185 made contributory negligence a defense to strict liability in tort.

■ More recently, Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016) became effective. It is the currently applicable comparative negligence statute. It applies to causes of action that accrue on or after February 8, 1992. Under this statute, neither contributory nor comparative negligence is a defense to a cause of action in strict liability. *Shipler v. General Motors Corp.*, 271 Neb. 194, 209-20, 710 N.W.2d 807, 824-31 (2006) (interpreting and applying Neb. Rev. Stat. §§ 25-21, 185.07 to 25-21,185.12 (Reissue 2016)). This does not seem to change rule from *Hawkins*, *supra*, but rather to take the law right back to it.

The Supreme Court has specifically affirmed that misuse still is a defense to a strict liability theory of recovery. *Jay*, 264 Neb. at 885-86, 652 N.W.2d at 882-83 ("[B]oth prior and subsequent to the 1992 statutory amendments . . . misuse of the product is a defense to a strict liability theory of recovery." *Id.*) It seems that both before and after the 1992 amendments just cited, misuse as an affirmative defense to strict liability is left in the hands of the common law.

"A seller is not liable when he delivers a product in a safe condition and subsequent mishandling or other causes make it harmful by the

time it is consumed." *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 888, 347 N.W.2d 99, 109 (1984). *See also Hawkins Constr. Co., supra*; *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect. A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect. Thus, misuse is not an aspect of assumption of risk.

Rahmig v. Mosley Mach. Co., 226 Neb. 423, 450, 412 N.W.2d 56, 74 (1987) (citations omitted).

It seems that misuse is a complete affirmative defense, much in the nature of, but not an aspect of, assumption of the risk. And, as discussed above, it is not an aspect of contributory negligence and, therefore, not a situation calling for the comparison of the negligence of the plaintiff and the defendant.

In a negligence-liability case against a manufacturer or supplier the defense of misuse is but one aspect of contributory negligence. This is discussed at NJI2d Civ. 11.12, Comment & Authorities.

Also see generally W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 102 (5th ed. 1984).

NJI2d Civ. 11.26

STRICT LIABILITY OF MANUFACTURER—KNOWN DEFECTS AS A DEFENSE

In connection with the claim that the plaintiff knew (here insert a statement expressing the claim that the plaintiff knew of the claimed defect), the burden is on the defendant to prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff knew of and understood the danger;
2. That the plaintiff voluntarily and unreasonably exposed (himself, herself, itself) to that danger; and
3. That the plaintiff's (injury, damage) occurred as a result of (his, her, its) exposure to that danger.

COMMENT & AUTHORITIES

Product liability law does not obligate a user of a product to make

an inspection to uncover an unknown defect: "It is not incumbent upon a plaintiff to discover a defect." *Hancock v. Paccar*, 204 Neb. 468, 488, 283 N.W.2d 25, 39 (1979). When, however, the existence of a defect in a product is known to the plaintiff prior to an accident and injury, there is no basis for recovery under a doctrine of strict liability. *Waegli v. Caterpillar Tractor Co.*, 197 Neb. 824, 826, 251 N.W.2d 370, 372 (1977).

The *Waegli* case makes it clear that there can be no recovery in strict liability where, prior to the injury, the plaintiff was aware of the defect. It does not make it clear whether knowledge of the defect is an affirmative defense. Here is what *Waegli* says:

In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), this court held that as a condition of a recovery under the doctrine of strict liability the 'plaintiff was unaware of the claimed defect.' This holding has been criticized, *NJI* (1975 P.P.), Comment § 11.20, p. 60, but to the effect that the knowledge of plaintiff to the claimed defect more properly ought to be an affirmative defense. We make no determination of that issue, but simply point out that in either circumstance, *Waegli* was conclusively shown to have knowledge of the claimed defect, *i.e.*, the absence of a parking brake. The doctrine of strict liability is not applicable.

Waegli, 197 Neb. at 826, 251 N.W.2d at 372.

Two years after *Waegli*, the court shed further light on this subject. *Hancock*, 204 Neb. at 485-86, 283 N.W.2d at 38, makes it clear that the burden of proving knowledge of the defect is on the defendant. *See also* *Brookins v. Sargent Indus., Inc.*, 717 F.2d 1201, 1204 (8th Cir.1983). This does not necessarily mean that knowledge of the defect is a separate affirmative defense; it could, for example, be an aspect of either the affirmative defense of contributory negligence or the affirmative defense of assumption of risk. (Contributory negligence no longer is a defense to actions in strict liability. *See NJI2d Civ. 11.20, Comment. Assumption of risk is a defense to a strict liability action. See NJI2d Civ. 11.20, Comment.*)

Thus, the question of how to treat knowledge of the defect does not have a definitive answer. It is the opinion of the Committee that knowledge of the defect is an aspect of assumption of risk, and *NJI2d Civ. 2.02B* is the applicable jury instruction. The Committee does not believe that knowledge of the defect would constitute a complete defense to a strict liability action—not knowledge alone, without some element of voluntary exposure to the danger and proximate cause. And this—"knew and understood the danger; . . . voluntarily exposed [him- or herself] to that danger; and [proximate cause]"—is the definition of assumption of risk. *NJI2d Civ. 2.02B*. (If knowledge of the defect is not an aspect of assumption of risk, then the Committee believes it is an aspect of contributory negligence, in which case *NJI2d Civ. 2.02A* will apply. It is also possible that knowledge of the defect could be an element of misuse; in which case *see NJI2d Civ. 11.25*.)

Devitt and Blackmar, lends some support to the Committee's conclusion that knowledge of the defect is an aspect of assumption of risk. It includes the knowledge of defect cases in the Note to its "Assumption of Risk"—"Obvious Danger" instruction. E. Devitt and C. Blackmar, 3 Federal Jury Practice and Instructions § 82.11 (4th ed. 1987). Relevant to, but not answering the question, the Restatement (Second) of Torts § 402A comment n (1965) states: "[T]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense . . . in . . . cases of strict liability."

For these reasons, this instruction is almost identical to NJI2d Civ. 2.02B. The difference is the addition to part B(2) of the words "and unreasonably." Those words are added because they are part of the rule of Restatement (Second) of Torts § 402A comment n (1965) and comment n is cited as authority in *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds by Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983). This difference may be accounted for by reason of the fact that under NJI2d Civ. 2.02B, conduct is on trial, whereas under NJI2d Civ. 11.26, a product is on trial.

D. GENERAL INSTRUCTIONS— NEGLIGENCE OR STRICT LIABILITY

NJI2d Civ. 11.30

LIABILITY OF MANUFACTURER—SALE BY DEFENDANT, TO PLAINTIFF, NOT REQUIRED

Recommend no separate instruction.

COMMENT & AUTHORITIES

The defendant's duty, if any, is not changed by the fact that the defendant did not supply the product in question directly to the plaintiff or the person using the product when the plaintiff was allegedly injured.

Liability extends "not only [to] the vendee but also all persons whose right or privilege to use the article is derived from him, unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use. Unless the article is made to special order for the peculiar use of a particular person, the manufacturer must realize the chance that it may be sold [The manufacturer is liable to] any person to whom the vendee sells or gives the chattel, or to whom such subvendee or donee sells or gives the chat-

tel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its use.”

Restatement [(Second) of Torts § 395] at Comment h at 329–30 [(1965)].

This same liability extends to a person whose property has been damaged, and that person “may . . . recover from such manufacturer for damages to his property caused by [the manufacturer’s] negligence in the same manner that such a remote vendee or other third person may recover for personal injuries.”

Rose v. Buffalo Air Serv., [170 Neb. 806, 828–29, 104 N.W.2d 431, 444 (1960)].

Morris v. Chrysler Corp., 208 Neb. 341, 344, 303 N.W.2d 500, 503 (1981). *See also* 3 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 82.07 (4th ed. 1987).

As stated in the above quotation, this is the general rule “unless the nature of the article or the conditions of the sale make it improbable that the article will be resold by the vendee or that he will permit others to use it or to share in its use [or u]nless the article is made to special order for the peculiar use of a particular person.” *Morris v. Chrysler Corp.*, *supra*. If there is sufficient evidence of this kind, then the instruction will have to be rewritten to handle that issue.

NJI 11.20 (pocket part, 1975) says: “[*Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971)] held that the person injured does not have to be the buyer, since the plaintiff in that case was a passenger in the car.” On the other hand, the Restatement (Second) of Torts § 402A (1965) says: “The Institute expresses no opinion as to whether the rules stated [in the above instruction] may not apply . . . to harm to persons other than users or consumers.” The Committee, likewise, expresses no opinion regarding whether these rules apply to harm to persons other than users or consumers.

Within limits stated in cases discussed at NJI2d Civ. 9.04, Nebraska law allows bystander recovery for the negligent infliction of emotional distress. Query, what effect does this have on recovery against a manufacturer or supplier? Regarding bystander recovery for negligent infliction of emotional distress, *see generally* NJI2d Civ. 9.04.

The Committee recommends no separate instruction on this point, believing that the general rule is adequately covered in the statement of the case instruction (NJI2d Civ. 11.20 for strict liability and NJI2d Civ. 2.01 for negligence liability) plus, in a negligence case, the “duty” instructions (NJI2d Civ. 11.10 and 11.11).

NJ12d Civ. 11.31

**LIABILITY OF MANUFACTURER OR SUPPLIER—
THE “STATE OF THE ART” DEFENSE**

In defense to the plaintiff's claim that the (design, testing, labeling) of the (product) was defective, the defendant claims the (design, testing, labeling) of the (product) conformed with the state of the art.

In connection with this defense, the burden is upon the defendant to prove, by the greater weight of the evidence, that the (design, testing, labeling) of the (product) conformed with the generally recognized and prevailing state of the art in the industry (if the date of the first sale to one not engaged in the business of reselling such products is not in issue, then here insert the word “on” followed by that date; otherwise insert the words “. . . at the time you find that the (product) was first sold by the defendant [to any person not engaged in the business of selling such (product)]”). “State of the art” means the best technology reasonably available at the time.

If the defendant has proved this defense by the greater weight of the evidence, then (he, she, it) is not liable for any defect in the (design, testing, labeling) of the product [and your verdict will be for the defendant].

COMMENT

The instruction on state-of-the-art is the same whether the case is in negligence or strict liability.

The instruction says: “(if the date of the first sale to one not engaged in the business of reselling such products is not in issue, then here insert the word ‘on’ followed by that date; otherwise insert the words ‘. . . at the time you find that the (product) was first sold by the defendant [to any person not engaged in the business of selling such (product)]’).” If there is an agreed upon date, select the first of the two alternatives; if the relevant date is a question of fact, use the second of the alternatives, using the bracketed part only if the issue stated therein is in the case. “(Product)” calls for the insertion of identification of the specific product that is the subject of the litigation, that is, for example, insertion of words designating the very automobile involved, rather than the first one sold of that make and model.

The final clause of the final paragraph of the instruction is bracketed for these reasons. If the claim in question in this instruction is the only claim in the case, then it controls the verdict and the bracketed material should be included in the instruction actually given

to the jury. If the claim in question is not the only one in the case, and the jury could find that the defendant proved the defense of state-of-the-art and yet still return a verdict for the plaintiff, then this bracketed clause should not be included in the instruction to the jury.

Frumer and Friedman say that “[t]he overwhelming majority of courts” do not treat state-of-the-art as an affirmative defense; rather, they treat it as “merely one factor to consider in assessing the manufacturer’s due care.” 1A L. Frumer & M. Friedman, *Products Liability* § 2.26[(8)][e][I] (1998). They go on to suggest, however, that this distinction may be more a technical, theoretical distinction than anything else, for the admission of this evidence “may have the same practical result” as though it were an affirmative defense. *Id.* at § 12.07[5][b]. In Nebraska, “state of the art” is a defense. *See the Authorities, below.*

Nebraska’s statute makes no mention of industry standards. Nonetheless, the distinction between state of the art and industry standards is important because state of the art is often confused with “then existing standards of the industry.” *Id.*, at § 12.07[2][a]. The Supreme Court of Nebraska has warned of this very same confusion:

While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively that state of the art. Obviously, the inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined.

Hancock v. Paccar, Inc., 204 Neb. 468, 479–80, 283 N.W.2d 25, 35 (1979).

Industry standards are the customary ways of providing for the quality and safety of the same or similar products, in the same or a similar industry. The distinction between “state of the art” and “industry standards” is the difference between the customary way of doing things in the industry and the best practical way of doing things in the industry. Regarding the definition of state of the art, *see* 1A L. Frumer & M. Friedman, *Products Liability* § 2.26[8][b][1] (1998); regarding “industry standards”, *see id.*, vol. 1A & 2, § 2.03 & 3.04[5].

Regarding “standards of performance” and the need for expert testimony when they are not obvious to a lay person, *see Delgado v. Inryco, Inc.*, 230 Neb. 662, 667, 433 N.W.2d 179, 183 (1988).

Regarding state-of-the-art and the rule against the admission of evidence of subsequent remedial measures, *see* Rule 407 of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-407 (Reissue 2016), and *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 444–49, 412 N.W.2d 56, 71–73 (1987). *And see* NJI2d Civ. 11.20, Comment & Authorities VI(B).

In *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir.1988) the trial court applied Nebraska law and gave a state-of-the-art instruction that included this: [I]f there is "evidence . . . tending to show that a certain danger is associated with the use of a product, the manufacturer may not ignore or discount that information in drafting its warning solely because it finds it to be unconvincing." *Id.* at 1472. The Tenth Circuit reversed, stating that "[a] state-of-the-art defense is provided to benefit defendants, not plaintiffs. It should not be construed to have the effect of tightening rather than relaxing Nebraska's standards governing failure to warn." *Id.* at 1473. The trial court's instruction had the effect of undermining the state-of-the-art defense and "is prejudicially flawed." *Id.*

AUTHORITIES

In 1978, the Unicameral said that "state of the art" is an affirmative defense in a products liability case based on negligent design.

In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

Neb. Rev. Stat. § 25-21,182 (Reissue 2016). *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 501-02, 618 N.W.2d 637, 647 (2000) (must be supported by the pleadings and the evidence; insufficient evidence here to warrant jury instruction on state of the art).

In 1983, the court said: "Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, [plaintiffs] case in negligence based upon a defective design must fail." *Nerud v. Haybuster Mfg. Inc.*, 215 Neb. 604, 613, 340 N.W.2d 369, 375 (1983) *overruled on other grounds by* *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 463, 412 N.W.2d 56, 82 (1987). And: the plaintiff "must show that there was some practicable way in which the product could have been made safer." *Id.*, at 614-15, 340 N.W.2d at 375. In 1984, the court said that "state of the art" is an affirmative defense. *Erickson v. Monarch Indus., Inc.*, 216 Neb. 875, 885, 347 N.W.2d 99, 108 (1984).

In 1987, the court said: "[I]nsofar as *Nerud v. Haybuster Mfg.* . . . requires that 'a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer,' *Nerud v. Haybuster Mfg.*, *supra*, is disapproved and overruled." *Rahmig*, 226 Neb. at 463, 412 N.W.2d at 81.

In *Erickson*, 216 Neb. at 885, 347 N.W.2d at 108, the court approved the trial court's instruction on the state-of-the-art defense. This instruction is based on the instruction given in that case.

Regarding state of the art, "[t]he question . . . is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done." *Nerud*, 215 Neb. at 612, 340 N.W.2d at 374, overruled on other grounds by *Rahmig*, *supra* (quoting *Hancock v. Paccar, Inc.*, 204 Neb. 468, 480, 283 N.W.2d 25, 35 (1979)). The question is whether the manufacturer is employing "the best technology reasonably available at the time." *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 841, 509 N.W.2d 603, 616 (1994).

See generally Zimmerman, Products Liability: Article 3, "Experts and the State of the Art" (NCLE, Inc. 1984). See also the Comment, *supra*.

E. LIABILITY FOR BREACH OF WARRANTY UNDER THE UNIFORM COMMERCIAL CODE

NJI2d Civ. 11.40

BREACH OF EXPRESS WARRANTY—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of breach of express warranty], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant sold the (here insert word(s) identifying the goods in question);
2. That the defendant expressly warranted (here insert the express warranty claimed by the plaintiff);
3. That the plaintiff is a (person, party) who could have been expected to use, consume, or be affected by the (goods);
4. That the (goods) (did not conform to the warranty, were not in compliance with the warranty, were not as they were warranted to be, failed to perform as warranted, et cetera);
5. That, within a reasonable time after the plaintiff discovered [or should have discovered] the breach, (he, she, it) gave the defendant notice of breach;

6. That the (breach of this warranty, noncompliance with this warranty, failure of the goods to perform as warranted) was a proximate cause of some damage to the plaintiff; and

7. The nature and extent of that damage.

COMMENT

This is the Burden of Proof part of the Statement of the Case instruction for breach of express warranty. For the Issues and Effects of Findings parts, use NJI2d Civ. 2.01 as a model. *See also* NJI2d Civ. 11.20.

This instruction is written for use where the transaction from which the express warranty allegedly arose was a sale. Subparagraph number 1 of the instruction states that “the plaintiff must prove, by the greater weight of the evidence, . . . [t]hat the defendant sold the [goods].” The transaction in question does not have to be a sale. If it is not, the above quoted part of the instruction will have to be changed.

Subparagraph number 5 of the instruction states “[t]hat within a reasonable time after the plaintiff discovered [or should have discovered] the breach, (he, she, it) [must have given] the defendant *notice of breach*.” It does not say what breach must be the subject of the notification, *i.e.*, must the notification relate to the breach under litigation, or does notification of one breach of warranty protect the plaintiff, satisfy the plaintiff’s notification requirements, regardless of the exact nature of the breach that is the subject of the litigation? It seems that the latter is true. The U.C.C. states: “[T]he buyer must within a reasonable time after he discovers or should have *discovered any breach* notify the seller of breach or be barred from any remedy.” Neb. U.C.C. § 2-607(3)(a) (Reissue 2008) (emphasis added). The U.C.C. does not say that the notification must specifically relate to the particular breach under litigation. In fact, comment 4 to this section of the Code says: “The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched.” This indicates that the notification need not relate to the specific breach under litigation. The Committee has quoted the language of the statute in the instruction because of the Committee’s uncertainty regarding the exact meaning of that part of the U.C.C. It may be that the Nebraska Supreme Court will interpret this part of the U.C.C. in some way that will allow this part of the instruction to be rewritten so that its statement of the law is more exact.

For the definition of express warranty, *see* NJI2d Civ. 11.41. This instruction, *i.e.*, NJI2d Civ. 11.40, should be given in conjunction with NJI2d Civ. 11.41.

Before turning to the question of whether there were breaches of express and implied warranties, we turn to the

question of whether the transaction upon which suit was brought was a "sale of goods" within the meaning of the Uniform Commercial Code or, rather, was a contract for the rendering of "services." . . . The cases are uniform in holding that the U.C.C. applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the U.C.C. do not apply.

The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.

Mennonite Deaconess Home and Hosp., Inc. v. Gates Eng'g Co., Inc., 219 Neb. 303, 307-08, 363 N.W.2d 155, 160 (1985). *Accord* *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 482-83, 390 N.W.2d 536, 542-43 (1986), (primary purpose was the rendition of service; the U.C.C. did not apply, and the court found an express common-law warranty).

Regarding express warranties created by advertisements, *see* NJI2d Civ. 11.41, Comment.

Regarding the "Manufacturer's Warranty Duties" statutes, also known as the Warranty Act and the Lemon Laws, *see* Neb. Rev. Stat. § 60-2701, *et seq.* (Reissue 2010); *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 565, 209 N.W.2d 643, 654 (1973), *disapproved on other grounds by* *Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983), the Court found that statements made in advertising brochures "regarding specific performance capabilities . . . constitute[d] express warranties as a matter of law."

As always, use only those paragraphs of this instruction as are put in issue by the pleadings and the evidence. If only a few of the paragraphs will be given, then it might be preferable to refashion the instruction. For example, if the only claim in the case is breach of an express warranty and paragraphs numbered 1, 2, 3, and 5 are not in issue, the instruction might be redone as follows:

"Before the plaintiff can recover against the defendant, (he, she, it) must prove by the greater weight of the evidence that the (goods) the defendant sold to (him, her, it) did not perform as the defendant had expressly warranted they would; that this breach of warranty was the proximate cause of some damage to the plaintiff; and the nature and extent of that damage."

Regarding the statute of limitations, *see* Neb. U.C.C. § 2-725 (Reissue 2008) and J. White and R. Summers, Uniform Commercial Code § 11-9 (4th ed. 1995). Regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D, Comment & Authorities, and cross-references therein.

The Supreme Court has merged the theories of recovery for breach of implied warranty and for strict liability for design and manufacturing defects. This is discussed at NJI2d Civ. 11.42. Because one is based on a contractual theory and the other a tort theory, there is no merger between breach of express warranty and strict liability.

AUTHORITIES

I. IN GENERAL

At the outset, one should understand how a warranty lawsuit looks to a plaintiff's lawyer and how it differs from a suit against an "insurer" on the one hand and an allegedly negligent defendant on the other. If an insurance company insures against the loss of an arm, all the claimant need do to recover is show the bloody stump. If the same claimant wishes to recover in warranty from the seller of the offending chain saw, he has a much tougher case to prove. Once the plaintiff has proven his injury, specifically, the loss of his arm, his troubles are just beginning. First, he must prove that the defendant made a warranty, express or implied, under [§§ 2-313, 2-314, or 2-315 [of the Nebraska U.C.C. (Reissue 2008)]. Second, he must prove that the goods did not comply with the warranty, that is, that they were defective at the time of the sale. Third, he must prove that his injury was caused, "proximately" and in fact, by the defective nature of the goods (and not, for example, by his careless use of the saw). Fourth, he must prove his damages. Finally, the warranty plaintiff must fight off all sorts of affirmative defenses such as disclaimers, statute of limitations, privity, lack of notice [which, in Nebraska, however, seems to be a part of the plaintiff's case, rather than an affirmative defense; *see* the discussion below], and assumption of the risk. [At this point, footnote 6 reads as follows: "If the seller has given an express written warranty, the Magnuson-Moss Act [a.k.a., Consumer Product Warranties Act, 15 U.S.C. §§ 2301-2312 (1982)] curtails his ability to disclaim any implied warranties or take advantage of a privity defense."]

J. White and R. Summers, Uniform Commercial Code § 9-1 at 478 (4th ed. 1995). In the interest of completeness, the Committee notes a second federal statute that may be relevant in product liability cases, the Consumer Product Safety Act, 15 U.S.C.A. §§ 2051-2089 (2010).

In order for a plaintiff to recover for breach of express warranty,

the plaintiff “must show . . . that ‘the goods did not comply with the warranty, that is, that they were defective.’” *Delgado v. Inryco*, 230 Neb. 662, 666–67, 433 N.W.2d 179, 183 (1988). Thus, where no evidence is provided to show that a defect in a product caused the plaintiff’s damages, he or she cannot recover for breach of warranty.” *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 112, 621 N.W.2d 529, 541 (2001). *Accord* *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 170, 871 N.W.2d 776, 793–94 (2015) (“Express warranty claims are not merged with implied warranty claims or strict liability claims due to the ‘dickered’ aspects of the individual bargain, but expressed warranty claims, like implied warranty theories and strict liability claims, require a showing that the goods were defective.” (footnotes omitted)).

II. PROVING DEFECTS

“The best means of proving a defect is expert testimony pointing to a specific defect. But in lieu of pleading and proving a specific defect,” there is the malfunction theory. *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 120–21, 903 N.W.2d 432, 447–48 (2017).

The malfunction theory is thoroughly discussed at *NJI2d Civ. 11.20*, *Comment & Authorities*, part VII.

On two somewhat related matters, regarding *res ipsa loquitur*, see *NJI2d Civ. 2.13* and regarding the general rule that negligence is never presumed from the fact of an accident or injury, see *NJI2d Civ. 2.01*.

III. DAMAGES

Regarding damages, see *particularly*, *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 248–51, 461 N.W.2d 55, 65–66 (1990); *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 28–29, 237 N.W.2d 92, 97 (1975). See also *J. White and R. Summers*, *Uniform Commercial Code* ch. 10, at 551–83 (4th ed. 1995).

IV. PRIVITY

When the non-privity plaintiff’s suit is not based upon 402A [of the Restatement (Second) of Torts] or implied warranty, but rather upon the defendant’s express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant. Usually courts characterize such cases as express warranty cases The [express warranty] may come through the defendant’s advertising, through labels attached to the product, or through brochures and literature about the product. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation.

J. White and R. Summers, *Uniform Commercial Code* § 11-7, at 597–98 (4th ed. 1995).

This is Nebraska's rule, *i.e.*, that to recover under breach of express warranty a plaintiff need not be in privity with the defendant. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 45–46, 302 N.W.2d 655, 664 (1981); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 564, 209 N.W.2d 643, 654 (1973), *disapproved on other grounds by Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983). *Accord Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 483, 390 N.W.2d 536, 543 (1986) (express common-law warranty). Subparagraph number 3 of the instruction assumes, however, that Nebraska law does require that the plaintiff “be a party whom the defendant could expect to act upon the representation.” See the final part of the indented quotation, immediately *supra*.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by a breach of the warranty. A seller may not exclude or limit the operation of this section.

Neb. U.C.C. § 2-318 (Reissue 2008). The final sentence of this section is not meant to preclude the seller from limiting his or her warranties to the buyer. Rather, it is meant to forbid extending such a warranty to the buyer while excluding the persons listed. (It deals with horizontal privity. “The ‘horizontal’ non-privity plaintiff is not a buyer within the distributive chain but one who consumes or uses or is affected by the goods.” J. White and R. Summers, Uniform Commercial Code § 11-2, at 585 (4th ed. 1995).) “Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on [vertical privity].” Neb. U.C.C. § 2-318, comment 3 (1992). (“The vertical non-privity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant.” J. White and R. Summers, Uniform Commercial Code § 11-2 (4th ed. 1995).) Nebraska case law on the subject includes the *Koperski* and *Hawkins* cases, cited above. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F.Supp. 1069, 1087–89 (D.Neb.1976), *repudiated by Mann v. Weyerhaeuser Co.*, 703 F.2d 272, 275 n.5 (8th Cir. 1983) (noting *Omaha Pollution Control's* treatment of vertical privity may not be in line with later interpretations of the Nebraska Supreme Court), also contains an extensive discussion of this subject.

V. NOTICE OF THE BREACH

A purchaser who relies on breach of warranty must plead that he or she gave timely notice of the breach. Neb. U.C.C. § 2-607(3)(a) (Reissue 2008) (where a tender has been accepted); *Timmerman v. Hertz*, 195 Neb. 237, 245, 238 N.W.2d 220, 225 (1976). *Accord Laird v. Scribner Coop, Inc.*, 237 Neb. 532, 539–40, 466 N.W.2d 798, 804–05 (1991); *Moore v. Puget Sound Plywood, Inc.*, 214 Neb. 14, 18, 332 N.W.2d 212, 215 (1983); *Hawkins*, 190 Neb. at 554, 209 N.W.2d at 652.

[C]ourts generally hold that the plaintiff has the burden of

pleading and going forward with proof on the issues, of privity and notice, when these are legally relevant In most cases the placing of the burden will have little effect upon the outcome of the law suit, but in some it will be crucial. For example, if a court were to hold that a corporate defendant may assert the notice defense only by proving that none of its agents ever received notice, in practical effect the notice defense would become unavailable to a large corporate defendant.

J. White and R. Summers, Uniform Commercial Code § 11-1 at 584-85 (4th ed. 1995). Further regarding notice, *see* NJI2d Civ. 11.45 and the Comment and Authorities thereto.

VI. RELIANCE

This pattern instruction is for use in a U.C.C. case. There are also non-U.C.C. breach of warranty cases, that is, cases involving common-law warranties. In a case involving a common-law warranty, the Court stated that “[o]ne of the elements of a cause of action for breach of warranty is reasonable reliance.” *Washington Mut. Bank v. Advanced Clearing, Inc.* 267 Neb. 951, 953-54, 679 N.W.2d 207, 210 (2004) (citing *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 483, 390 N.W.2d 536, 543 (1986) (express common-law warranty)).

Regarding “reliance,” *see also* NJI2d Civ. 11.41, Comment.

NJI2d Civ. 11.41

EXPRESS WARRANTY DEFINED

An express warranty is created in any of the following ways:

1. If the seller makes a statement of fact or a promise to the buyer, which relates to the goods and becomes part of the basis of the bargain, that creates an express warranty that the goods will conform to the statement of fact or promise.
2. If a description of the goods is part of the basis of the bargain, that creates an express warranty that the goods will conform to the description.
3. If a sample or model of the goods is part of the basis of the bargain, that creates an express warranty that the whole of the goods will conform to the sample or model.

An express warranty may be created even if formal words such as “warranty” or “guarantee” are not used, and even if the seller does not have a specific intention to make a warranty. On the other hand, a statement of the value of the goods or a statement purporting to be the seller’s opinion or commendation of the goods, does not, by itself, create a warranty.

COMMENT

I. GENERAL COMMENTS

This instruction defines express warranty and should be given in conjunction with N.J.I2d Civ. 11.40. Use only those parts of this instruction as are appropriate under the pleadings and the evidence in the case.

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Neb. U.C.C. § 2-316(1) (Reissue 2008). *See also, id.* at comment 1 and 2.

"[A]n advertisement may create an express warranty." *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 483, 390 N.W.2d 536, 543 (1986) (express common-law warranty); *Peterson v. N. Am. Plant Breeders*, 218 Neb. 258, 263, 354 N.W.2d 625, 630 (1984) (express warranty under the U.C.C.).

See also the Comment and the Authorities to N.J.I2d Civ. 11.40 and the comment to Neb. U.C.C. § 2-316 (Reissue 2008).

II. BASIS OF THE BARGAIN

This instruction requires that promises, descriptions, samples, and so on, become "part of the basis of the bargain." That phrase is quoted from the controlling statute. Neb. U.C.C. § 2-313 (Reissue 2008). The Committee has not tried to restate "basis of the bargain" in language that might be more easily understood by a jury because it is not clear what the drafters of the statute meant by the phrase. *J. White and R. Summers*, Uniform Commercial Code § 9-5 (4th ed. 1995).

Herman v. Bonanza Bldgs., Inc., 223 Neb. 474, 390 N.W.2d 536 (1986), though a case involving an express common-law warranty, and not one under § 2-313 of the U.C.C., does shed this light on the subject: "[I]t must be determined . . . whether [the plaintiff] relied on the statements in [the defendant's] brochure such that those statements become a part of the basis of the bargain." *Id.* at 483-84, 390 N.W.2d at 543. And, later, *Herman v. Bonanza Bldgs., Inc.*, stated "that an express common-law warranty arises when, to induce a sale, the seller makes a statement of fact representing the quality or character of the thing sold, which statement is reasonably relied upon by the buyer." *Id.* at 483, 390 N.W.2d at 542-43. The common-law express warranty does not refer to "basis of the bargain," but to "reasonable reliance."

Hillcrest Country Club v. N.D. Judds Co., 236 Neb. 233, 461 N.W.2d

55 (1990), a case involving § 2-313 of the U.C.C., stated: “It has been held that since an express warranty must have been “made part of the basis of the bargain,” it is essential that the plaintiffs prove reliance upon the warranty.’” *Id.* at 241, 461 N.W.2d at 61 (citation omitted).

As noted in the Authorities to NJI2d Civ. 11.40, the Court has held that reliance is an issue in non-U.C.C. (common-law) actions for breach of expressed warranty. In U.C.C. cases “reliance” seems to enter the case not as an element of breach but as a part of the definition of the express warranty—in the “basis of the bargain” part.

In any event, when possible, restate the “basis of the bargain” part of this instruction so that the jury will more easily understand it.

AUTHORITIES

Neb. U.C.C. § 2-313 (Reissue 2008); *Mennonite Deaconess Home and Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985); *Peterson v. N. Am. Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); *England v. Leithoff*, 212 Neb. 462, 323 N.W.2d 98 (1982); *Fricke v. Hart*, 206 Neb. 590, 294 N.W.2d 737 (1980); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 548, 209 N.W.2d 643, 654–55 (1973), *disapproved on other grounds by Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39, 43 (1983).

See also *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990); *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 483, 390 N.W.2d 536, 543 (1986) (quoted in the Comment, above).

NJI2d Civ. 11.42

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of breach of implied warranty of merchantability], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant sold the (here insert word(s) identifying the specific goods in question);
2. That, at the time of the sale, the defendant was a merchant with respect to (goods) of that kind;
3. That, at the time the (goods) were (delivered, turned over, tendered, et cetera) by the defendant, they were not merchantable;
4. That, within a reasonable time after the plaintiff discovered [or should have discovered] the breach, (he, she, it) gave the defendant notice of breach;

5. That the (breach of this warranty, noncompliance with this warranty, failure of the goods to perform as warranted) was a proximate cause of some damage to the plaintiff; and

6. The nature and extent of that damage.

COMMENT

This is the Burden of Proof part of the Statement of the Case instruction for breach of implied warranty of merchantability. For the Issues and Effects of Findings parts, use NJI2d Civ. 2.01 as a model. *See also* NJI2d Civ. 11.20. For the definition of implied warranty of merchantability, *see* NJI2d Civ. 11.43.

This instruction is written for use where the transaction from which the warranty allegedly arose was a sale. If the transaction was not a sale, paragraph number 1 of the instruction will have to be changed. *See* NJI2d Civ. 11.40, Comment.

Subparagraph number 4 of this instruction requires that “within a reasonable time after the plaintiff discovered . . . the breach, (he, she, it) [give] the defendant notice of breach.” For an explanation of why the instruction says “notice of breach” instead of, for example, “notice of the breach,” *see* NJI2d Civ. 11.40, Comment.

This instruction should be given in conjunction with NJI2d Civ. 11.43.

The Supreme Court has merged the theories of recovery for breach of implied warranty and for strict liability for design and manufacturing defects. *Aimee Freeman v. Hoffman-La Roche, Inc.* 260 Neb. 552, 572–74, 618 N.W.2d 827, 842–43 (2000) (they are identical causes of action that have evolved under different tort labels). There is no merger between breach of express warranty and strict liability because one is based on a contractual theory and the other a tort theory. *Id.*

“[We have] noted the developing trend in products liability law of merging the contract theory of breach of implied warranty with tort theories based upon defects in design and manufacturing and failure to warn. We [have] found the underlying reasoning of this trend to be persuasive and therefore [have] considered allegations of breach of implied warranty as falling under the accompanying allegations of design and manufacturing defect.” *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 607, 667 N.W.2d 244, 252 (2003). *Accord Freeman v. Hoffman-La Roche, Inc.* 260 Neb. 552, 572 618 N.W.2d 827, 842–43 (2000).

All implied warranty theories of recovery and strict liability claims for manufacturing defect, design defect, or failure to warn seek to recover for a “defect.” *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 170, 871 N.W.2d 776, 794 (2015).

While a “defect” traditionally falls under the category of either a design, manufacturing, or warning defect, “defective” installation is also cognizable under the Uniform Commercial Code’s breach of warranty theories when the installation is incident to the sale; in other words, when the purchase is for a system that is dependent upon proper installation. And the user of a product may also assert a cause of action for negligent installation concurrently with actions under express and implied warranty theories.

Roskop Dairy v. GEA Farm Tech., 292 Neb. 148, 170, 871 N.W.2d 776, 802 (2015). *See also* *O’Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 119, 903 N.W.2d 432, 447 (2017) (“Defects usually fall into one of three categories: design defects, manufacturing defects, or warning defects.”.)

See also the Comment and Authorities to *NJ*2d Civ. 11.40 and the comment to Neb. U.C.C. § 2-314 (Reissue 2008).

AUTHORITIES

Neb. U.C.C. § 2-314 (Reissue2008).

“Under [§ 2-314], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind [T]o be merchantable . . . , they must [at least be] fit for the ordinary purposes for which such goods are used. Under this implied warranty, no reliance upon the seller need be shown.” *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 702, 261 N.W.2d 358, 362 (1978). Such warranty “exists ‘unless excluded or modified.’” *Wilke v. Woodhouse Ford*, 278 Neb. 800, 809, 774 N.W.2d 370, 378 (2009) (quoting the Uniform Commercial Code, Neb. U.C.C. § 2-314 (Reissue 2008)).

“To establish a breach of implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff’s injury. In order for the goods to be merchantable under § 2-314, they must be at least such as are fit for the ordinary purposes for which such goods are used.” *Mennonite Deaconess Home and Hosp., Inc. v. Gates Eng’g Co.*, 219 Neb. 303, 314, 363 N.W.2d 155, 163 (1985) (citations omitted). *Delgado v. Inryco, Inc.*, 230 Neb. 662, 668, 433 N.W.2d 179, 183 (1988); *O’Keefe Elevator Co., Inc. v. Second Ave. Props.*, 216 Neb. 170, 343 N.W.2d 54 (1984); *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), *overruled on other grounds by* *Rahmig v. Mosley Mach. Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987)); *Geiger v. Sweeney*, 201 Neb. 175, 266 N.W.2d 895 (1978); *Christensen v. E. Neb. Equip. Co.*, 199 Neb. 741, 261 N.W.2d 367 (1978); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, *supra*. *J. White and R. Summers*, Uniform Commercial Code §§ 9-7, 9-8, and 9-9 (4th ed. 1995).

“Merchant” and “merchantability” are discussed in *Laird v. Scribner Coop, Inc.*, 237 Neb. 532, 539, 466 N.W.2d 798, 804 (1991).

There is no privity requirement where a breach of implied warranty is claimed. *Moglia v. McNeil*, 270 Neb. 241, 248, 700 N.W.2d 608, 615 (2005) (within limitations stated, “the implied warranty of workmanlike performance extends in favor of subsequent [home] purchasers against contractors”); *Gables CVF, Inc. v. Bahr, Vermeer & Haecker Architect, Ltd.*, 244 Neb. 346, 357, 506 N.W.2d 706, 712 (1993); *Peterson v. N. Am. Plant Breeders*, 218 Neb. 258, 264, 354 N.W.2d 625, 630–32 (1984); *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 860, 112 N.W.2d 252, 255 (1961) (privity no longer an element in action on implied warranty of fitness of food products where they are shown to be in same condition as when left control of manufacturer). *See also* *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F.Supp. 1069, 1085–89 (D.Neb. 1976).

Under Uniform Commercial Code warranty rules, where a tender has been accepted, the plaintiff is required to give the defendant notice of the breach. Neb. U.C.C. § 2-607(3)(a) (Reissue 2008). *See* the Authorities to NJI2d Civ. 11.40 and 11.45.

NJI2d Civ. 11.43

IMPLIED WARRANTY OF MERCHANTABILITY DEFINED

To be merchantable, (goods) must:

1. Be such as would pass without objection in the trade as (goods) of the kind described [or otherwise designated];
2. In the case of (fungible, interchangeable, generic) goods, be of fair average quality for (goods) of the kind described [or otherwise designated] in the contract;
3. Be fit for the ordinary purposes for which such (goods) are used;
4. Within the variations permitted by the agreement, be of even kind, quality, and quantity, within each unit and among all of the units involved;
5. Be adequately contained, packaged, and labeled as the agreement may require; and
6. Conform to the promises or affirmations of fact made on the container or the label, if any.

COMMENT

Use only those of the numbered paragraphs of this instruction as

are appropriate to the pleadings and the evidence. When appropriate to the evidence in the case, substitute the word “assertion” or the word “statement” or the word “representation” in place of the word “affirmation.”

This instruction should be given in conjunction with NJI2d Civ. 11.42. This instruction deals with the implied warranty of fitness for “ordinary purposes” under Neb. U.C.C. § 2-314 (Reissue 2008). It does not deal with the implied warranty of fitness for a particular purpose under Neb. U.C.C. § 2-315 (Reissue 2008). The latter is dealt with in NJI2d Civ. 11.44.

“Under this section [of the U.C.C.] the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.” Neb. U.C.C. § 2-314(1) (Reissue 2008).

Subparagraph 2 of the instruction contains parentheses that offer a choice among words, including the word “fungible.” “Fungible” is the word used in the statute. In the interest of clarity, it would seem best to substitute some other word or phrase in place of “fungible,” and the Committee offers the two other words in those parentheses as possible substitutes. Another suggestion is to substitute some version of the following in place of subparagraph 2.

2. “In the case of a contract calling for the delivery not of a specific item, but of an item of a certain kind or class, the goods must be of average quality for goods of that kind or class.” Keep in mind that “fungible” is the word of the statute. When selecting a word or phrase to use in its place, take care that in the context of the case it is a proper substitute for “fungible.” (The Oxford English Dictionary quotes Austin, *Jurisprudence* (1879) for its definition of fungible: “‘When a thing which is the subject of an obligation . . . must be delivered in specie, the thing is not fungible, i.e., that very thing, and not another thing of the same or another class in lieu of it must be delivered. Where the subject of the obligation is a thing of a given class, the thing is said to be fungible, i.e., the delivery of any object which answers to the generic description will satisfy the terms of the obligation.’” 4 O.E.D. 606 (1933).)

Subparagraph 2 also speaks of goods of “fair average quality.” The words “fair average quality” are taken from the Uniform Commercial Code. Neb. U.C.C. § 2-314 (Reissue 2008). Comment 7 to that section of the statute explains: “‘Fair average’ is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass ‘without objection.’” The Committee has included the notion of “fair average quality” in the instruction in anticipation that, as words of art, they will be used by the witnesses at the trial. If that is not true, then it may be

appropriate to substitute “average” for “fair average,” on the theory that the latter would not mean anything to the jurors and the former is a fair substitute therefor.

“[Subparagraph 5 of the instruction] applies only where the nature of the goods and of the transaction require a certain type of container, package or label. [Subparagraph 6] applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation.” Neb. U.C.C. § 2-314 comment 10 (Reissue 2008).

“Unless excluded or modified . . . implied warranties [other than those specified in the instruction] may arise from course of dealing or usage of trade.” Neb. U.C.C. § 2-314 (Reissue 2008). Where that is the situation, this instruction may have to be redrafted. Exclusion or modification of the warranty of merchantability is dealt with in Neb. U.C.C. § 2-316 (Reissue 2008), which is dealt with in NJI2d Civ. 11.46.

In at least one jurisdiction, there is a special instruction regarding implied warranties and allergies of the user. WJI-Civ 3209 (Wisc. 1981). The Committee is of the opinion that no such special instruction is necessary. The instructions on implied warranty of merchantability, NJI2d Civ. 11.42 and 11.43, should adequately cover the subject. If that is not the case, then the instructions dealing with express warranty, NJI2d Civ. 11.40 and 11.41, or that dealing with implied warranties of fitness for a particular purpose, NJI2d Civ. 11.44, should adequately cover the subject.

See also the Comment and the Authorities to NJI2d Civ. 11.40 and the comment to Neb. U.C.C. § 2-314 (Reissue 2008).

AUTHORITIES

Neb. U.C.C. § 2-314 (Reissue 2008). *Mennonite Deaconess Home and Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985); *O'Keefe Elevator Co., Inc. v. Second Ave. Props.*, 216 Neb. 170, 343 N.W.2d 54 (1984); *Geiger v. Sweeney*, 201 Neb. 175, 266 N.W.2d 895 (1978); *Christensen v. E. Neb. Equip. Co.*, 199 Neb. 741, 261 N.W.2d 367 (1978); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978). *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F.Supp. 1069 (D.Neb.1976). *J. White and R. Summers*, Uniform Commercial Code §§ 9-7 and 9-8 (4th ed. 1995).

NJI2d Civ. 11.44

BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE—BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his,

her, its) claim of breach of implied warranty of fitness for a particular purpose], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant sold the (here insert word(s) identifying the specific goods in question);
2. That, when the contract for sale was made, the plaintiff purchased the (goods) for (here insert the particular purpose claimed) and the defendant had reason to know that;
3. That, when the contract of sale was made, the plaintiff was relying on the defendant's skill or judgment to (select, furnish) (goods) suitable for that particular purpose and the defendant had reason to know of this reliance;
4. That at the time the (goods) were (delivered, turned over, tendered, et cetera) by the defendant, they were not fit for the particular purpose in question;
5. That, within a reasonable time after the plaintiff discovered [or should have discovered] that the (goods) were not fit for the particular purpose in question, (he, she, it) gave the defendant notice of breach;
6. That the breach of this warranty was a proximate cause of some damage to the plaintiff; and
7. The nature and extent of that damage.

COMMENT

This is the Burden of Proof part of the Statement of the Case instruction for breach of implied warranty of fitness for a particular purpose. For the Issues and Effects of Findings parts, use NJI2d Civ. 2.01 as a model. *See also* NJI2d Civ. 11.20.

This instruction deals only with the implied warranty of fitness for a particular purpose under Neb. U.C.C. § 2-315 (Reissue 2008). It does not deal with the implied warranty of fitness for "ordinary purposes" under Neb. U.C.C. § 2-314 (Reissue 2008). The latter is dealt with in NJI2d Civ. 11.42 and 11.43.

In subparagraph number 5 of this instruction, the Committee used the words "notice of breach"; *see* the discussion of this point in the Comment to NJI2d Civ. 11.40. Regarding what amount of time is a reasonable time, *see* NJI2d Civ. 11.45.

The reader may notice that this instruction is a bit different from the other warranty instructions in this part of Chapter 11. The instruc-

tion on the burden of proof for a breach of express warranty, NJI2d Civ. 11.40, is followed by one on the definition of express warranty, NJI2d Civ. 11.41. The instruction on the burden of proof for a breach of implied warranty of merchantability, 11.42, is followed by one on the definition of implied warranty of merchantability, 11.43. This instruction, however, is not followed by an instruction on the definition of a warranty of fitness for a particular purpose: because the definition is incorporated into this burden of proof instruction, no separate instruction is required.

The Supreme Court has merged the theories of recovery for breach of implied warranty and for strict liability for design and manufacturing defects. This is discussed at NJI2d Civ. 11.42, Comment.

Nebraska has not adopted an implied warranty of habitability. *Moglia v. McNeil*, 270 Neb. 241, 249-50, 700 N.W.2d 608, 616-17 (2005).

See also the Comment and the Authorities to NJI2d Civ. 11.40 and the comment to Neb. U.C.C. § 2-315 (Reissue 2008).

AUTHORITIES

Neb. U.C.C. § 2-315 (Reissue 2008). *See also* *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 568-70, 558 N.W.2d 540, 546-47 (1997) (buyer must provide some evidence he or she had a particular purpose and seller knew of buyer's particular purpose); *Laird v. Scribner Coop, Inc.*, 237 Neb. 532, 537, 466 N.W.2d 798, 803 (1991); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 705, 261 N.W.2d 358, 365 (1978); *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 27, 237 N.W.2d 92, 97 (1975); *Larutan Corp. v. Magnolia Homes Mfg. Co.*, 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973).

"[T]he buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists." Neb. U.C.C. § 2-315 comment 1 (Reissue 2008).

The liability of the defendant for a breach of the implied warranty of fitness for the particular purpose is not affected by the fact that [at the time of the sale and delivery of the goods] the defendant was unaware [that the goods were not fit for their particular purpose]. To return to the doctrine of caveat emptor is wholly unacceptable. If the defendant desired to exclude implied warranties imposed by the Uniform Commercial Code, it could have done so.

Ruskamp v. Hog Builders, Inc., 192 Neb. 168, 177, 219 N.W.2d 750, 756 (1974). (Regarding breeding stock and trade usage as an exclusion or modification of an implied warranty of fitness for that particular purpose, *see* *Torstenson v. Melcher*, 195 Neb. 764, 769, 241 N.W.2d 103, 106 (1976).)

There is no privity requirement where a breach of implied warranty is claimed. *See* the Authorities to NJI2d Civ. 11.42.

Under Uniform Commercial Code warranty rules, where a tender has been accepted, the plaintiff is required to give the defendant notice of the breach. Neb. U.C.C. § 2-607(3)(a) (Reissue 2008). *See* the Authorities to NJI2d Civ. 11.40 and 11.45.

NJI2d Civ. 11.45

NOTICE OF BREACH OF WARRANTY

As I said in Instruction No. ____, in order to recover for breach of (here specify the kind of warranty involved or insert the word warranty), the plaintiff must prove that (he, she, it) notified the defendant of the breach, and that (he, she, it) did so within a reasonable time after (he, she, it) discovered [or should have discovered] the breach.

You must determine what amount of time is reasonable. In doing so, take into consideration the circumstances shown by the evidence in this case and the nature of the act to be done, that is, giving notice.

The notice may be oral or written. It does not have to be in any particular form and it does not have to use any particular words. Notice is sufficient if it informs the defendant of the alleged (breach of warranty, defect).

COMMENT

This instruction is not to be given in all cases, but only when there is a problem with the timing or form of the notice. When given, this instruction will accompany NJI2d Civ. 11.40, 11.42, or 11.44.

Tailor this instruction to meet the needs of the particular case. When necessary, modify the second paragraph to include any applicable notice rules from Neb. U.C.C. § 1-201(26) or (27) (Reissue 2008).

AUTHORITIES

Laird v. Scribner Coop, Inc., 237 Neb. 532, 539-40, 466 N.W.2d 798, 804-05 (1991). *See also* NJI2d Civ. 11.40, Authorities.

The Uniform Commercial Code states: "Whether a time for taking action required by the Uniform Commercial Code is reasonable depends on the nature, purpose and circumstances of the action." Neb. U.C.C. § 1-204 (Reissue 2008). The nature of the action involved in this situation is giving notice; the instruction tells the jury to take that into consideration. The instruction does not use the word "purpose": The purpose of the action is giving notice; if the action in question has a

more specific purpose, the code does not say what it is, and we have no way to tell the jury what it is. Since we have no definition of the purpose of giving notice (other than just that—giving notice), the word purpose is not in the instruction. The instruction states: “In [deciding what is a reasonable amount of time for giving notice], take into consideration the circumstances shown by the evidence in this case and the nature of the act to be done, that is, giving notice.” In the context of this instruction, that seems to be a fair interpretation of § 1-205 of the Code.

The time of notification is to be determined by applying commercial standards to a merchant buyer. ‘A reasonable time’ for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer’s rights under this article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Neb. U.C.C. § 2-607 comment 4 (Reissue 2008). Regarding the timeliness of notice, *see* J. White and R. Summers, Uniform Commercial Code § 11-10 (4th ed. 1995).

Regarding the content of notice, “[u]nder this comment, it is difficult to conceive of words which, if put in writing, would not satisfy the notice requirement of 2-607.” J. White and R. Summers, Uniform Commercial Code, *supra*, at 484. That is not to say that notification must be in writing. “The law seems well settled now that oral notification satisfies th[is] notice requirement.” *Id.* at 485.

NJI2d Civ. 11.46

IMPLIED WARRANTIES—EXCLUSION OR MODIFICATION

(What follows are two different instructions on the exclusion or modification of an implied warranty. The first alternative presents exclusion of implied warranty as an element of plaintiff’s case; the second, as an affirmative defense. For reasons explained in the Comment, it is not clear which of these instructions is a proper statement

of Nebraska law. Although the instruction is to be used in a case involving either exclusion or modification, for simplicity sake the pattern uses the word exclusion. The Comment explains how to adapt the instruction in a case involving modification.)

FIRST ALTERNATIVE—AN ELEMENT OF PLAINTIFF'S CASE

The defendant claims (here insert a statement of the claim regarding the exclusion of implied warranty).

A seller may exclude an implied warranty in any of the following ways:

1. Implied warranties are excluded by language that, as commonly understood, calls the buyer's attention to the exclusion of the warranty and makes it plain that there is no implied warranty. This includes expressions like "as is" and "with all faults."

2. When a buyer, before entering into a contract, examines (the goods, a sample or model of the goods) as fully as (he, she) desires, or refuses to examine the goods, then there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed to (him, her).

3. An implied warranty may be excluded by (a course of dealing, a course of performance, usage of the trade). A ("course of dealing", "course of performance") is defined as a series of previous dealings between the parties involved, which establishes an understanding between them for interpreting their subsequent dealings. A "usage of trade" is defined as a practice [or method of dealing] that is so regularly observed in a place, a vocation, or a trade as to justify an expectation that it will be observed with respect to the transaction in question.

4. Unless it has been excluded in one of the ways stated above, the exclusion of all or part of an implied warranty of merchantability must be done in language that mentions merchantability and, if it is in writing, in language that is conspicuous.

5. Unless it has been excluded in one of the ways stated above, the exclusion of all or part of an implied warranty of fitness for a particular purpose must be in writing and must be conspicuous.

Remember, the plaintiff has the burden of proving the terms of the warranty; that includes the burden of proving that no such exclusion existed.

SECOND ALTERNATIVE—AFFIRMATIVE DEFENSE

A. ISSUES

In defense to the plaintiff's claim (here insert a statement of plaintiff's claim), the defendant claims (here insert a statement of the claim regarding the exclusion of implied warranty).

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

The defendant has the burden of proving, by the greater weight of the evidence, (his, her, its) claim that the warranty [if necessary or helpful, here specify the warranty involved] was excluded. A warranty may be excluded in one of the following ways:

1. Implied warranties are excluded by language that, as commonly understood, calls the buyer's attention to the exclusion of the warranty and makes it plain that there is no implied warranty. This includes expressions like "as is" and "with all faults."

2. When a buyer, before entering into a contract, examines (the goods, a sample or model of the goods) as fully as (he, she) desires, or refuses to examine the goods, then there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to (him, her).

3. An implied warranty may be excluded by (a course of dealing, a course of performance, usage of the trade). A ("course of dealing", "course of performance") is defined as a series of previous dealings between the parties involved, which establishes an understanding between them for interpreting their subsequent dealings. A "usage of trade" is defined as a practice [or method of dealing] that is so regularly observed in a place, a vocation, or a trade as to justify an expectation that it will be observed with respect to the transaction in question.

4. Unless it has been excluded in one of the ways stated above, the exclusion of all or part of an implied warranty of merchantability must be done in language that mentions merchantability and, if it is in writing, in language that is conspicuous.

5. Unless it has been excluded in one of the ways stated above, the exclusion of all or part of an implied warranty of fitness for a particular purpose must be in writing and must be conspicuous.

C. EFFECT OF FINDINGS

If the defendant has proved by the greater weight of the evidence that the [claimed] warranty was excluded in one of these ways, then your verdict [on this claim] must be for the defendant[, and this is true even if you find that the plaintiff has met (his, her, its) burden of proof].

If the defendant has not met this burden of proof, you must disregard the defense of exclusion of the warranty.

COMMENT

This area of the law involves two concepts: (1) exclusion of implied warranty; and (2) modification of implied warranty. The pattern instruction that appears above is drafted for the case involving the exclusion of an implied warranty. It is easily adapted for use in a case involving modification of an implied warranty, instead of exclusion, or a case involving exclusion or modification in the alternative. If all that is involved is modification, then substitute the word "modification" for the word "exclusion." If the case involves exclusion or modification, in the alternative, then add the words "or modification" after the word "exclusion."

The Committee takes no position on the question of whether or not exclusion of an implied warranty is an affirmative defense. There is an Annotation that says: "[I]t has been said that disclaimer of warranty is an affirmative defense which the seller has the burden of pleading," and cites as its sole authority a federal district court case from Nebraska. Annot., 73 A.L.R.3d 248, 262 (1976), footnoting *Norfolk Dev. Corp. v. St. Regis Pulp & Paper Corp.*, 338 F.Supp. 1213 (D.Neb.1972). The case, however, is not really authority for the proposition for which it is cited. In the *Norfolk Dev. Corp.* case, the court did three things: (1) noted that waiver of warranty was raised at the trial, as an affirmative defense; (2) stated that had the issue been important to the outcome of the case, the court would have ignored it because it had not been pleaded; and (3) concluded that the issue had no effect on the outcome of the case. *Id.* at 1216.

There is a second Nebraska case on the subject: *Peterson v. N. Am. Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984). *Peterson* does not settle the issue either. At the trial, defendant raised "limitation of warranty" as an affirmative defense. On appeal, defendant objected to the particular wording of the affirmative defense instruction but not to its nature as an affirmative defense instruction. The court said that the defendant did not make these points at the jury instruction conference and, absent plain error, they would not be considered on appeal.

There are cases from other jurisdictions that treat exclusion of warranty as an affirmative defense, but the Committee has not found one that is very persuasive authority. The following are examples:

■ *Williams v. Gradall Co.*, 990 F.Supp. 442, 446 (E.D. Va. 1998). "A warranty disclaimer defense is an affirmative defense". *Williams* contains no analysis. It cites two cases, each of which simply states that the defendant pled disclaimer of warranty as an affirmative defense.

■ *R & L Grain Co. v. Chicago E. Corp.*, 531 F.Supp. 201, 208 (N.D. Ill.1981). "Generally, it is the burden of the party seeking to invoke a warranty exclusion to plead and prove its effect, although the parties have not presented any authority on this point." The court follows this quotation with the citation to the A.L.R.3d Annotation quoted above, which Annotation cites one case, which case does not stand for the proposition for which it is cited. *See also, e.g., Rosenberg v. Cottrell, Inc.*, No. 05-454-MJR, 2007 WL 1120242, at *1 (S.D. Ill. April 13, 2007) (stating the same proposition and citing *R & L Grain* as authority).

■ *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wash. App. 892, 896, 491 P.2d 241, 244 (1971). "A disclaimer of warranty is an affirmative defense and the burden rests with the defendant to establish it." The court does not cite any authority.

■ *Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp.*, 341 F.Supp. 968, 970 (D.Minn.1972); and *Dougall v. Brown Bay Boat Works and Sales, Inc.*, 287 Minn. 290, 297, 178 N.W.2d 217, 222 (1970). *Noel* cites *Dougall* for the proposition that, under Minnesota law, a warranty disclaimer must be treated as an affirmative defense. *Dougall* says that disclaimer of warranty is "in the nature of an affirmative defense"; it does not cite any authority.

■ *See also Balderson-Berger Equip. Co., Inc. v. Blount*, 653 S.W.2d 902, 907-08 (Tex.App.1983). In a venue hearing, where the plaintiff argued that the exclusion of the warranty was the act establishing venue in the county where he filed the suit, the court stated: "In the posture of the cause, then, the written exclusion of the pleaded warranties was not an affirmative defense; instead, the written exclusion was an integral part of the transaction Blount had to show before he could establish the cause of action pleaded."

These cases all treat exclusion of warranty as an affirmative defense, but they do it in an off-handed sort of way, with no apparent thought. In the Committee's opinion, however, the exclusion of a warranty is not necessarily in the nature of an affirmative defense. It may be in the nature of an element of the warranty. That is, it is possible that the question of the exclusion of a warranty imposes no burden on the defendant. There is nothing in the nature of exclusion that necessarily makes it inappropriate to raise the question under a general denial. It could be that exclusion of a warranty is to be treated in the same way as, for example, the argument that the proximate cause of an occurrence was the conduct of a nonparty third person. *See* NJ12d Civ. 3.44.

Absent a more definite statement of Nebraska's rule, and given the

lack of persuasive authority from other jurisdictions, the Committee takes no position on which of the two approaches set out above is the correct approach.

Whichever of these approaches is taken, use only those paragraphs of the instruction as are appropriate under the pleadings and the evidence.

See generally the comments to Neb. U.C.C. § 2-316 (Reissue 2008).

Note that Neb. U.C.C. § 2-316(3)(d) (Reissue 2008) states: “[W]ith respect to the sale of cattle, hogs, and sheep, there shall be no implied warranty that the cattle, hogs, and sheep are free from disease.” Regarding breeding stock and trade usage as an exclusion or modification of an implied warranty of fitness for that particular purpose, *see* *Torstenson v. Melcher*, 195 Neb. 764, 769, 241 N.W.2d 103, 106 (1976).

AUTHORITIES

Regarding whether exclusion of warranty is an affirmative defense, *see* the Comment, above.

Neb. U.C.C. § 2-316(2) and (3) (Reissue 2008) is authority for all of this instruction except for the definitions of “course of dealing” or “course of performance” and “usage of trade,” for which Neb. U.C.C. § 1-201 (Reissue 2008), citing U.C.C. § 1-303 (2008), is authority. “The existence and scope of . . . a usage [of trade] are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.” U.C.C. § 1-303 (2008).

In addition to the statutory sections cited, *see* *Koperski v. Husker Dodge Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981); *Pfizer Genetics, Inc. v. Williams Mgmt. Co.*, 204 Neb. 151, 281 N.W.2d 536 (1979); *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F.Supp. 1069 (D.Neb.1976).

CHAPTER 12

PROFESSIONAL MALPRACTICE

TABLE OF INSTRUCTIONS

Instruction Number	<i>Subject Matter</i>
12.01	Duty of a Health Care Provider
12.02	Patient's Duty to Follow Instructions
12.03	Informed Consent
12.04	Duty of One Rendering Professional and Skilled-Trade Services—In General

NJI2d Civ. 12.01

DUTY OF A HEALTH CARE PROVIDER

A (here insert words identifying the health care providers involved, words such as physician, hospital, et cetera) has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other (here insert same words as inserted above) engaged in a similar practice in the same or similar localities.

SPECIAL NOTE

Before using this instruction, read part II(B) of the Comment, below, which is titled "The Erosion of the Locality Rule."

COMMENT & AUTHORITIES

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 - A. THE DUTY GENERALLY
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 - D. TOLLING THE STATUTE
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- VII. ERRONEOUS JURY INSTRUCTIONS
- VIII. THE PHYSICIAN-PATIENT RELATIONSHIP
- IX. CONTRIBUTORY NEGLIGENCE
- X. SPECIALISTS
- XI. LIMITATIONS ON INDIVIDUAL LIABILITY AND ON THE TOTAL AMOUNT OF DAMAGES RECOVERABLE
- XII. IMMUNITY
- XIII. MISCELLANEA

I. THE HEALTH-CARE PROVIDER'S DUTY AND THE NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT

A. THE DUTY GENERALLY

More than anything else, this instruction is supported by The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801, *et*

seq. (Reissue 2010) and by *Burns v. Metz*, 245 Neb. 428, 432–33, 513 N.W.2d 505, 508–09 (1994), which approved NJI2d Civ. 12.01.

Generally, on this topic, see Prosser and Keeton *On the Law of Torts* § 32 (W. Keeton gen. ed. 5th ed. 1984); Restatement (Second) of Torts § 299A (1965). “The rule of the Restatement has been applied in professional malpractice cases.” *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 3, 346 N.W.2d 699, 701 (1984) (referring to Restatement (Second) of Torts § 299A (1965)).

The law requires that a doctor possess the skill and learning possessed by the average member of the medical profession in good standing in the same or similar localities and apply that skill and learning with ordinary and reasonable care. (See below, in this Comment & Authorities, for a discussion of the locality rule and its apparent erosion.) The law does not hold doctors to a standard of infallibility. They are not required to exercise the utmost degree of care or skill of which the human mind is capable. There is no “implied warranty of recovery,” that is, doctors are not liable simply because a patient does not recover; the failure to recover must be caused by some default of the doctor’s own duty. *E.g.*, *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 253, 818 N.W. 2d 589, 597 (2012); *Murray v. UNMC Physicians*, 282 Neb. 260, 266, 270, 806 N.W.2d 118, 123, 125 (2011); *Momsen v. Nebraska Methodist Hosp.*, 210 Neb. 45, 55–56, 313 N.W.2d 208, 214 (1981); *Anderson v. Moore*, 202 Neb. 452, 464, 275 N.W.2d 842, 849 (1979); *Booth v. Andrus*, 91 Neb. 810, 833–34, 137 N.W. 884, 893 (1912); *Van Skike v. Potter*, 53 Neb. 28, 36, 73 N.W. 295, 297 (1897); *O’Hara v. Wells*, 14 Neb. 403, 409, 15 N.W. 722, 723 (1883).

“That standard is consistent with the general common-law rule and is a so-called unitary, or wealth-blind, standard of care. In other words, the standard of care is found in the customary practices prevailing among reasonable and prudent physicians and must not be compromised simply because the patient cannot afford to pay.” *Murray*, *supra* (footnotes omitted).

Regarding the standard of care in negligence actions generally, including duty, see NJI2d Civ. 3.02 Comment & Authorities.

B. QUESTION OF LAW VERSUS QUESTION OF FACT

Duty is a question of law. See NJI2d Civ. 3.02, Comment & Authorities. “[W]hile the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.” *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 256, 818 N.W. 2d 589, 599 (2012). Regarding the issue of duty in negligence actions generally, see NJI2d Civ. 3.02 Comment & Authorities.

C. PHYSICIAN’S NONDELEGABLE DUTY

“The duty of care owed by a physician is nondelegable. . . . [T]he

law ordinarily does not permit a tort-feasor to escape liability by the act of attempting to transfer responsibility for a nondelegable duty to an independent contractor.' " Long v. Hacker, 246 Neb. 547, 555, 520 N.W.2d 195, 201 (1994) (quoting Swierczek v. Lynch, 237 Neb. 469, 482, 466 N.W.2d 512, 520 (1991)). *Accord* Darrah v. Bryan Mem'l Hosp., 253 Neb. 710, 713-14, 571 N.W.2d 783, 786-87 (1998) (head surgeon has nondelegable duty to provide health care and assumes exclusive control of patient; not liable, however, for failure of hospital employee to execute reasonable instructions left for treatment of patient). An anesthesiologist has a nondelegable duty "to be aware of reasonably available medical information significant to the health of his or her patient prior to administering anesthesia." Breeden v. Anesthesia W., 265 Neb. 356, 365, 656 N.W.2d 913, 921 (2003).

Whether a duty is nondelegable is a question of law. There is no set formula for determining when a duty is nondelegable. Indeed, whether a particular duty is properly categorized as nondelegable necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations. In a given case, the policy question facing a court is whether, on the facts presented, the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks inherent in the performance of the task. Courts have often deemed a duty to be nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.

Rodriguez v. Surgical Associates P.C., 298 Neb. 573, 584-85, 905 N.W.2d 247, 257-58 (footnotes and multiple internal quotation marks omitted). *See also* Breeden, 265 Neb. at 363, 364, 656 N.W.2d at 920.

The evolution of the nondelegable duty rule, the cases and authorities, and its application in Nebraska are thoroughly reviewed in *Breeden*, 265 Neb. at 362-66, 656 N.W.2d at 919-20. The Breeden case also approves of the nondelegable duty jury instruction that was given by the trial court in that case.

The effect of a nondelegable duty, in the context of an anesthesiologist, has been stated as follows: "If . . . the standard of care is ultimately found to be one which delegates to others the responsibility for reporting to the anesthesiologist reasonably available medical information significant to the health of the patient, the anesthesiologist is not relieved from liability if the finder of fact determines the delegated duties were performed negligently." *Breeden*, 265 Neb. at 365-66, 656 N.W.2d at 921.

Regarding nondelegable duties and independent contractors in general, *see* NJI2d Civ. 6.06.

D. THE NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT

Many of the procedures applicable to claims of malpractice against

health-care professionals are governed by the Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. §§ 44-2801, *et seq.* (Reissue 2010). In considering the relationship of that statute to the cases in the area, note that many of the relevant provisions of this Act became law on July 10, 1984. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) upheld the constitutionality of the 1976 version of this Act.

“Health care provider” is defined in § 44-2803 of the NHMLA. *See also* Neb. Rev. Stat. § 44-2804 (Reissue 2010) (defines physician).

The definition of malpractice in the NHMLA speaks of “the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used . . .” by other such health care providers. Neb. Rev. Stat. §§ 44-2810, *et seq.* (Reissue 2010). *See also, e.g., Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 253, 818 N.W.2d 589, 597 (2012). This instruction does not include the words “reasonable care.” In the opinion of the Committee, “the care, skill, and knowledge ordinarily possessed and used under like circumstances by other [such health care providers] engaged in a similar practice in the same or similar localities” will be reasonable care. The former is the definition of the latter. Use of both would be at best redundant and at worst, to the juror who notices both statements and wonders what the difference is, confusing. *Burns v. Metz*, 245 Neb. 428, 432-33, 513 N.W.2d 505, 508-09 (1994) (citing this paragraph of this Comment & Authorities and adopting this approach to this instruction).

The [NHMLA] provides a method whereby health care providers, such as physicians, may limit their malpractice liability with respect to patients who have elected not to remove themselves from its operation In order to receive the protection of the act, the provider must file with the director of the Department of Insurance proof of certain financial responsibility and pay the surcharges levied under the act.

Barry v. Bohi, 221 Neb. 651, 653, 380 N.W.2d 249, 251 (1986).

The NHMLA “cover[s] only those qualified health care providers practicing within the boundaries of this state.” *Harper v. Silva*, 224 Neb. 645, 650, 399 N.W.2d 826, 830 (1987).

“The NHMLA specifically provides for use of the locality rule.” *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 253, 818 N.W. 2d 589, 597 (2012).

Regarding this statute, *see also Hitzemann v. Adam*, 246 Neb. 201, 518 N.W.2d 102 (1994) (as provided by Neb. Rev. Stat. § 44-2821 (Reissue 2010), for cause of action arising while parties are patient and health care provider, absent patient’s election not to be bound by the NHMLA, Act is exclusive remedy for medical malpractice and breach of contract).

The NHMLA limits the amount of damages that may be recovered

against covered health-care providers. This is discussed below, in part XI of this Comment & Authorities.

The NHMLA does not include a waiver of sovereign immunity. The applicable waiver of sovereign immunity is in the Tort Claims Act, which is cited and discussed at NJ12d Civ. 8.72, Comment. A party filing suit against a state health-care provider must comply with both the Nebraska Hospital-Medical Liability Act and the Tort Claims Act. *Keller v. Tavarone*, 262 Neb. 2, 12–13, 628 N.W.2d 222, 230–31 (2001).

II. THE LOCALITY RULE

A. THE LOCALITY RULE STATED

This instruction includes the “locality” rule. This rule says that the standard of care for a doctor is judged against that of other practitioners in good standing in the same or similar localities. Neb. Rev. Stat. §§ 44-2810 and 44-2816 (Reissue 2010). *See, e.g.,* *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 235, 959 N.W.2d 251, 276 (2021) (“Whether a skilled contractor breached a contract to render services in a practice of the trade by failing to conduct the work in a workmanlike manner depends on whether the contractor exercised the skill and knowledge normally possessed by members of the trade in good standing in similar communities.”); *Anderson v. Bebbe*, 304 Neb. 186, 203, 933 N.W.2d 813, — (2019) (“To establish the customary standard of care in a particular case, expert testimony by a qualified medical professional is normally required. Often, such testimony is premised on the expert’s personal knowledge of, and familiarity with, the customary practice among medical professionals in the same or similar locality under like circumstances.”); *Curran v. Buser*, 271 Neb. 332, 338, 711 N.W.2d 562, 568 (2006); *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W.2d 219, 223 (2005); *Hamilton v. Bares*, 267 Neb. 816, 824, 678 N.W.2d 74, 81 (2004) (“In order to resolve any perceived conflict among *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); other informed consent cases; and § 44-2816, we hold that a physician’s duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.”); *Hitzemann v. Adam*, 246 Neb. 201, 518 N.W.2d 102 (1994) (alleging malpractice: failed sterilization procedure resulting in birth of child); *Miles v. Box Butte Cty.*, 241 Neb. 588, 600, 489 N.W.2d 829, 838 (1992) (concerning the standard of care for hospitals); *Kortus v. Jensen*, 195 Neb. 261, 268, 237 N.W.2d 845, 850 (1976) (stating that specialists from one medical community are competent to testify as experts on the standard of care in another community, if they have knowledge of and familiarity with the practice and standard of care in community in question, or similar or like communities); *McDaniel v. Wolcott*, 115 Neb. 675, 677, 214 N.W. 296, 297 (1927); *Booth v. Andrus*, 91 Neb. 810, 834, 137 N.W. 884, 893 (1912).

The same is true for a hospital: It must exercise the care used by

hospitals in the same community or similar communities. See part XIII of this Comment, below.

This, of course, does not mean that the standard of care must necessarily be established through the testimony of expert witnesses who practice locally. "There are no state lines recognized in the Nebraska rules which speak in terms of 'similar localities' and 'similar communities.'" *Kortus v. Jensen*, 195 Neb. 261, 269, 237 N.W.2d 845, 850 (1976) (specialist from one medical community competent to testify as expert on standard of care in another community, if witness has knowledge of and familiarity with practice and standard of care in community in question, or similar or like communities).

Even under the locality rule, a medical expert from one community can testify "as to the standard of care or skill required in another community if the expert has knowledge of or familiarity with the practice and standard of the locality in question or of a similar or like community." *Robinson v. Bleicher*, 251 Neb. 752, 759, 559 N.W.2d 473, 478 (1997). (Regarding informed consent, see *however*, N.JI2d Civ. 12.03 and *Hamilton v. Bares*, 267 Neb. 816, 824, 678 N.W.2d 74, 81 (2004)) (Stating that "[i]n order to resolve any perceived conflict among *Robinson*, [*supra*]; other informed consent cases; and § 44-2816, we hold that a physician's duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. This language mirrors the provisions of § 44-2816. To the extent that *Robinson* can be interpreted to conflict with § 44-2816 and the same-or-similar-locality standard regarding informed consent, that interpretation is disapproved.") See also the discussion of the erosion of the locality rule, below). When the locality rule applies, then, it not only affects the wording of the instruction, but also means that an expert witness must be familiar with the standard of care in the litigating doctor's community or similar communities, or the expert will not be able to testify on this point. Familiarity with national standards is not good enough in this situation, unless the witness also knows that the local standard is the same as the national standard. See also *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 255-56, 818 N.W.2d 589, 599 (2012) (reversing grant of summary judgment for plaintiff on the issue of liability because the plaintiff's expert did not aver that she was familiar with the standard of care in the locality).

And there is the "common knowledge" exception. See, e.g., *Walls v. Shreck*, 265 Neb. 683, 690-91, 658 N.W.2d 686, 693 (2002) (generally expert testimony is not required "where the physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment of one part of the body and sustains injury to another part of the body." Where the doctor operated on the plaintiff's right eye without express or implied consent, "the common knowledge exception is applicable in establishing whether [the surgeon] met the standard of care regarding informed consent"). This exception is discussed at part III(b), below.

In a somewhat related vein, a doctor may not be excluded from testifying as an expert witness just because the doctor is not a particular kind of specialist. This is discussed below, in part III of this Comment.

See also the discussion of expert testimony in part III of this Comment, below.

B. THE EROSION OF THE LOCALITY RULE?

The locality rule has been disavowed in certain situations: “If practices within a certain specialty do not vary significantly throughout the country, there is no policy justification for the “locality” rule.” *Wentling v. Jenny*, 206 Neb. 335, 346–47, 293 N.W.2d 76, 82 (1980) (gravamen of cause of action predated effective date of Neb. Rev. Stat. § 44-2810, quoted below). As communication among doctors improves, as continuing medical education improves and medical education becomes more standardized, and as areas of medicine cease to vary significantly from locality to locality, more and more of the locality rule may give way to the national rule.

On the other hand, however, the NHMLA states: “Malpractice . . . mean[s] . . . fail[ure] to use the . . . care, skill, and knowledge ordinarily possessed and used under like circumstances by members of [the same] profession engaged in similar practice in [the same] or in similar localities.” Neb. Rev. Stat. § 44-2810 (Reissue 2010). See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 253, 818 N.W. 2d 589, 597 (2012) (“The NHMLA specifically provides for use of the locality rule.”); *Wentling v. Jenny*, 206 Neb. 335, 345–48, 293 N.W.2d 76, 82–83 (1980) (Clinton, J. dissenting). Still, (whether the locality rule ever completely gives way to the national rule or not) where there is no testimony about a particular local standard, where all of the evidence supports the conclusion that the local standard is the same as the national standard, where it is undisputed that practices do not vary throughout the country—in other words, where this is not an issue of fact—it is appropriate to drop the following words from the instruction:

“in the same or similar localities.”

Regarding the above discussion, note that while the decision in *Wentling* postdates the effective date of § 44-2810, the incident that was the subject of the lawsuit predated its effective date.

More recently, the Supreme Court has abrogated the locality rule even further. The NHMLA requires the locality rule in cases to which it applies. Neb. Rev. Stat. § 44-2801, et seq. (Reissue 2010). In cases where the defendant is a health care provider who is not qualified under that statute, then it can be error to instruct the jury on the locality rule. If the evidence “supports a conclusion that the local standard of care for a health care provider is the same as the national standard, the phrase

‘in the same or in similar localities’ should not be given as part of the jury instructions.” *Fales v. Books*, 253 Neb. 491, 497, 570 N.W.2d 841, 844 (1997) (not harmless error; absent evidence of a local standard or finding that local standard differs from national standard, jury should be allowed to consider defendant’s actions in light of conflicting experts’ opinions, without instruction directing jury to favor or discount opinions based on whether experts’ practice and experience are in same or similar locality).

III. BURDENS, EVIDENCE GENERALLY, EXPERT TESTIMONY, AND RES IPSA LOQUITUR

A. BURDENS, EVIDENCE GENERALLY, AND EXPERT TESTIMONY

“In a malpractice action, the burden is on the plaintiff to prove the generally recognized [professional] standard involved, that there was a deviation from that standard by the defendant, and that such deviation was the proximate cause of the plaintiff’s injury.” *Anderson v. Moore*, 202 Neb. 452, 464, 275 N.W.2d 842, 849 (1979). *Anderson* was a medical malpractice action. The bracketed word “professional” was substituted for the word “medical” to take the quotation out of its specific context and express the general rule. *Accord, e.g., Cohan v. Med. Imaging Consultants*, 297 Neb. 111, 127, 900 N.W.2d 732, 743 (2017); *Ewers v. Saunders Cty.*, 298 Neb. 944, 956 906 N.W.2d 653, 662–63 (2018); *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 253, 818 N.W. 2d 589, 597 (2012); *Yoder v. Cotton*, 276 Neb. 954, 962, 758 N.W.2d 630, 638 (2008); *Rankin v. Stetson*, 275 Neb. 775, 788, 749 N.W.2d 460, 469 (2008); *Thone v. Regional W. Med. Ctr.*, 275 Neb. 238, 243, 745 N.W.2d 898, 903 (2008); *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 181, 738 N.W.2d 831, 837 (2007) (quoting *Anderson*); *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 147–48, 738 N.W.2d 434, 448 (2007); *Hamilton v. Bares*, 267 Neb. 816, 821, 678 N.W.2d 74, 79 (2004); *Keys v. Guthmann*, 267 Neb. 649, 653, 676 N.W.2d 354, 358 (2004); *Fackler v. Genetzky*, 263 Neb. 68, 71, 638 N.W.2d 521, 526 (2002); *Snyder v. Contemporary Obstetrics & Gynecology, P.C.*, 258 Neb. 643, 651, 605 N.W.2d 782, 791 (2000). *See also, e.g., Winters v. Rance*, 125 Neb. 577, 580, 251 N.W. 167, 168 (1933); *McGuire v. Rix*, 118 Neb. 434, 441, 225 N.W. 120, 123 (1929); *Booth v. Andrus*, 91 Neb. 810, 833, 137 N.W. 884, 893 (1912).

“Hospital policies and rules do not conclusively determine the standard of care owed.” *Green*, 284 Neb. at 255, 818 N.W.2d at 598-99.

Regarding the first of the three elements stated above—proving the generally recognized professional standard involved—it is of course true that the trier of fact cannot apply the standard of care unless it knows what it is. The general rule, applicable except in the most outrageous cases, is that there must be expert testimony as to what constitutes ordinary care in the particular profession. *E.g., Anderson v. Bebbe*, 304 Neb. 186, 203, 933 N.W.2d 813, — (2019) (“To establish the customary

standard of care in a particular case, expert testimony by a qualified medical professional is normally required.” Here, the defendant’s own testimony “clearly established a violation of [his own] standard of care.”); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 294 Neb. 407, 415, 882 N.W.2d 910, 916 (2016); *Rice v. Poppe*, 293 Neb. 467, 475, 881 N.W.2d 162, 169 (2016). (“Expert testimony is generally required to show whether an attorney’s performance conformed to the standard of conduct.”); discussing the common-knowledge exception; on motion for summary judgment, attorney’s own affidavit would have sufficed, but none was presented); *Yoder*, 276 Neb. at 963, 758 N.W.2d at 638 (“[A] self-supporting affidavit from a defendant physician suffices to make a prima facie case that the defendant did not commit malpractice.”); *Thone, supra*; *Bellino*, 274 Neb. at 147–48, 738 N.W.2d at 448; *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W.2d 219, 223 (2005); *Hamilton, supra*; *Keys, supra*; *Casey v. Levine*, 261 Neb. 1, 12, 621 N.W.2d 482, 490 (2001); *Vilcinskis v. Johnson*, 252 Neb. 292, 296, 562 N.W.2d 57, 61 (1997) (finding that the defendant’s affidavit and that of another expert in the relevant field were sufficient to present “a prima facie case of lack of negligence for the purposes of summary judgment”); *Boyd v. Chakraborty*, 250 Neb. 575, 581, 550 N.W.2d 44, 48 (1996) (noting the general rule and discussing the “‘common knowledge exception’”); *Medley v. Davis*, 247 Neb. 611, 618, 529 N.W.2d 58, 63 (1995); *Overland Constructors v. Millard Sch. Dist.*, 220 Neb. 220, 229–30, 369 N.W.2d 69, 76 (1985) (“[I]n the majority of cases involving an architect’s liability for harm, there can be no finding of negligence unless there is expert testimony to support it, because lay [persons] would be unable to understand highly technical architectural requirements without hearing other architects testify as to those requirements.”); *Halligan v. Cotton*, 193 Neb. 331, 335–36, 227 N.W.2d 10, 13 (1975); *McDaniel v. Wolcott*, 115 Neb. 675, 678, 214 N.W. 296, 297 (1927); *Tady v. Warta*, 111 Neb. 521, 524, 196 N.W. 901, 902 (1924). *See also* *Momsen v. Nebraska Methodist Hosp.*, 210 Neb. 45, 56, 313 N.W.2d 208, 214 (1981); *Kortus, supra*; *Grandy v. Merchant*, 127 Neb. 696, 256 N.W. 636 (1934).

Regarding the “locality rule”—the expert must have knowledge of the standard of care in the community in question or a similar community—, *see* part II of this Comment & Authorities, above.

Regarding the second of the three elements stated above—deviation from the professional standard—our Court has stated, “In the medical malpractice context, the element of proximate causation requires proof that the physician’s deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.” Same quotation: *Cohan v. Med. Imaging Consultants*, 297 Neb. 111, 127, 900 N.W.2d 732, 743 (2017); *Ewers v. Saunders Cty.*, 298 Neb. 944, 956, 906 N.W.2d 653, 662–63 (2018). Furthermore, “in medical malpractice cases, expert testimony by a medical professional is normally required to establish causation and the standard of care under the circumstances.” *Simon v. Drake*, 285 Neb. 784, 793, 829 N.W.2d 686, 693 (2013). *Accord, e.g.*, *Hemsley v. Langdon*, 299 Neb. 464, 473, 909 N.W.2d 59, 67 (2018); *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 253, 818 N.W.2d 589, 597

(2012). Deviation from the professional standard can, however, be established by lay testimony. *Thone*, 275 Neb. at 248–50, 745 N.W.2d at 907–08. The Court has not decided “whether the ability to establish the deviation element with lay testimony is an exception or the norm.” *Thone*, 275 Neb. at 249, 745 N.W.2d at 908.

Regarding the third element, “[e]xpert testimony is almost always required to prove proximate causation” in a professional negligence case. *Thone*, 275 Neb. at 250, 745 N.W.2d at 908. *Accord Simon*, 285 Neb. at 793, 829 N.W.2d at 686 (as quoted above); *Green*, 284 Neb. at 253, 818 N.W.2d at 588; *Yoder*, 276 Neb. at 963, 758 N.W.2d at 638 (“[A] self-supporting affidavit from a defendant physician suffices to make a prima facie case that the defendant did not commit malpractice.”); *Paulk v. Central Lab. Assocs., P.C.*, 262 Neb. 838, 846, 636 N.W.2d 170, 177 (2001) (“Whether a causal relationship existed between the misdiagnosis and the metastasis of the primary tumor is a complex medical issue requiring expert testimony.”); *Doe v. Zedek*, 255 Neb. 963, 970, 587 N.W.2d 885, 891 (1999) (“[W]here the character of an alleged injury is not objective, but, rather, subjective, the cause and extent of the injury must be established by expert medical testimony.”). *See also Ewers*, 298 Neb. at 956, 906 N.W.2d at 662–63 (as quoted above).

Nebraska’s adoption of the learned treatise exception to the hearsay rule, Neb. Rev. Stat. § 27-803(17) (Reissue 2016), does not change the general rule that the standard of care for a physician can only be shown by expert testimony. *Breeden v. Anesthesia W.*, 265 Neb. 356, 369–71, 656 N.W.2d 913, 924–25 (2003). *See the discussion of this point in this Comment, below, under the heading “Learned Treatises and the Hearsay Rule.”*

In a professional negligence case, expert testimony regarding causation need not be couched in the magic words “reasonable medical certainty” or “reasonable probability.” It must, however, be stated as at least “probable,” that is, “more likely than not.” *Fackler v. Genetzky*, 263 Neb. 68, 74, 638 N.W.2d 521, 527–28 (2002). Further, such testimony must be based on more than possibility or speculation, guess or conjecture. *Lewison v. Renner*, 298 Neb. 654, 663, 905 N.W.2d 540, 548 (2018) (stating “that ‘[m]edical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least “probable,” in other words, more likely than not.’” *Id.* at 663–64, 905 N.W.2d at 548); *Fackler*, 263 Neb. at 74, 638 N.W.2d at 528; *Doe v. Zedek*, 255 Neb. 963, 975, 976, 587 N.W.2d 885, 894, 894 (1999). In this regard, *see generally* NJI2d Civ. 1.42.

Expert testimony from “qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical science.” *Vilcinskis v. Johnson*, 252 Neb. 292, 296, 562 N.W.2d 57, 61 (1997) (citing cases). The key is not whether they are certified in a particular specialty, but whether “they possess special skill or

knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value." *Vilcinskis*, 252 Neb. at 296–97, 562 N.W.2d at 61 (citing cases).

While medical malpractice generally requires expert testimony, a medical expert may not set up his or her own standard and bind thereto a physician charged with malpractice. A medical standard cannot depend upon the idiosyncrasies of the expert, or the personal standard of the expert, which itself may be a deviation from the generally accepted medical standard. *Anderson v. Moore*, 202 Neb. 452, 467, 275 N.W.2d 842, 850 (1979); *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N.W. 252 (1893). The testimony of other physicians that they would have followed a different course of treatment than that followed by defendant does not establish negligence, nor does a disagreement between doctors of equal skill and learning as to what the treatment should have been. In cases based upon this sort of testimony, the court must hold that a prima facie case has not been established. *Kortus*, 195 Neb. at 270–71, 237 N.W.2d at 851–52; *McGuire v. Rix*, 118 Neb. 434, 441, 225 N.W. 120, 123 (1929). Where a prima facie case of negligence has been established, however, disagreement among expert witnesses will neither prevent a recovery for the plaintiff or a verdict for the defendant. *Greenberg v. Bishop Clarkson Mem'l Hosp.*, 201 Neb. 215, 222, 266 N.W.2d 902, 907 (1978); *Stohlman v. Davis*, 117 Neb. 178, 185, 220 N.W. 247, 250 (1928); *Hewitt*, 36 Neb. at 800, 55 N.W. at 254.

And from the other side, mere agreement on a course of action between physicians will not protect them from liability if they have not used due care in pursuing the course of action. *Kimble v. Roeder*, 115 Neb. 589, 592–93, 214 N.W. 1, 2 (1927). *See also Johnson v. Winston*, 68 Neb. 425, 430, 94 N.W. 607, 609 (1903).

For two situations where expert testimony is not needed, *see* the discussion of the common knowledge exception, immediately below, and the *res ipse loquitur* exception, immediately after that.

B. THE COMMON-KNOWLEDGE EXCEPTION

The common-knowledge exception applies here, as it does to the standard of care. Regarding the common-knowledge exception generally, *see also* N.J.I2d Civ. 1.42.

"[U]nder the 'common knowledge' exception, a party may make a prima facie case of professional negligence even without expert testimony in cases where the evidence and circumstances are such that recognition of the alleged negligence may be presumed to be within the comprehension of laypersons." *Bixenmann v. Dickinson Land Surveyors, Inc.*, 294 Neb. 407, 410, 882 N.W.2d 910, 913 (2016). *Accord Thone v. Regional West Med. Cntr.*, 275 Neb. 238, 250–51, 745 N.W.2d 898, 908 (2008) (holding that "it would be impossible for a lay person to conclude

that Collette's ultimate injuries were caused specifically by a 5-day delay in treating her"); *Green v. Box Butte Gen. Hosp.*, 284 Neb. 243, 255, 818 N.W.2d 589, 598–99 (2012); *Yoder v. Cotton*, 276 Neb. 954, 963, 758 N.W.2d 630, 639 (2008); *Keys v. Guthmann*, 267 Neb. 649, 653, 676 N.W.2d 354, 358–59 (2004) (discussion the application of the *res ipsa loquitur* doctrine to medical malpractice cases and stating three ways in which negligence may be inferred without affirmative proof, including this "common knowledge exception"; common knowledge exception generally applies when a physician fails to remove a foreign object from a patient's body or a patient enters the hospital for treatment of one part of the body and sustains injury to another part); *Walls v. Shreck*, 265 Neb. 683, 690–91, 658 N.W.2d 686, 693 (2002) (generally expert testimony is not required "where the physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment of one part of the body and sustains injury to another part of the body." Where the doctor operated on the plaintiff's right eye without express or implied consent, "the common knowledge exception is applicable in establishing whether [the surgeon] met the standard of care regarding informed consent"); *Boyd v. Chakraborty*, 250 Neb. 575, 581, 550 N.W.2d 44, 48 (1996) (failure to remove foreign object from patient's body); *Halligan v. Cotton*, 193 Neb. 331, 335–36, 227 N.W.2d 10, 13 (1975). Regarding *res ipsa loquitur* and medical malpractice, see part III(B) of this Comment & Authorities, below.

"Thus causation may be inferred without expert testimony if the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently obvious to laypersons." *Thone*, 275 Neb. at 250–51, 745 N.W.2d at 908.

"This common-knowledge exception is limited to cases of extreme and obvious misconduct." *Thone*, 275 Neb. at 243–44, 745 N.W.2d at 904. "There are only very limited exceptions to the requirement of expert testimony to rebut a *prima facie* case by a physician stating that he or she met the standard of care, where the alleged negligence and the causal link to the plaintiff's injuries are presumed to be within the comprehension of laymen." *Lombardo v. Sedlacek*, 299 Neb. 400, 418, 908 N.W.2d 630, 644 (2018). The exception applies when a physician fails "to remove a surgical instrument from a patient's body following a procedure or amputating an incorrect limb." *Id.* It also applies "when a physician fails to timely attend to a patient who bears serious injuries." *Id.* at 245, 745 N.W.2d at 904–05. (In *Thone* it was alleged that the doctor left the "patient vomiting blood and languishing in pain for . . . 5 days without" providing any care. *Id.* at 248, 745 N.W.2d at 907.) *Accord Bixemann v. Dickinson Land Surveyors (Bixemann II)*, 295 Neb. 40, 43, 886 N.W.2d 277, 279 (2016) (per curiam; supplemental opinion); *Bixemann v. Dickinson Land Surveyors (Bixemann I)*, 294 Neb. 407, 410, 882 N.W.2d 910, 913 (2016).

Thone also discusses "the manufacturer-instruction exception" to the rule requiring expert testimony and notes that a number of courts

have adopted it. “[T]he rationale behind the . . . exception is that a reasonable physician would not violate a manufacturer’s specific instructions when using a drug or device.” *Id.* at 247, 745 N.W.2d at 902. Lay persons can, therefore, find that failure to follow such instructions is negligence. *Thone* neither adopts nor rejects this exception but finds that even were Nebraska to adopt the exception it would not apply on the *Thone*’s facts.

Regarding the need for expert testimony, *see also* the discussion of *res ipsa loquitur* in the next part (part III(C)) of this Comment & Authorities.

On this subject of burdens and expert testimony in medical malpractice actions, the court has said the “an affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a *prima facie* case of lack of negligence for the purposes of summary judgment.” *Wagner v. Pope*, 247 Neb. 951, 954, 531 N.W.2d 234, 236–37 (1995). *Accord, e.g., Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 785, 387 N.W.2d 486, 488 (1986).

C. RES IPSA LOQUITUR

Res ipsa loquitur can apply in medical malpractice cases:

(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, *i.e.*, leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

Chism v. Campbell, 250 Neb. 921, 928, 553 N.W.2d 741, 746 (1996) (multiple quotation marks omitted) (quoting *Swierczek v. Lynch*, 237 Neb. 469, 476, 466 N.W.2d 512, 517 (1991), in turn quoting *McCall v. St. Joseph’s Hosp.*, 184 Neb. 1, 5, 165 N.W.2d 85, 88 (1969)). *Accord* *Keys v. Guthmann*, 267 Neb. 649, 653, 676 N.W.2d 354, 358–59 (2004). *See Long v. Hacker*, 246 Neb. 547, 557–59, 520 N.W.2d 195, 202–03 (1994) (discussing *res ipsa* and holding it applied in case where surgeon operated on wrong vertebrae of patient’s spine).

Regarding *res ipsa loquitur*, *see generally* NJI2d Civ. 2.13. Regarding the common-knowledge exception, *see* part III(B) of this Comment & Authorities, above.

D. EVIDENCE GENERALLY

The Nebraska Court of Appeals has held, “as a matter of first

impression, that evidence of risk-of-procedure or risk-of-surgery discussions with the patient is *generally* irrelevant and unfairly prejudicial where the plaintiff alleges only negligence, and not lack of informed consent” *Hillyer v. Midwest Gastrointestinal Assocs.*, 24 Neb. App. 75, 86, 833 N.W.2d 404, 412 (2016) (emphasis added; not a “per se rule of exclusion”)

E. CROSS REFERENCE

Expert testimony is discussed in various places in NJI2d Civ. For a general discussion of the topic, *see* NJI2d Civ. 1.42, Comment & Authorities (including, at part XVII, cross-references to other places in this book where expert testimony is discussed).

IV. LEARNED TREATISES AND THE HEARSAY RULE

In 1999, Nebraska enacted the so-called learned treatise exception to the hearsay rule. The exception reads as follows:

(17) Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits.

Neb. Rev. Stat. § 27-803(17) (Reissue 2016). *See* R. Collin Mangrum, *Mangrum on Nebraska Evidence*, Article VIII § 27-803[B](9), [C](18), [D](11) (vol. 3, Nebraska Practice Series, West Group). *See also* G. Michael Fenner, *The Hearsay Rule* 212–251 (3d ed. Carolina Academic Press 2013).

Prior to the effective date of this exception, the hearsay rule was a general bar to the use of medical texts and other learned writings as independent evidence of the opinions and theories advanced by the parties, as substantive evidence of the facts stated therein. *Stang-Starr v. Byington*, 248 Neb. 103, 108, 532 N.W.2d 26, 29 (1995).

There always were, and still are, however, legitimate nonhearsay uses for learned-treatise evidence. Under the right circumstances, for example, learned treatises may be used for impeachment purposes (including during rebuttal testimony). *Stang-Starr*, 248 Neb. at 109, 532 N.W.2d at 30.

Nebraska’s adoption of the learned treatise exception to the hearsay rule does not change the general rule that the standard of care for a physician can only be shown by expert testimony. *Breeden v. Anesthe-*

sia W., 265 Neb. 356, 369–71, 656 N.W.2d 913, 924–25 (2003). (Regarding the standard of care for a physician and the general rule requiring expert testimony, *see* the discussion in this Comment & Authorities, above, under the heading “Burdens, Expert Testimony, and Res Ipsa Loquitur.”) The treatise must have been called to the attention of an expert witness on cross-examination or relied on by an expert witness in direct examination. As such, the learned treatises are part of the expert’s testimony. *Breeden*, 265 Neb. at 370–71, 656 N.W.2d at 924–25. “[D]uly admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination.” *Breeden*, 265 Neb. at 371, 656 N.W.2d at 925.

On the subject of learned treatises, *see also* Neb. Rev. Stat. § 25-1218 (Reissue 2016): “Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive *evidence of facts of general notoriety or interest.*” (Emphasis added.)

V. SOME AREAS OF POTENTIAL MEDICAL MALPRACTICE

A. DIAGNOSIS

Malpractice may consist of a lack of skill or care in treatment or in diagnosis, including collecting the data essential to a proper diagnosis. *Momsen v. Nebraska Methodist Hosp.*, 210 Neb. 45, 55, 313 N.W.2d 208, 213–14 (1981); *Anderson v. Moore*, 202 Neb. 452, 464, 275 N.W.2d 842, 849 (1979); *Golonka v. Gatewood*, 199 Neb. 216, 225, 257 N.W.2d 403, 408 (1977); *Bailey v. Williams*, 189 Neb. 484, 486, 203 N.W.2d 454, 456 (1973); *In re Johnson’s Estate*, 145 Neb. 333, 343, 16 N.W.2d 504, 510 (1944); *Mangiameli v. Ariano*, 126 Neb. 629, 635, 253 N.W. 871, 874 (1934); *Cook v. Moats*, 121 Neb. 769, 773, 238 N.W. 529, 530 (1931); *Van Boskirk v. Pinto*, 99 Neb. 164, 155 N.W. 889, 889 (1915) (syllabus by the court). Note that until a surgeon has reason to suspect its correctness, he or she may be entitled to rely upon a physician’s diagnosis. *In re Johnson’s Estate*, 145 Neb. 333, 344, 16 N.W.2d 504, 511 (1944).

B. POST-OPERATIVE TREATMENT

Post-operative treatment and advice by a physician to a patient are an interwoven and essential part of the physician-patient relationship. Thus, a surgeon’s standard of care includes subsequent, or post-operative, treatment of a patient. *Momsen*, 210 Neb. at 56, 313 N.W.2d at 214; *Toman v. Creighton Mem’l St. Josephs Hosp., Inc.*, 191 Neb. 751, 758, 217 N.W.2d 484, 489 (1974); *Stacey v. Pantano*, 177 Neb. 694, 696–97, 131 N.W.2d 163, 165 (1964); *Stohlman v. Davis*, 117 Neb. 178, 183, 220 N.W. 247, 249–50 (1928). *Cf. McLaughlin v. Hellbasch*, 256 Neb. 615, 622, 591 N.W.2d 569, 573–74 (1999) (declining to extend as a matter of law the duty of care to include making suitable arrangements for another physician to treat a possibly later-occurring condition).

C. DONEE'S TRANSPLANT PHYSICIAN'S DUTY OF CARE TO DONOR

"[A] physician's duty to exercise the applicable standard of care arises during the physician's treatment of the patient." *Olson v. Wrenshall*, 284 Neb. 445, 451, 822 N.W.2d 336, 341-42 (2012). *Olson* involved a kidney transplant gone wrong. The donor brought suit against his doctor, the donee's doctor, and the hospital. This appeal concerns the donor's suit against the donee's doctor. Allegations that the doctor was negligent in the treatment of the donee do not create a duty of care to the donor. To establish a duty owed to him the donor must allege negligence in *his own* treatment. *Id.* at 451-52, 822 N.W.2d at 341-42. Furthermore, the donee's doctor "did not owe a general third-party duty of care to the [donor] during [the donee's] allegedly negligent treatment." *Id.* at 452, 822 N.W.2d at 342.

D. PHYSICIAN'S INSTRUCTIONS TO HOSPITAL

"Generally, an attending staff physician is not liable for failure of a hospital to execute reasonable instructions that he has given for the treatment of his patients." *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 787, 387 N.W.2d 486, 489 (1986) (citing 1 D. Louisell & H. Williams, *Medical Malpractice* ¶ 16.07[2] (1985)). *Accord* *Darrah v. Bryan Mem'l Hosp.*, 253 Neb. 710, 713-14, 571 N.W.2d 783, 786-87 (1998).

"[H]ospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient." *Casey v. Levine*, 261 Neb. 1, 7, 621 N.W.2d 482, 487 (2001).

E. VICARIOUS LIABILITY OF HOSPITAL

"Hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior." *Casey v. Levine*, 261 Neb. 1, 7, 621 N.W.2d 482, 487 (2001). *Accord, e.g.,* *Darrah v. Bryan Mem'l Hosp.*, 253 Neb. 710, 715, 571 N.W.2d 783, 787 (1998). Hospitals may be liable for the negligence of their nurses. *Casey v. Levine*, 261 Neb. 1, 7, 621 N.W.2d 482, 487 (2001) (continuing treatment exception to the statute of limitations does not apply to the negligence of hospital nurses; this is discussed in the Statute of Limitations part of the N.JI2d Civ. 12.04, Comment & Authorities).

F. PHYSICIAN PATIENT CONTACT APART FROM THE PHYSICIAN-PATIENT RELATIONSHIP

It is not enough that the damage would not have occurred if there had been no physician-patient relationship. The damage must have occurred in the course of treatment. *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000), included a medical malpractice action. The grava-

men of the action was a long-term sexual relationship between the plaintiff and her doctor. There was, however, no evidence that this sexual conduct occurred during the course of treatment. The contact was apart from the concurrent physician-patient relationship. The Court affirmed summary judgment for the doctor. *Id.* at 640–42, 611 N.W.2d at 613–15 (that there was a physician-patient relationship and the contact occurred in the defendant's medical office is not determinative). *Accord* *R.W. v. Schrein*, 264 Neb. 818, 824–25, 830–31, 652 N.W.2d 574, 580–81, 584 (2002).

VI. STATUTE OF LIMITATIONS AND REPOSE

A. STATUTE OF LIMITATIONS ISSUES TRIED SEPARATELY AND BY A JURY

In 1997, the Unicameral amended the statute governing statute-of-limitations trial-procedure, Neb. Rev. Stat. § 25-221 (2016), to provide that, unless waived by all parties, factual issues concerning the bar of a statute of limitations shall be determined by a jury. This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first. This amendment is discussed in the Statute of Limitations part of NJI2d Civ. 12.04, Comment & Authorities.

B. MEDICAL-MALPRACTICE STATUTE'S RELATIONSHIP TO GENERAL PROFESSIONAL-MALPRACTICE STATUTE

The statute of limitations under the Nebraska Hospital-Medical Liability Act (NHMLA) is Neb. Rev. Stat. § 44-2828 (Reissue 2010). It became effective in 1984. The statute of limitations for professional negligence in general, and the statute that applied to medical malpractice prior to 1984, is Neb. Rev. Stat. § 25-222 (Reissue 2008). The former is discussed here. The latter is discussed at NJI2d Civ. 12.04, Comment & Authorities. The two statutes are substantively the same.

By its terms, § 44-2828 applies to “damages.” This includes “all personal injury and wrongful death actions against health care providers who have taken the necessary steps to qualify under the NHMLA.” *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 72, 615 N.W.2d 460, 467–68 (2000) (lengthy discussion of how it is that this statute of limitations, and not the general statute of limitations found at Neb. Rev. Stat. § 30-810 (Reissue 2010), applies to this kind of wrongful death action).

Many medical-malpractice statute-of-limitations cases involve alleged malpractice predating 1984. Since the statute of limitations part of the previously applicable statute is substantively the same as that of the newer statute, it should not matter whether cases were decided under one statute or the other.

As regards either of these two statutes of limitations, the discussion

of the other should be consulted. See NJI2d Civ. 12.04, Comment & Authorities.

C. MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AND REPOSE GENERALLY

1. The Statute

The statute of limitations generally applicable in cases of professional malpractice is Neb. Rev. Stat. § 25-222 (Reissue 2016). In cases of medical malpractice, however, the generally applicable statute of limitations is Neb. Rev. Stat. § 44-2828 (Reissue 2010). In some regards these statutes are identical and where that is the case it is not error to use one as opposed to the other. See *Bonness v. Armitage*, 305 Neb. 747, 756, 942 N.W.2d 238, 245 (2020). If the claim is against a political subdivision of the state, the applicable section is Neb. Rev. Stat. § 13-919 (Reissue 2012), and if the claim is against an officer, agent, or employee of the state, Neb. Rev. Stat. § 81-8,227 (Supp. 2009) applies. The statute of limitations for a wrongful death action is Neb. Rev. Stat. § 30-810 (Reissue 2016). See NJI2d Civ. 4.60.

Section 44-2828 is a statute of limitations: The action must be commenced (1) within two years of the act or omission that provides the basis for the cause of action, (2) unless the cause of action is not and could not reasonably be discovered within that two years, in which case it shall be filed within one year of the discovery of either the damage or facts that would reasonably lead to the discovery of the damage, whichever comes first. See, e.g., *Bonness*, 305 Neb. at 756, 942 N.W.2d at 245. (Regarding the discovery rule, see part VIII(G) of this Comment & Authorities, below.)

Section 44-2828 is also a statute of repose: In no event may the action be commenced more than 10 years after the date of the act or omission that provides the basis for the cause of action.

2. Interpretative Case Law

In medical malpractice cases involving continuing treatment, “the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.” *Healy v. Langdon*, 245 Neb. 1, 5, 511 N.W.2d 498, 501 (1994) (continuing treatment exception to statute of limitations merged into occurrence rule). *Accord Weaver v. Cheung*, 254 Neb. 349, 353, 576 N.W.2d 773, 776 (1998) (discovery exception permits filing of action after 2-year period only where cause of action was not discovered and could not reasonably have been discovered within that period, *id.* at 354, 576 N.W.2d 773). See also NJI2d Civ. 12.04, Comment & Authorities.

“For purposes of determining whether an action is time barred, an action is commenced on the date the petition is filed. However, [t]he ac-

tion shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed.’” *Kocsis v. Harrison*, 249 Neb. 274, 279, 543 N.W.2d 164, 168 (1996) (citations omitted) (quoting Neb. Rev. Stat. § 25-217 (Reissue 2016)) (treating physician and physician’s employer named as defendants; physician not served within required time, so action against physician dismissed and, because time-barred, cannot be refiled; since liability under doctrine of respondeat superior does not require both employee and employer be sued, action against employer can continue).

“When it is apparent from the face of a petition that the cause of action asserted is ostensibly barred by the statute of limitations, the petition is demurrable as failing to state a cause of action unless the plaintiff alleges some excuse which tolls the operation and bar of the statute.” *Giese v. Stice*, 252 Neb. 913, 924, 567 N.W.2d 156, 165 (1997). *Accord* *Nuss v. Alexander*, 269 Neb. 101, 105, 691 N.W.2d 94, 98 (2005); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 411, 507 N.W.2d 275, 278 (1993) (when petition facially shows cause of action is barred by statute of limitations, plaintiff must allege facts sufficient to avoid the bar of the statute) (not medical malpractice action but nonetheless applicable; see part B of this part of this Comment, above).

“[A] county hospital is not merely an agency of the county, but, rather, is a separate and independent political subdivision.” *Brothers v. Kimball Cty. Hospital*, 289 Neb. 879, 889, 857 N.W.2d 789, 798 (2015). Regarding both the State and the Political Subdivision Tort Claims Acts, see *NJI2d Civ. 8.72*. Note this caveat regarding a lawsuit against a doctor who is an employee of a political subdivision. The Political Subdivision Tort Claims Act provides that if a claim is filed under a Nebraska statute other than the Political Subdivision Tort Claims Act and if the court in which it is filed determines that the Political Subdivision Tort Claims Act provides the exclusive remedy, then the time to make the claim and begin suit under the Political Subdivision Tort Claims Act shall be extended for a period of six months from the date of the court order. Neb. Rev. Stat. § 13-919 (Reissue 2012). The Supreme Court has held that a claim “made of filed under any other law of this state,” Neb. Rev. Stat. § 13-919 (Reissue 2012), must itself be filed within the 1-year time limit of the Political Subdivision Tort Claims Act. *Keller v. Tavarone*, 265 Neb. 236, 241–43, 655 N.W.2d 899, 904–05 (2003) (plaintiff first sued under the Nebraska Hospital-Medical Liability Act (NHMLA); the district court dismissed that suit, holding that as the doctor in question was an employee of a county the Political Subdivision Tort Claims Act was the exclusive remedy; plaintiff’s action under the NHMLA was filed within the statute of limitations for such a suit, but it was not filed within the one-year filing deadline of the Political Subdivision Tort Claims Act).

Interpretative case law regarding the statutes of limitations in professional malpractice cases is discussed in more detail at *NJI2d Civ. 12.04, Comment & Authorities*. That Comment & Authorities should be consulted along with this one.

For a more complete discussion of cases under this statute, *see* the discussion of both this statute (applicable to medical-malpractice cases) and its twin (applicable to other professional-negligence cases), at NJI2d Civ. 12.04, Comment & Authorities.

For a general discussion of the time at which a cause of action accrues, *see* NJI2d Civ. 5.04, Comment, NJI2d 12.01, Comment & Authorities, part VI, and 12.04, Comment & Authorities, part VIII(E).

D. TOLLING THE STATUTE

On the subject of tolling statutes of limitations or repose, *see* NJI2d Civ. 12.04, Comment & Authorities, part VIII. For a list of cross-references to other discussions of statutes of limitations within NJI2d Civ., *see* NJI2d Civ. 12.04, Comment & Authorities, part VIII(C).

In *Jacobs v. Goetowski*, 221 Neb. 281, 289, 376 N.W.2d 773, 778 (1985), the Court said: "[T]he running of the . . . statute of limitations is interrupted during the medical review proceedings and . . . [recommences] 90 days after the medical [review] panel issues its opinion." In *Barry v. Bohi*, 221 Neb. 651, 655-56, 380 N.W.2d 249, 253 (1986), the Court said: "We conclude that while a medical malpractice action accrues for limitations and repose purposes when the treatment rendered after and relating to the act or omission complained of is completed, such an action arises, for the purpose of determining the admissibility into evidence of the written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made."

Although it is not a medical malpractice action, *Sluka v. Herman*, 229 Neb. 200, 202, 425 N.W.2d 891, 892 (1988) stated that "the filing of a petition does not toll the running of a statute of limitations for the purpose of bringing subsequent actions on the same set of facts."

E. AVOIDING THE STATUTE BY RECASTING THE CAUSE OF ACTION

The limitation in the statute of limitations for medical malpractice (and, in fact, for all professional negligence) is relatively short. There are a number of cases wherein plaintiffs tried to recharacterize the cause of action as something other than medical malpractice, tried to find a basis for recovery to which a different—a longer—statute of limitations would be applied. These cases are discussed in the statute-of-limitations part of the Comment & Authorities to NJI2d Civ. 12.04.

F. LEGISLATIVELY CHANGING THE PERIOD OF LIMITATION

"Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the right accrued before or after that date." *Kratochvil v. Motor Club Ins. Ass'n*, 255 Neb. 977, 985, 588

N.W.2d 565, 572 (1999). *Accord* Farber v. Lok-N-Logs, Inc., 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005) (“[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.”); Harris v. Omaha Housing Auth., 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005). The legislative power to create a limitation period or to shorten a preexisting limitation period where none existed shorten limitation periods is subject to two restrictions. (1) The Legislature may not deprive a party of a bar that has already become complete. (2) The Legislature may not deprive a party of an already accrued cause of action without providing a reasonable time in which to file the action. To do the latter may violate the party’s right to due process of law. *Kratochvil*, 255 Neb. at 986–87, 588 N.W.2d at 573. *Accord* Harris, 269 Neb. at 986, 698 N.W.2d at 63.

VII. ERRONEOUS JURY INSTRUCTIONS

In *Watson v. McNamara*, 229 Neb. 1, 2–3, 424 N.W.2d 611, 612 (1988), a medical malpractice action, plaintiff’s expert witnesses testified that defendant failed to use various diagnostic techniques available to him and that, under the circumstances, this failure “constituted a breach of the standard of care. These physicians further testified that the defendant performed [surgery] in contravention of the standard of care. If believed, this testimony certainly established a prima facie case of negligence for the plaintiff.” The Supreme Court reversed a verdict in favor of the defendant doctor because one of the trial court’s instructions permitted the jury to infer that this testimony, by itself, was not enough to establish negligence. The instruction was subject to a number of interpretations, the correct one not being the most obvious. About this case, Dean Harvey Perlman has said: “The court displays proper sensitivity to the need that jury instructions be written for jurors not lawyers.” Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law, Nebraska Tort Law 1987–88, Review and Comments 6* (1988). For more recent discussion of this same error, see *Denesia v. St. Elizabeth Cmty. Health Ctr.*, 235 Neb. 151, 164–67, 454 N.W.2d 294, 303–05 (1990); *Ourada v. Cochran*, 234 Neb. 63, 449 N.W.2d 211 (1989).

In *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990), the plaintiff requested an instruction that if hospital employees knew or should have known a doctor’s treatment of a patient was improper, the hospital, through its employees, had a duty to intervene and provide or obtain proper care. The court characterized this as creating a duty on hospitals and nurses to analyze all orders and conduct of treating physicians. The court held that “hospital staff members lack authority to alter or depart from an attending physician’s order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient.” *Id.* at 8, 459 N.W.2d at 183. Consequently, such an instruction would be improper. *Accord* Miles v. Box Butte Cty., 241 Neb. 588, 601–02, 489 N.W.2d 829, 839–40 (1992).

VIII. THE PHYSICIAN-PATIENT RELATIONSHIP

Generally, a physician’s duty to exercise the required skill

or standard of care arises out of the physician-patient relationship. While the relationship is often described as contractual in nature, based upon the express or implied consent of both physician and patient, we have held that absent fraud or misrepresentation, consent to medical treatment is presumed. The relationship can therefore be said to arise when the physician undertakes treatment of the patient. This relationship engenders a duty to the patient and, in certain cases, to third parties who may be subject to serious risks associated with a patient's treatment or condition.

Some courts, however, have held that a physician-patient relationship is not a necessary prerequisite for sustaining an action in medical malpractice, and have grounded liability upon the traditional duty analysis for negligence. Since nothing is called to our attention in the facts of the case before us which would support imposition of such a duty in the absence of a physician-patient relationship, we need not now determine the general question of whether liability can ever exist absent an underlying physician-patient relationship.

Flynn v. Bausch, 238 Neb. 61, 64-65, 469 N.W.2d 125, 127-28 (1991) (citations omitted) (no physician-patient relationship; insufficient evidence to support inference doctor had undertaken to participate in care and treatment of infant involved herein).

"Generally a physician's duty to exercise the required skill or standard of care must arise out of the physician-patient relationship. The relationship can be said to arise when the physician undertakes treatment of the patient." *Gallion v. Woytasek*, 244 Neb. 15, 18, 504 N.W.2d 76, 79 (1993).

"The existence of a physician-patient relationship is normally a question of fact; [and, in order to state a claim,] the party claiming the existence of the relationship must allege some facts to show that the relationship came into existence." *Gallion*, 244 Neb. at 20, 504 N.W.2d at 80.

IX. CONTRIBUTORY NEGLIGENCE

"Generally, the defense of contributory negligence has been recognized in a medical malpractice action when the patient has (1) failed to follow a medical instruction, (2) refused or neglected prescribed treatment, or (3) intentionally given erroneous, incomplete, or misleading information which is the basis for medical care or treatment of the patient." *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 10, 459 N.W.2d 178, 184 (1990) (giving examples). This defense does not apply when the patient's alleged negligence is linked to the reason the patient sought medical attention in the first place, but only when it is linked to

the medical attention itself. *Id.* at 15, 459 N.W.2d at 186 (decendent's failure to lose weight may have been causally related to the pulmonary embolism that brought him to the hospital, but it was not a proximate cause in reference to alleged medical malpractice in treating the pulmonary embolism).

X. SPECIALISTS

This instruction applies whether the health care provider is a specialist or a general practitioner. A specialist must use the skill and knowledge ordinarily possessed and used under similar circumstances by practitioners of the same specialty. *Wentling v. Jenny*, 206 Neb. 335, 338, 293 N.W.2d 76, 78-79 (1980); *Kortus v. Jensen*, 195 Neb. 261, 268, 237 N.W.2d 845, 850 (1976); *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10, 12-13 (1975).

Regarding whether testifying expert-witnesses need be specialists in a particular field of medicine, *see* part III of this Comment, above.

XI. LIMITATIONS ON INDIVIDUAL LIABILITY AND ON THE TOTAL AMOUNT OF DAMAGES RECOVERABLE

The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2825 (Reissue 2010) limits the amount of damages that may be recovered under the Act. Recovery is limited as follows: (1) For any one occurrence after December 31, 1992 and on or before December 31, 2003, the plaintiff may not recover more than \$1,250,000. (Regarding occurrences before that date, consult the statute.) For any one occurrence after December 31, 2003, the plaintiff may not recover more than \$1,750,000. (2) A single health care provider qualified under the Act shall not be liable for any more than \$500,000. (3) If the plaintiff's recovery (*see* (1), above) is more than that total liability of all of the health-care providers found liable (*see* (2), above), then the excess amount shall be paid from the Excess Liability Fund, pursuant to Neb. Rev. Stat. §§ 44-2831 to 44-2833 (Reissue 2010).

In *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), the Supreme Court upheld this provision of the Act against many constitutional challenges, including due process and equal protection challenges. At the time of *Prendergast*, Nebraska's Constitution did not have an Equal Protection Clause; it did not become part of the constitution until 1998. Neb. Const. art. I, § 3. In 2003, the Supreme Court upheld this provision's limitation on liability against a challenge based on Nebraska's Equal Protection Clause. *Gourley v. Neb. Methodist Health System, Inc.*, 265 Neb. 918, 950, 663 N.W.2d 43, 73 (2003).

XII. IMMUNITY

[A] psychiatrist who has been directed by a court to evaluate a patient for the purposes of determining competency to stand trial is entitled to absolute immunity from a suit for

damages based on that examination, made within the scope of his or her authority and while acting without willfulness, malice, or corruption.

Gallion v. Woytassek, 244 Neb. 15, 26, 504 N.W.2d 76, 83–84 (1993).

XIII. MISCELLANEA

When a patient is no longer under a physician's care, there is no continuing duty to warn the patient of the effect of a particular treatment. Schendt v. Dewey, 246 Neb. 573, 576, 520 N.W.2d 541, 545 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997).

“Once a hospital agrees to provide medical services to a patient, that hospital and its licensed professional employees owe a duty to a patient to exercise that degree of care, skill, and diligence used by hospitals generally in the community or hospitals located in similar communities.” Crider v. Bayard City Sch., 250 Neb. 775, 788, 553 N.W.2d 147, 156 (1996). *Accord* Green v. Box Butte Gen. Hosp., 284 Neb. 243, 253, 818 N.W.2d 589, 597 (2012); Casey v. Levine, 261 Neb. 1, 7, 621 N.W.2d 482, 487 (2001).

The Committee calls the reader's attention to Nebraska Association of Trial Attorneys, Professional Malpractice (Nov. 18, 1983) (C.L.E. materials).

NJI2d Civ. 12.02

PATIENT'S DUTY TO FOLLOW INSTRUCTIONS

Recommend no separate instruction.

COMMENT & AUTHORITIES

A patient must exercise ordinary care and prudence, and obey all reasonable instructions given by a doctor. A doctor will not be held liable for damages resulting from a patient's disregard of these instructions. Booth v. Andrus, 91 Neb. 810, 833, 137 N.W. 884, 893 (1912); O'Hara v. Wells, 14 Neb. 403, 411, 15 N.W. 722, 724 (1883). *See also* Mecham v. McLeay, 193 Neb. 457, 461–62, 227 N.W.2d 829, 832 (1975).

This is an aspect of contributory negligence or proximate cause. Regarding a medical malpractice action and contributory negligence based on the patient's failure to follow the doctor's instructions, *see* Jensen v. Archbishop Bergan Mercy Hosp., 236 Neb. 1, 10–15, 459 N.W.2d 178, 184–87 (1990) and the Comment to NJI2d 12.01. *See also* Booth, 91 Neb. at 833, 137 N.W. at 893 (error to place burden on doctor to prove patient followed instructions).

NJI2d Civ. 12.03**INFORMED CONSENT**

Before the plaintiff can recover against the defendant [on (his, her, its) claim of failure to obtain informed consent], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant failed to obtain the plaintiff's informed consent before (he, she, it) (here insert the words "operated on," or "treated," or some other words identifying the procedure in question) the plaintiff;

2. That, under similar circumstances, a reasonably prudent (here identify the type of health care provider involved, such as "physician") in this community or similar communities would have obtained express or implied consent for such (an operation, treatment, a course of treatment, a procedure);

3. That a reasonably prudent person in the plaintiff's position would not have undergone the (operation, treatment, procedure) had he or she been properly informed;

4. That the lack of informed consent was the proximate cause of some damage to the plaintiff; and

5. The nature and extent of that damage.

Consent to (an operation, treatment, a course of treatment, a procedure) is informed consent if it is based on information that would ordinarily be provided to a patient under like circumstances by (here identify the type of health care provider involved, such as "physicians") engaged in a similar practice in the same or similar localities.

Informed consent may be express or implied.

COMMENT & AUTHORITIES

- I. USE OF THE INSTRUCTION
- II. APPLICATION OF THE INSTRUCTION
- III. AUTHORITY FOR THE INSTRUCTION
- IV. CONSENT MAY BE EXPRESS OR IMPLIED AND NEED NOT ALWAYS BE IN WRITING
- V. STATUTE OF LIMITATIONS AND REPOSE
- VI. EXPERT TESTIMONY
 - A. IN GENERAL

- B. THE STANDARD OF THE REASONABLE MEDICAL PRACTITIONER IN THE SAME OR A SIMILAR LOCALITY OR COMMUNITY
- C. THE EXPERT TESTIMONY OF THE DEFENDANT
- VII. INFORMED CONSENT TO AN ABORTION

I. USE OF THE INSTRUCTION

Before using this pattern instruction, read this Comment's discussion of the locality rule in cases involving informed consent, which appears in part V(B), below.

This is the Burden of Proof part of the Statement of the Case instruction for the statutory tort of failure to obtain informed consent. Use NJI2d Civ. 2.01 as a model for the Statement of the Case and the Effect of Findings parts of the instruction.

II. APPLICATION OF THE INSTRUCTION

This instruction applies to chiropractors as well as physicians. *Jones v. Malloy*, 226 Neb. 559, 564, 412 N.W.2d 837, 842 (1987).

"[A] hospital has no independent duty to obtain a patient's informed consent to a surgical procedure to be performed by a physician who is not an employee of the hospital and that such duty lies exclusively with the treating physician." *Giese v. Stice*, 252 Neb. 913, 923, 567 N.W.2d 156, 164 (1997) (case of first impression).

III. AUTHORITY FOR THE INSTRUCTION

See generally Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2816, 44-2820 (Reissue 2010); *Bank v. Mickels*, 302 Neb. 1009, 1019-21, 926 N.W.2d 97, 104-106 (2019); *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005); *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004); and other cases cited in this Comment & Authorities.

"[C]onsent is informed when a doctor advises a patient of the risks in the same manner as doctors in similar localities and under similar circumstances would." Same quotation: *Bank*, 302 Neb. at 1019, 926 N.W.2d at 105; *Curran v. Buser*, 271 Neb. 332, 340, 711 N.W.2d 562, 569 (2006) (*see also, id.* at 338, 711 N.W.2d at 569). The doctor must disclose what a reasonably prudent health care provider would ordinarily provide to a patient under similar circumstances. The other side of this is that a doctor need not disclose information that a reasonably prudent health care provider would not ordinarily provide to a patient under similar circumstances. *Bank*, above; *Curran*, 271 Neb. at 338, 711 N.W.2d at 568 (doctor did not disclose disciplinary history to patient; doctor need not do so unless a reasonably prudent health care provider would ordinarily provide to a patient under similar circumstances).

Furthermore, the standard is not the doctor's own personal standard of care. The fact that a doctor's own personal standard of care required him or her to disclose certain information does not make the doctor liable for failure to do so. *Curran*, 271 Neb. at 341, 711 N.W.2d at 570 (“[A] doctor’s ‘personal standard regarding information for a patient’s consent is irrelevant.’” (quoting *Eccleston v. Chait*, 241 Neb. 961, 969, 492 N.W.2d 860, 865 (1992))).

“[T]he plaintiff must prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff’s position would not have undergone the treatment if he or she were ‘properly informed’ and that his or her injuries were proximately caused by the lack of informed consent.” *Curran*, 271 Neb. at 340, 711 N.W.2d at 569 (see also, *id.* at 338, 711 N.W.2d at 568). *Accord* Neb. Rev. Stat. §§ 44-2816, 44-2820 (Reissue 2010); *Smith v. Weaver*, 225 Neb. 569, 574, 407 N.W.2d 174, 178 (1987).

See also Prosser and Keeton *On the Law of Torts* §§ 18, 32, at 112-24, 189-93 (W. Keeton gen. ed. 5th ed. 1984).

IV. CONSENT MAY BE EXPRESS OR IMPLIED AND NEED NOT ALWAYS BE IN WRITING

“Consent may be express or implied.” *Jones v. Malloy*, 226 Neb. 559, 564, 412 N.W.2d 837, 841 (1987). *Accord* *Bank v. Mickels*, 302 Neb. 1009, 1020, 926 N.W.2d 97, 105 (2019).

The requirement of informed consent “can be met in more than one form.” *Bank*, 302 Neb. at 1021, 926 N.W.2d at 105. The controlling statute does not require that the consent be in writing. *Bank*, 302 Neb. at 1019, 926 N.W.2d at 104.

V. STATUTE OF LIMITATIONS AND REPOSE

“We hold that when an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.” *Jones v. Malloy*, 226 Neb. 559, 564, 412 N.W.2d 837, 842 (1987) (consent to surgery; plaintiff urged application of statute of limitations for battery). *Accord* *Hill v. Women’s Med. Ctr. of Nebraska*, 254 Neb. 827, 832-33, 580 N.W.2d 102, 106-07 (1998) (action for failure to obtain informed consent—here, informed consent for abortion—is professional negligence action; two-year statute of limitations applies).

The statute of limitations and repose is discussed in detail at NJI2d Civ. 12.01, Comment & Authorities, part VI(C). Regarding the statute of limitations generally applicable in cases of non-medical professional malpractice, see NJI2d Civ. 12.04, Comment & Authorities, and the cross-references therein.

VI. EXPERT TESTIMONY

A. IN GENERAL

Expert testimony is dealt with in various places in NJI2d Civ. For

a discussion of the topic in general, see NJI2d Civ. 1.42 and its Comment and Authorities. The Comment to NJI2d Civ. 1.42 contains a list of cross-references to the various places in this book where the topic of expert testimony is discussed.

In an informed consent case, expert testimony is generally required to establish what information a reasonably prudent health care provider would ordinarily provide to a patient under similar circumstances. Neb. Rev. Stat. § 44-2816 (Reissue 2010); *Curran v. Buser*, 271 Neb. 332, 338, 711 N.W.2d 562, 568 (2006); *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W.2d 219, 223 (2005); *Hamilton v. Bares*, 267 Neb. 816, 824, 678 N.W.2d 74, 81 (2004) (stating that “[i]n order to resolve any perceived conflict among *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); other informed consent cases; and § 44-2816, we hold that a physician’s duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.”); *Walls v. Shreck*, 265 Neb. 683, 690–91, 658 N.W.2d 686, 693 (2002) (generally expert testimony is not required “where the physician fails to remove a foreign object from a patient’s body or where a patient enters the hospital for treatment of one part of the body and sustains injury to another part of the body.” Where the doctor operated on the plaintiff’s right eye without express or implied consent, “the common knowledge exception is applicable in establishing whether [the surgeon] met the standard of care regarding informed consent”); *Eccleston v. Chait*, 241 Neb. 961, 968, 492 N.W.2d 860, 864 (1992) (citing cases); *Jones v. Malloy*, 226 Neb. 559, 566, 412 N.W.2d 837, 841 (1987); *Smith v. Weaver*, 225 Neb. 569, 574, 407 N.W.2d 174, 179 (1987).

B. THE STANDARD OF THE REASONABLE MEDICAL PRACTITIONER IN THE SAME OR A SIMILAR LOCALITY OR COMMUNITY

Experts from one medical community are competent to testify as experts on the standard of care in another community, if they have knowledge of and familiarity with the practice and standard of care in community in question, or similar or like communities. This is discussed in part II(A) & (B) of this Comment & Authorities, above.

C. THE EXPERT TESTIMONY OF THE DEFENDANT

“[T]he affidavit of a defendant physician in a malpractice case that states that he or she met the standard of care presents a prima facie case of lack of negligence for summary judgment purposes.” *Cerny v. Longley*, 270 Neb. 706, 711, 708 N.W.2d 219, 224 (2005). Presumably both the burden of producing evidence and the burden of proof start with the plaintiff. In *Cerny*, the Court states that when the defendant physician submits his or her own affidavit, that established a prima facie case of lack of negligence and it shifts the burden of producing some evidence to the plaintiff. It seems that the burden of producing

some evidence starts on the plaintiff and stays with the plaintiff. Even after the doctor submits his or her own affidavit affirming that he or she met the standard of care, that burden stays with the plaintiff. That is, if the plaintiff does not submit evidence of lack of care, the plaintiff—who has the burden—loses. If the doctor submits evidence of sufficient care and the plaintiff does not present evidence of lack of care, the plaintiff—who had the burden all along—still loses.

For a general discussion of defendant's affidavit and summary judgment, *see* the discussion in parts III(A) and (B) of the Comment & Authorities to NJI2d Civ. 12.01. For general discussion of expert testimony, *see* NJI2d Civ. 1.42.

VII. INFORMED CONSENT TO AN ABORTION

The statutory duty to obtain informed consent before performing or attempting an abortion “is placed upon ‘the physician who is to perform the abortion . . . the referring physician, or . . . a licensed physician assistant or registered nurse who is an agent of either.’” *Hill v. Women’s Med. Ctr. of Neb.*, 254 Neb. 827, 834, 580 N.W.2d 102, 107 (1998), quoting Neb. Rev. Stat. § 28-327(1) (Reissue 2016) (ellipses added in *Hill*) (finding no evidence that the defendant facility fit under this definition, no such duty was imposed on this defendant).

NJI2d Civ. 12.04

DUTY OF ONE RENDERING PROFESSIONAL AND SKILLED-TRADE SERVICES—IN GENERAL

A (here identify profession or trade group) has the duty to use the skill and knowledge ordinarily possessed by other (here identify profession or trade group) in good standing in the (profession, trade), in the same or similar localities.

SPECIAL NOTE

The Comment & Authorities below lists several specific professions and skilled trades to which the Nebraska Supreme Court has said this instruction applies. Some of those cases have been called into question by *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 1033, 926 N.W.2d 107, 114 (2019); *Jorgensen v. State Nat’l Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998), and other cases, particularly *Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 268 Neb. 499, 684 N.W.2d 543 (2004). *Wehrer*, *Jorgensen*, and *Parks* are discussed in part II(A) of the Comment & Authorities appearing just below. Before using this instruction, consult that part of the Comment & Authorities.

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- XI. ASSIGNMENT OF PROFESSIONAL-NEGLIGENCE CLAIM
- XII. DAMAGE DONE DURING, BUT OUTSIDE OF, A PROFESSIONAL SERVICES RELATIONSHIP

I. INTRODUCTION

See generally Prosser and Keeton On the Law of Torts § 32, at 185–93 (W. Keeton gen. ed. 5th ed. 1984).

In addition to this Comment & Authorities, *see* NJI2d Civ. 12.01, Comment & Authorities, which discusses medical malpractice; much of what is said there, arguably applies here by analogy.

“[A]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice.” *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 859 (2002).

“As a general matter, we note that before a plaintiff may recover for . . . [professional] malpractice, the essential elements of any negligence action must be proved, namely, (1) duty, (2) breach, (3) causation, and (4) resulting damages.” *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 276, 557 N.W.2d 1, 11 (1996).

Regarding these elements, *see generally* NJI2d Civ. 2.01 Special Note, Comment, and the Authorities.

Before there can be actionable negligence the alleged tortfeasor must have owed a duty to the allegedly injured party. Prior to 2010, Nebraska courts used a risk-utility balancing test to determine whether a duty exists. *Riggs v. Nickel*, 281 Neb. 249, 256, 796 N.W.2d 181, 187 (2011); *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 211, 784 N.W.2d 907, 914 (2010).

In *A.W. v. Lancaster Cty. Sch. Dist. 0001*, . . . we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts. Under this approach, an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm. This approach examines the defendant’s conduct, not in terms of whether he had a “duty” to take particular actions, but, rather, in terms of whether his conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.

Riggs, 281 Neb. at 256–57, 796 N.W.2d at 187–88 (footnotes omitted, including a footnoted citation to Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010)). That the Court has abandoned the risk-utility balance is discussed at length at NJI2d Civ. 3.02, Comments & Authorities. In the context of professional negligence, the Court traditionally said that the risk-utility balance considered the following factors.

(1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness

of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. And courts have repeatedly emphasized that the starting point for analyzing an attorney's duty of a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services.

Perez v. Stern, 279 Neb. 187, 192, 777 N.W.2d 545, 550–51 (2010) (footnotes citing cases omitted).

All but the second consideration on this list may still be relevant to the court's determination of duty, but only to the extent that they are relevant to whether the defendant's "conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances." *Riggs*, 281 Neb. at 257, 796 N.W.2d at 188. As for the second consideration, *A.W. v. Lancaster Cty. Sch. Dist. 0001*, adopting "the duty analysis contained in the Restatement (Third) of Torts, § 7, . . . expressly h[e]ld that foreseeability is not a factor to be considered by courts when making determinations of duty." *Id.* at 218, 784 N.W.2d at 918. What is or is not foreseeable goes into the decision of what is or is not reasonable care under the circumstances, which is a question for the jury. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. at 218, 784 N.W.2d at 918. "[A] lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination." *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. at 215, 784 N.W.2d at 916. NJI2d Civ. 3.02, Comments & Authorities contains a more complete discussion of this case.

Regarding foreseeability, *see* NJI2d Civ. 3.02.

Regarding causation, *see also* NJI2d Civ. 3.41; regarding damages, *see also* Chapter 4.

NJI2d Civ. 3.02 concerns the duty involved in the general negligence case. NJI2d Civ. 12.01 concerns the duty owed by health-care providers. This instruction, NJI2d Civ. 12.04, concerns the duty owed by professionals and practitioners of skilled trades. Though there are three different instructions, there is, in truth, only one duty. *See* part III of this Comment & Authorities, below, headed "There Is, In Truth, But One Standard."

II. OCCUPATIONS TO WHICH THIS INSTRUCTION APPLIES

A. DEFINITION OF A "PROFESSION"

"Whether a particular vocation is a profession is a question of law that is determined independently of the trial court." *Bixenmann v. Dickinson Land Surveyors, Inc.*, 294 Neb. 407, 411, 882 N.W.2d 910, 913 (2016).

"In determining whether a particular act or service is professional in nature, we must look to the nature of the act or service itself and the circumstances under which it was performed." *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 1033, 926 N.W.2d 107, 114 (2019). *Accord Bixemann v. Dickinson Land Surveyors (Bixemann II)*, 295 Neb. 40, 41, 886 N.W.2d 277, 278 (2016) (per curiam; supplemental opinion); *Churchill*, 285 Neb. at 768, 830 N.W.2d at 59. *See also, e.g., Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 268 Neb. 508, 684 N.W.2d 550 (2004); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 450, 590 N.W.2d 380, 388 (1999).

A professional negligence claim calls into question the conduct of the professional in his area of expertise. Administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence. If the allegations of the complaint involve the exercise of professional skill and judgment within the professional's area of expertise and go to the propriety of professional decisions rather than to the efficacy of the professional's conduct in carrying out decisions previously made, the claim sounds in professional negligence rather than ordinary negligence.

Bixemann II, 295 Neb. at 42, 886 N.W.2d at 278–79 (internal quotation marks and citations omitted).

"The same factual predicate cannot give rise to two independent obligations to exercise due care according to two different standards, because 'a defendant has only *one* duty, measured by *one* standard of care, under any given circumstances.'" *Bixemann II*, 295 Neb. at 43, 886 N.W.2d at 279. That is, the defendant does "not owe one standard of care to his clients and a different standard of care to everyone else." *Id.*

Does this point really matter? Perhaps not as regards duty, for the duty instructed on here is not really any different than the duty generally possessed by everyone—professional or not. *See* part III of this Comment & Authorities, below. But it does matter regarding other issues. For example, which statute of limitations applies in a particular case can depend on whether or not the defendant is a "professional." In *Tylle v. Voucha*, 226 Neb. 476, 480–81, 412 N.W.2d 412, 441 (1987), the court's point was that the real estate broker who was the defendant was not a professional for purposes of professional-negligence statute of limitations. In *Parks*, the Court's point was that the investment consultant who was the defendant was not a professional for purposes of the professional-negligence statute of limitations. *See also, e.g., Churchill*, 285 Neb. at 763, 830 N.W.2d at 57–58 ("In determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based."); *Reinke Mfg. Co.*, 256 Neb. at 448–50, 590 N.W.2d at 388.

Regarding the statute of limitations for non-medical professional malpractice, see part VIII of this Comment & Authorities, below. Regarding a plaintiff trying to take advantage of a different statute of limitations, see parts VIII(N) & (P) of this Comment & Authorities, below.

For purposes of “the professional negligence statute of limitations under [Neb. Rev. Stat.] § 25-222” the definition of profession is

(1) a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods; (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct, and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.

Wehrer, 302 Neb. at 1033, 926 N.W.2d at 114. *Accord*, e.g., *Bixemann I*, 294 Neb. at, 411, 882 N.W.2d at 412; *Churchill v. Columbus Cmty. Hosp., Inc.*, 285 Neb. 759, 765–66, 830 N.W.2d 53, 57–58 (2013). *Accord Parks*, 268 Neb. at 506, 684 N.W.2d at 550; *Reinke Mfg. Co.*, 256 Neb. at 450, 590 N.W.2d at 388; *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 704, 523 N.W.2d 27, 29 (1994); *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 27, 430 N.W.2d 34, 38 (1988); *Tylle*, 226 Neb. at 489, 412 N.W.2d at 440 (quoting Webster’s Third International Dictionary, Unabridged 1811 (1981)).

Tylle, above, “radically altered” the preexisting definition of “professional.” *Jorgensen v. State Nat’l Bank & Trust Co.*, above. *Tylle*’s definition of “profession” is much narrower than the pre-*Tylle* definition. Here is an even more detailed definition from *Wehrer*.

[For an occupation to constitute] a “profession” for purposes of § 25-222 each of the following principal elements must be demonstrated. The occupation is not a “profession” unless: (1) The profession requires specialized knowledge; (2) the profession requires long and intensive preparation; (3) preparation must include instruction in skills and methods of the profession; (4) preparation must include scientific, historical, or scholarly principles underlying the skills and methods of the profession; (5) membership in a professional organization is required; (6) a professional organization or concerted opinion within an organization regulates and enforces standards for membership; (7) the standards for membership include high standards of achievement; (8) the standards for membership include high standards of conduct; (9) its members are committed to continued study; (10) its members are committed to a

specific kind of work; and (11) the specific kind of work has for its primary purpose the rendering of a public service.

When analyzing whether a particular group or organization meets the definition of a “profession” for purposes of § 25-222, one should be able to affirmatively answer each element set forth above. If this cannot be accomplished, then, one should anticipate that the group or organization does not fall within the scope of § 25-222.

Wehrer, 302 Neb. at 1031–32, 926 N.W.2d 107, 114–15 (2019) (footnotes omitted). Note that *Wehrer* states that these elements “*must* be demonstrated,” *id.* at 1034, 926 N.W.2d at 114 (emphasis added), and that “[i]f this cannot be accomplished, then, one should *anticipate* that the group or organization does not fall within the scope of § 25-222,” *id.* at 1035, 926 N.W.2d at 115 (emphasis added).

Factors to consider when deciding whether one is a professional include licensure, the preparation and training required to procure the license (which might include a college degree), continuing education requirements, disciplinary authority with the power to sanction ethical violations and failure to follow professional practice. *Wehrer*, 302 Neb. at 1031, 926 N.W.2d at 113 (“A license indicates a person is a professional, but that is not the only prerequisite, nor is it dispositive.”); *Tylle*, 226 Neb. at 489, 412 N.W.2d at 440; *Bixemann I*, 294 Neb. at 412, 882 N.W.2d at 914 (stating that “although not dispositive,” “the requirement of a license” “‘strongly indicates that an occupation is a profession’” and that while a college degree is not required it may “indicate[] [the required] preparation and training”); *Churchill*, 285 Neb. at 766–67, 830 N.W.2d at 57–58 (2013); *Parks*, 268 Neb. at 508, 684 N.W.2d at 550–51 (noting the emphasis that is placed on a college degree and licensing, but also that there are over 100 certified or licensed occupations in Nebraska and licensing is not dispositive; discussing the issue and citing cases). See also *Bixemann II*, 295 Neb. at 41, 886 N.W.2d at 278.

Regarding their application of professional negligence statutes, a number of the cases discussed herein have been called into question by *Wehrer* and, before that, by *Tylle*. It is no longer valid to categorize the practitioners of certain occupations as ‘professionals’ or, at least, as categorically “professionals.”

What follows are cases that have applied this pattern instruction’s standard of care—the duty of one rendering professional services and, therefore, the application of the statute of limitations in Neb. Rev. Stat. § 25-222 (Reissue 2016)—to particular occupations. Some of these cases are called into question by *Wehrer* and earlier cases discussed above and perhaps overruled *sub silentio*. Where that caution should be exercised is noted below.

■ Abstracters: *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 413, 882 N.W.2d 910, 915 (2016).

■ Accountants: *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008) (listing and discussing the elements of accounting malpractice action: accountant's employment; accountant's neglect of a reasonable duty; said negligence proximately caused damage to the client, *id.* at 741, 749 N.W.2d at 449); *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996) (audit); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 416, 507 N.W.2d 275, 281 (1993); *Lincoln Grain, Inc. v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). *See also Wehrer*, 302 Neb. at 1030, 926 N.W.2d at 112.

"While minor inaccuracies in an audit or report may be overlooked, where by reason of the accountant's negligence, inaccuracies and failure to report facts of serious character appear, he or she is not entitled to compensation. And when compensation is paid to an accountant in reliance upon his or her report, it may be recovered, upon proof that through the accountant's negligence, the audit was in substance, false."

World Radio, 251 Neb. at 284, 557 N.W.2d at 15 (quoting 1 Am. Jur. 2d Accountants § 13 at 537 (1994); now found, with almost exactly the same quotation, at 1 Am. Jur. 2d Accountants § 8 at 593 (2005)).

■ Architects: *Wehrer v. Dynamic Life Therapy & Wellness*, 302 Neb. 1025, 1030, 1032, 926 N.W.2d 107, 112, 113 (2019); *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 239, 404 N.W.2d 32, 34 (1987); *Overland Constructors v. Millard Sch. District*, 220 Neb. 220, 229, 369 N.W.2d 69, 75-76 (1985).

■ Attorneys:

1. *Some Cases: E.g.*, *Dondlinger v. Nelson*, 305 Neb. 894, 942 N.W.2d 772 (2020); *Wehrer*, 302 Neb. at 1030, 926 N.W.2d at 112. *Rice v. Poppe*, 302 Neb. 643, 924 N.W.2d 344 (2019); *Rice v. Poppe*, 293 Neb. 467, 881 N.W.2d 162 (2016); *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015); *Swanson v. Ptak*, 268 Neb. 265, 269, 682 N.W.2d 225, 230 (2004); *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999); *Carpenter v. Cullan*, 254 Neb. 925, 937, 581 N.W.2d 72, 80 (1998); *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 702, 578 N.W.2d 446, 450 (1998); *Bauermeister v. McReynolds*, 253 Neb. 554, 565, 571 N.W.2d 79, 87 (1997); *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 685, 689, 551 N.W.2d 266, 271, 273 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 548, 550 N.W.2d 327, 335 (1996); *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 273-74, 534 N.W.2d 317, 318-19 (1995); *Patterson v. Swarr, May, Smith, & Anderson*, 238 Neb. 911, 919, 473 N.W.2d 94, 100 (1991); *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988); *Stansbery v. Schroeder*, 226 Neb. 492, 497, 412 N.W.2d 447, 450-51 (1987).

2. *The Elements of the Cause of Action:* In a legal malpractice ac-

tion, the plaintiff must allege and prove the attorney's employment (duty), negligence (the attorney's neglect of a reasonable duty), proximate cause, and damages. *E.g.*, *Rice v. Poppe*, 302 Neb. at 649, 924 N.W.2d at 348; *Rice v. Poppe*, 293 Neb. at 474, 881 N.W.2d at 168; *Harris v. O'Connor*, 287 Neb. 182, 186, 842 N.W.2d 50, 54 (2014); *Young v. Govier & Milone*, 286 Neb. 224, 235, 835 N.W.2d 684, 693 (2013); *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 835, 792 N.W.2d 134, 142 (2010); *Perez v. Stern*, 279 Neb. 187, 191, 777 N.W.2d 545, 550 (2010); *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 537-38, 657 N.W.2d 911, 916 (2003) (*Borley Storage & Transfer I*) (these "are the same general elements required in any other case based on negligence"); *Bowers v. Dougherty*, 260 Neb. 74, 84-85, 615 N.W.2d 449, 456 (2000). The following cases combine the elements of proximate cause and damages and state that there are three elements. *E.g.*, *Radiology Servs. v. Hall*, 279 Neb. 553, 560, 780 N.W.2d 17, 24 (2010); *Wolski v. Wandel*, 275 Neb. 266, 271, 746 N.W.2d 143, 148 (2008); *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 143, 738 N.W.2d 434, 447 (2007).

An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 341-42, 729 N.W.2d 311, 316-17 (2007).

"The construction of contracts between attorneys and their clients as to compensation is to be governed by the usual rules relating to the construction of agreements generally." *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 30, 938 N.W.2d 319, — (2020).

"In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances." Same quotation: *Young*, 286 Neb. at 236, 835 N.W.2d at 694; *Radiology Servs.*, 279 Neb. at 560, 780 N.W.2d at 24. *Accord Rice v. Poppe*, 293 Neb. at 474, 881 N.W.2d at 168-69 (regarding an attorney's advice respecting settlement); *Freedom Fin. Group*, 280 Neb. at 835, 792 N.W.2d at 142 (2010).

A client is bound by the acts, omissions, neglect, and fraud of the client's attorney if such conduct is within the attorney's scope of express, implied, apparent, or ostensible authority. From the nature of the attorney-client relationship itself, a lawyer derives authority to manage the conduct of litigation on behalf of a client including the authority to make certain procedural or tactical decisions. That authority is not absolute; it does not, for example, encompass settlement of a claim without a client's specific consent or silence in open court. But

it encompasses the choice, in a civil action as opposed to a criminal action, to waive a jury trial.”

McGill Restoration, Inc. v. Lion Place Condominium Association, 309 Neb. 202, 225–26, 959 N.W.2d 251, — (2021) (footnotes omitted).

“[B]y accepting employment to give legal advice or to render other legal services, [an attorney] impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.” *Wolski*, 275 Neb. at 271, 746 N.W.2d at 148. “[W]hat an attorney’s specific conduct should be in a particular case and whether an attorney’s conduct fell below that specific standard is a question of fact. Expert testimony is generally required to establish an attorney’s standard of conduct in a particular circumstance and that the attorney’s conduct was not in conformity therewith.” *Wolski*, 275 Neb. at 271–72, 746 N.W.2d at 148–49 (footnotes omitted) (expert testimony required except where these things “may be presumed to be within the comprehension of laypersons,” *id.* at 272, 746 N.W.2d at 154). Generally regarding expert testimony in a legal malpractice action, see *NJI2d Civ.* 1.42.

3. *Questions of Law vs. Questions of Fact*: “The general standard of an attorney’s conduct is established by law, but whether an attorney’s conduct fell below that standard in a particular case is a question of fact.” *Rice v. Poppe*, 293 Neb. at 475, 881 N.W.2d at 175 (“[W]hether a client’s failure to read or understand the disputed document [—here a settlement agreement—] is a superseding cause depends on the facts.”). *Accord*, e.g., *Young*, 286 Neb. at 236, 835 N.W.2d at 694; *Radiology Servs.*, 279 Neb. at 560, 780 N.W.2d at 24.

4. *A Client’s Contributory Negligence*: “A client cannot recover in a legal malpractice case if the client’s own conduct caused his or her injury. . . . We have noted that a client’s negligence in a legal malpractice case is often more relevant to negating the proximate cause element of the claim than to showing that the client’s negligence was a contributing cause of the client’s injury.” *Rice v. Poppe*, 293 Neb. at 476, 881 N.W.2d at 169–70 (footnotes omitted). “[A] client cannot recover . . . when the client’s own conduct caused the injury . . . [including] (1) when the client failed to follow the attorney’s reasonable advice; (2) when the client directed the attorney’s actions in a matter and the attorney acted in accordance with the client’s instruction; and (3) when the client misrepresented material facts upon which the attorney relied. [And] when a client’s contributory negligence . . . contributed to the professional’s inability to meet the standard of care and was a proximate cause of the plaintiff’s injury.” *Balames*, 290 Neb. at 696–97, 861 N.W.2d at 696 (footnotes omitted). *Accord* *Rice v. Poppe*, 302 Neb. at 650, 924 N.W.2d at 348 (including the same statement of points (1), (2), and (3) and restating the final sentence of the quotation from *Balames*).

“Frequently, a client’s negligence in a legal malpractice case is more relevant to negating the proximate causation element of the claim than to showing that the plaintiff’s negligence was a contributing cause to the plaintiff’s injury[.]” *Balames*, 290 Neb. at 698, 861 N.W.2d at 697. *Accord Rice v. Poppe*, 302 Neb. at 650, 924 N.W.2d at 349 (quoting *Balames* with one alteration).

5. *A Client who has Agreed to a Settlement*: A client who has agreed to a settlement may still be able to sue his or her attorney for malpractice. This is discussed in *Young*, 286 Neb. at 235, 835 N.W.2d at 693; *Wolski*, 275 Neb. at 271–75, 746 N.W.2d at 148–52. *See also Rice v. Poppe*, 293 Neb. at 474–75, 881 N.W.2d at 168–69.

6. *The Common-Knowledge Exception*: The common-knowledge exception applies here as elsewhere. “Under the common-knowledge exception, expert testimony is not needed if the alleged negligence is within the comprehension of laypersons.” *Rice v. Poppe*, 293 Neb. at 475, 881 N.W.2d at 169. *See also id.* at 480. The common-knowledge exception to the need for expert testimony in the context of professional malpractice is discussed above, in part III(B) of this Comment & Authorities. Regarding the common-knowledge exception generally, *see also* NJI2d Civ. 1.42. Regarding this exception in medical malpractice cases, *see* NJI2d 12.01, Comment & Authorities. Regarding the related topic *res ipsa loquitor*, *see* NJI2d Civ. 2.13 and 12.11, Comment & Authorities.

7. *Attorney Liability to Third Parties*: “[A] lawyer’s duty to use reasonable care ordinarily does not extend to third parties, absent facts establishing a duty to them.” *Perez v. Stern*, 279 Neb. 187, 192, 777 N.W.2d 545, 551 (2010) (emphasis in original). Formerly whether or not a lawyer has a duty to a third party depended on the outcome of a risk-utility balance. In 2010 the Court abandoned the risk-utility balance. This is discussed in the Introduction that is part I of this Comment & Authorities and, in greater depth at NJI2d Civ. 3.02.

8. *Legal Malpractice Claims are not Assignable*: The nonassignability of legal malpractice claims is discussed elsewhere in this Comment & Authorities.

9. *Attorney in a Civil Action*: In a case alleging attorney malpractice regarding representation in a civil matter, the plaintiff must allege and prove the four things discussed above—the attorney’s employment (duty), negligence (the attorney’s neglect of a reasonable duty), proximate cause, and damages—plus this: but for the attorney’s malpractice, “he or she would have been successful in the underlying action.” *Bowers v. Dougherty*, 260 Neb. 74, 85, 615 N.W.2d 449, 457 (2000). *Accord Bellino v. McGrath North Mullin & Kratz, PC*, 274 Neb. 130, 150, 738 N.W.2d 434, 454 (2007) (plaintiff must establish he “would have obtained a more favorable judgment or settlement”). One way of

looking at this “fifth requirement” is to consider it part of the fourth general requirement, *i.e.*, damages.

10. *Defense Attorney in a Criminal Action*: In a case alleging attorney malpractice in the defense of a criminal matter, the convicted criminal filing the action must allege and prove those four things and “that he or she is innocent of the underlying crime.” *Rodriguez v. Nielsen*, 264 Neb. 558, 561, 650 N.W.2d 237, 240 (2002); *Rodriguez v. Nielsen*, 259 Neb. 264, 274, 609 N.W.2d 368, 375 (2000). To be acquitted in a criminal trial, one need not be innocent of the crime, but rather not guilty beyond a reasonable doubt. In a civil action alleging legal malpractice in a criminal action, then, this fifth element, *i.e.*, innocence of the underlying crime, must be added onto the four elements listed in paragraph 9, just above, and cannot be considered part of paragraph 9’s fourth element, *i.e.*, damages. *See also* NJ12d Civ. 2.01.

11. *Statute of Limitations*: *See* part VIII of this Comment & Authorities, below.

■ **Dentists**: *Capps v. Manhart*, 236 Neb. 16, 19, 458 N.W.2d 742, 744 (1990); *Grandy v. Merchant*, 127 Neb. 696, 700, 256 N.W. 636, 638 (1934); *Mangiameli v. Ariano*, 126 Neb. 629, 635, 253 N.W. 871, 874 (1934); *Knepher v. McKenney Dentists*, 107 Neb. 106, 108, 185 N.W. 412, 413 (1921).

■ **Engineers**: *See Wehrer*, 302 Neb. at 1030, 1032 926 N.W.2d at 107, 113; *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 503, 519 N.W.2d 530, 538 (1994); *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 27, 430 N.W.2d 34, 38 (1988); *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 239, 404 N.W.2d 32, 34 (1987). *But see* the discussion of *Tylle, Jorgensen, and Parks, et al.*, above. The category of engineers who are professionals can depend on what kind of “engineer” one is.

■ **Framing carpenters**: *Topil v. Hub Hall Co.*, 230 Neb. 151, 157, 430 N.W.2d 306, 309 (1988). *But see* the discussion of *Wehrer*, above, which may *sub silentio* overturn or limit *Topil*’s decision regarding the status of framing carpenters.

■ **Investment advisers**: *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994) (“negligent planning of a retirement benefit program”), *disapproved on other grounds by Jorgensen, supra*; *Educational Serv. Unit No. 3 v. Mammel, Olsen, Schropp, Horn & Swartzbaugh, Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). *See also* *Tylle v. Zoucha*, 226 Neb. 476, 483, 412 N.W.2d 438, 442 (1987) (Caporale, J., concurring). *But see* the discussion above and particularly *Parks, supra*, where the Court held that the investment consultant therein was not a professional.

Investment advisers provide a good example of the fact that some persons practicing an occupation may be “professionals,” while others

may not be. The decision is dependent on the facts regarding the particular adviser. The decision in *Jorgensen* was “[b]ased on the evidence adduced,” leaving room for a different kind of evidence in a different case: “Based on the evidence adduced, we conclude that Bank’s employees, even if characterized as ‘retirement planners,’ were not professionals.” *Jorgensen*, 255 Neb. at 247, 583 N.W.2d at 335. (See also Justice Caporale’s concurring opinion in *Jorgensen*, referring to “this court’s case-by-case analysis of the issue.” *Jorgensen*, 255 Neb. at 247, 583 N.W.2d at 335 (Caporale, J. concurring).) Likewise, the investment consultant in *Parks* was not a professional. In *Parks*, the court noted that was no evidence that the investment consultant who was the defendant therein had a securities license that required “advanced education or significant experience in his field.” There was no evidence that his license “required long and intensive training or preparation on a par with a college degree, or even preparation [equivalent to that found in other cases].” *Parks*, 268 Neb. at 510, 684 N.W.2d at 552.

■ Medical technicians: *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976). See also *Tylle v. Zoucha*, 226 Neb. 476, 483, 412 N.W.2d 438, 442 (1987) (Caporale, J., concurring). But see the discussion of *Wehrer*, above, which rules out a categorical decision regarding the status of medical technicians.

■ Petroleum products, one who stores or sells: *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1026, 574 N.W.2d 478, 485 (1998). But see the discussion of *Wehrer*, above, which may *sub silentio* overturn or limit the *Bargmann* decision.

■ Physicians: *E.g.*, *Wehrer*, 302 Neb. at 1030, 926 N.W.2d at 112. Note that the statute of limitations and repose for medical malpractice is Neb. Rev. Stat. § 44-2828 (Reissue 2010) and for professional negligence in general is Neb. Rev. Stat. § 25-222 (Reissue 2016). The terms of each are the same as regards limitation and repose. For physicians, see generally *NJI2d Civ. 12.01*.

■ Physical therapists: *Wehrer*, 302 Neb. at 1030, 1032–33, 926 N.W.2d at 112–14; *Churchill*, 285 Neb. at 768, 830 N.W.2d at 59. But not massage therapists. *Wehrer*, 302 Neb. 1036, 926 N.W.2d at 115–16. Again, *Wehrer* may rule out a categorical decision regarding the status of a physical therapist.

■ Real estate brokers and agents: Neb. Rev. Stat. § 25-229 (Reissue) states that a two-year statute of limitation, one-year discovery rule, and 10-year statute of repose apply to a “real estate licensee, defined as “a broker or salesperson who is licensed under the Nebraska Real Estate License Act.” This is a separate statute than § 25-222, which is the statute under discussion here. But see *Wehrer*, 302 Neb. at 1030, 926 N.W. 2d at 112, which cites *Tylle*, as holding “that a real estate agent was not a professional under § 25-222.”

■ Registered surveyors: “[R]egistered surveyors are professionals

for purposes of professional negligence." *Bixemann I*, 294 Neb. at 415, 882 N.W.2d at 916 (emphasis added). *Wehrer*, 302 Neb. at 1030, 926 N.W.2d at 112 ("land surveyor"). *But see* the discussion of *Wehrer*, above.

■ Stockbrokers: *O'Connor v. Burns, Potter & Co.*, 151 Neb. 9, 30, 36 N.W.2d 507, 519 (1949). *But see* the discussion of *Wehrer*, above.

■ Termite inspectors: *Douppnik v. Usher Pest Control*, 217 Neb. 1, 346 N.W.2d 699 (1984). *But see* the discussion of *Wehrer*, above, which seems to overturn *Douppnik's* decision, at least to the extent that it may have been a categorical decision.

■ Title insurance agents: *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 513, 557 N.W.2d 696, 705 (1997) ("[T]itle insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing in the locality" This is not the duty of a guarantor, but the duty to exercise reasonable care). *But see* the discussion of *Wehrer*, above, which may change the status of title insurance agents.

■ Torch operator: *Schuster v. Baumfalk*, 229 Neb. 785, 794, 429 N.W.2d 339, 346 (1988) (brazing-torch operator). *But see* the discussion of *Wehrer*, above, which may *sub silentio* overrule or limit this holding in *Schuster*.

■ Tow-truck operators: *Brown v. Kaar*, 178 Neb. 524, 529, 134 N.W.2d 60, 64 (1965). *But see* the discussion of *Wehrer*, above, which may *sub silentio* overrule this holding in *Brown*.

■ Veterinarians: *Fackler v. Genetzky*, 257 Neb. 130, 135-36, 595 N.W.2d 884, 889 (1999); *Barney v. Pinkham*, 29 Neb. 350, 352, 45 N.W. 694, 694 (1890).

B. THE RULE OF THE RESTATEMENT

The standard of care of the Restatement (Second) of Torts applies generally to malpractice cases involving both professionals and practitioners of skilled trades. Restatement (Second) of Torts § 299A (1965).

" 'Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities' " *Schuster v. Baumfalk*, 229 Neb. 785, 794, 429 N.W.2d 339, 346 (1988) (brazing-torch operator) (quoting syllabus of the court in *Douppnik v. Usher Pest Control*, 217 Neb. 1, 346 N.W.2d 699 (1984)). *But see* part II(B) of this Comment & Authorities, above.

See also the two parts of this Comment & Authorities, below, that discuss the locality rule and specialists, and the part of this Comment & Authorities, just below, headed "Definition of 'Profession.' "

III. THERE IS, IN TRUTH, BUT ONE STANDARD

Regarding whether this instruction must be given, whether it is error to refuse the instruction, note the following. In *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 288, 404 N.W.2d 424, 428–29 (1987), the plaintiff argued that the jury should have been instructed that the defendant, as a professional property manager, was to be held to an enhanced standard of care. The court said that the refusal to instruct the jury that the defendant's "expertise was to be considered in assessing the quantum of care required did not constitute error, as there is in truth, but one standard: that of reasonable prudence under the circumstances."

IV. THE TORT ACTION VERSUS THE BREACH OF CONTRACT ACTION

In *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996), an assisted living facility had taken some of its residents on an excursion to a wildlife refuge. After exiting the van, one of the residents fell in the refuge parking lot and broke her hip. She brought an action against the owner and operator of the facility. On appeal, the facility argued that the trial court should have directed a verdict in its favor because plaintiff failed to put on evidence of "the standard of care exercised by similar facilities in providing similar services," that is, the standard of care for like professionals in the performance of similar professional services.

[T]his appeal does not involve an allegation of professional negligence. As [plaintiff] argues, this case was pled and tried on the theory that [defendant] breached its contractual duty to provide assistance to [plaintiff] There is no allegation that [defendant's employees] breached a professional standard of care; therefore, this case should be treated as an ordinary negligence case, and no evidence of a special standard of care is necessary.

Id. at 557–58, 550 N.W.2d at 341. *See also* the part of this Comment & Authorities, above, headed "There Is, In Truth, But One Standard." (Regarding the contractual duty and negligence, *see* N.JI2d Civ. 15.01, Comment.)

"If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies." *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 859–60 (2002). This point is discussed along with the discussion of the statute of limitations found at part VIII of this Comment & Authorities, below.

"Although an attorney-client relationship rests in contract, an attorney's alleged professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence

action.” *Bauermeister v. McReynolds*, 253 Neb. 554, 565, 571 N.W.2d 79, 87 (1997). *Accord Swanson v. Ptak*, 268 Neb. 265, 269, 682 N.W.2d 225, 230 (2004).

V. THE LOCALITY RULE

“Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.” *Schuster v. Baumfalk*, 229 Neb. 785, 794, 429 N.W.2d 339, 346 (1988) (brazing-torch operator) (quoting syllabus of the court in *Doupnik v. Usher Pest Control*, 217 Neb. 1, 346 N.W.2d 699 (1984)). *Accord, e.g., Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1026, 574 N.W.2d 478, 485 (1998); *Topil v. Hub Hall Co.*, 230 Neb. 151, 157, 430 N.W.2d 306, 310 (1988).

NJI2d Civ. 12.01, Comment & Authorities, contains an extensive discussion of the locality rule in its specific application to malpractice on the part of health-care providers. In cases involving health care providers who are not qualified for the protection of the Nebraska Hospital-Medical Liability Act (which requires application of the locality rule where it applies), the Supreme Court has been rather swiftly eroding the locality rule. Those cases are discussed at NJI2d Civ. 12.01, Comment & Authorities. The logic of those cases may apply to professional malpractice cases outside the health care area. NJI2d Civ. 12.01, Special Note and Comment & Authorities should be consulted before giving the “locality rule” portion of this pattern instruction.

VI. SPECIALISTS

If the professional in question has represented that he or she has greater or less skill or knowledge than that normally possessed by practitioners of the profession (for example, if the professional holds him-or herself out as a specialist), then the standard of care may be greater or less, and this instruction may have to be adapted. The law in this regard is not very well fleshed out. The court in *Schuster v. Baumfalk*, 229 Neb. 785, 794, 429 N.W.2d 339, 346 (1988) (citing one case), stated that, unless representations are made that greater or lesser skill is possessed, one who undertakes to render services in practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade, in good standing in similar communities. It does not necessarily say anything about what happens if representations of greater or lesser skill are made. There is nothing in Nebraska elaborating on what *Schuster* says on this point. There is some, though not much, elaboration on the point in comment d to Restatement (Second) of Torts § 299A (1965). *Prosser and Keeton On the Law of Torts* § 32, at 185–89 (W. Keeton gen. ed. 5th ed. 1984) also addresses the subject, though it is of even less help than the Restatement.

Regarding malpractice by health-care providers, the same instruc-

tion on duty applies whether the provider is a specialist or a general practitioner. A specialist must use the skill and knowledge ordinarily possessed and used under similar circumstances by practitioners of the same specialty. *See* the part of the Comment & Authorities to NJI2d Civ. 12.01 headed “Specialists.”

VII. EXPERT TESTIMONY

Those who practice a trade must exercise the skill and care normally possessed by members of that trade who are in good standing in the same community. As a general rule, this requires evidence of the skill and care normally possessed by members of the trade in the community in question—evidence of the applicable standard of care. Often this will require expert testimony of the standard for the trade in the community. *See* *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1027, 574 N.W.2d 478, 485 (1998).

Expert testimony is dealt with in various places in NJI2d Civ, including elsewhere in this chapter. For a discussion of the topic in general, *see* NJI2d Civ. 1.42 and its Comment & Authorities. The Comment & Authorities to NJI2d Civ. 1.42 contains a list of cross-references to the various places in this book where the topic of expert testimony is discussed.

VIII. STATUTE OF LIMITATIONS

A. STATUTE OF LIMITATIONS ISSUES OF FACT TRIED SEPARATELY AND BY A JURY

In 1997, the Nebraska statute regarding the trial of statute-of-limitations issues was amended. Section 25-221 of the Revised Statutes of Nebraska has long provided that when a party claims an action is barred by a statute of limitations, any party may move that the statute of limitations issues be determined before any other issues in the case. The 1997 amendment to § 25-221 adds this: “Issues of fact raised by the statute of limitations shall be tried before a jury unless trial by jury is waived by all parties. Issues of law raised by the statute of limitations shall be determined by the court without a jury.” Neb. Rev. Stat. § 25-221 (Reissue 2016).

The Unicameral web site includes this statement, by Senator Brashear, Chairperson of the Judiciary Committee, of the reason for the amendment:

[Prior to this amendment, the law provided that the issue of the statute of limitations as a bar to an action] will be “tried separately and before any other issues in the case . . .”

Nebraska judges have not been consistent in their interpretation of this statute. In some instances the judge will allow the

parties to have the issue decided before a jury. In other instances the judge will insist that the matter be determined by the judge without a jury. This bill will allow the matter to be determined by a jury unless both parties agree to waive a jury trial.

This bill will not require that a new jury be impaneled nor will it delay the adjudication of the principal issue. LB 165 would allow a degree of uniformity to be achieved throughout the state in this area of civil practice.

Formerly found at <http://unicam2.lcs.state.ne.us/legdocs/stateint/165.htm>.

The court still decides statute-of-limitation issues that present questions of law. "Which statute of limitations applies is a question of law." *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 761, 830 N.W.2d 53, 55 (2013). "In determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based." *Churchill*, 285 Neb. at 761, 830 N.W.2d at 55. "[W]hether an action was a professional service [is] a question of law." *Churchill*, 285 Neb. at 768, 830 N.W.2d at 59-60. "If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law." *Carruth v. State*, 271 Neb. 433, 436, 712 N.W.2d 575, 578 (2006).

B. PLEADINGS

If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action. *Egan v. Stoler*, 265 Neb. 1, 7, 653 N.W.2d 855, 860 (2002); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 358, 543 N.W.2d 445, 450 (1996) (where face of petition shows cause of action is barred by statute of limitations, plaintiff must allege facts explaining why statute was tolled and, then, must provide sufficient evidence at hearing on motion for summary judgment to create material question of fact on limitations issue); *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989); *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989). See also *NJI2d Civ. 2.02D*, Comment & Authorities.

As noted above: "If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law." *Carruth v. State*, 271 Neb. 433, 436, 712 N.W.2d 575, 579 (2006).

Such a petition is either subject to a demurrer or to a rule 12(b)(6) motion, depending on when the cause of action was filed. Effective Janu-

ary 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 691 N.W.2d 508 (2005). “A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer.” *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515. This affirmative defense may now be raised in the answer or in a rule 12(b)(6), and the 12(b)(6) motion may be styled a Motion to Dismiss. *Weeder, Id.* at 122–23, 691 N.W.2d at 515.

As discussed elsewhere in this Comment & Authorities, “[w]here a party’s claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies.” *Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 268 Neb. 499, 505, 684 N.W.2d 543, 549 (2004).

“The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.” *McGill v. Lion Place Condo. Ass’n*, 291 Neb. 70, 88, 864 N.W.2d 642, 657 (2015) (appellees did not “raise[] a statute of limitations defense in their answers or motions to dismiss”).

C. CROSS REFERENCES

The statute of limitations applicable in almost all cases of alleged professional malpractice is Neb. Rev. Stat. § 25-222 (Reissue 2016). In this regard, *see* Casenote, “The Decline and Rise of Statutes of Repose—*Witherspoon v. Sides Construction Co.*,” 19 Creighton L.Rev. 509, 524–25 (1986).

Statutes of limitations applicable in particular kinds of cases that might involve allegations of negligence against professionals, and sources of information regarding each, include:

- **Fraud:** *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 419–24, 507 N.W.2d 275, 282–85 (1993) (citing and discussing cases).

- **Health-care providers (including medical malpractice) and the Nebraska Hospital-Medical Liability Act:** NJI2d Civ. 12.01.

- **Home construction:** Neb. Rev. Stat. § 25-223 (Reissue 2016). *See also* *Adams v. Manchester Park*, 291 Neb. 978, 983, 871 N.W.2d 215, 218–19 (2015); *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 27–31, 430 N.W.2d 34, 38–40 (1988).

- **Products liability:** Neb. Rev. Stat. § 25-224 (Reissue 2016); NJI2d Civ. 11.20.

- **Tort claims against the state or political subdivisions under either the State Tort Claims Act or the Political Subdivisions Tort Claims Act:** NJI2d Civ. 8.72.

- **Wrongful death:** NJI2d Civ. 4.60.

Statutes of limitations are also discussed in depth at NJI2d Civ. 2.02D, Comment & Authorities.

For a more complete exposition of authorities relevant to this statute, see the discussion of both this statute, § 25-222 (applicable in cases of professional negligence in general, and discussed in this Comment & Authorities), and its twin, § 44-2828 (applicable in cases of medical-malpractice, and discussed at NJI2d Civ. 12.01, Comment & Authorities).

Olsen v. Richards, 232 Neb. 298, 440 N.W.2d 463 (1989), discussed the difference between a cause of action to which the professional negligence statute of limitations applies and one to which the ordinary negligence statute of limitations applies.

D. THE STATUTE IN TWO SENTENCES

Neb. Rev. Stat. § 25-222 (Reissue 2016) applies to causes of action for professional negligence or breach of warranty regarding professional services. It enacts a two-year statute of limitations, with a one-year discovery rule, and a ten-year statute of repose.

E. THE ACCRUAL DATE OF THE CAUSE OF ACTION

The action must be filed within two years “after the alleged act or omission . . . providing the basis for such action.” Neb. Rev. Stat. § 25-222 (Reissue 2016).

A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action. *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). A statute of limitations may begin to run at some time before the full extent of damages has been sustained.

Zion Wheel Baptist Church v. Herzog, 249 Neb. 352, 357–58, 543 N.W.2d 445, 449–50 (1996). *Accord* *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 768, 830 N.W.2d 53, 59-60 (2013); *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 141, 738 N.W.2d 434, 445 (2007); *Carruth v. State*, 271 Neb. 433, 437, 712 N.W.2d 575, 580 (2006); *Nuss v. Alexander*, 269 Neb. 101, 106, 691 N.W.2d 94, 99 (2005); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 450–54, 590 N.W.2d 380, 388–90 (1999); *Giese v. Stice*, 252 Neb. 913, 924–25, 567 N.W.2d 156, 164–165 (1997).

“The point at which a statute of limitations commences to run must be determined from the facts of each case.” *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 25, 430 N.W.2d 34, 37 (1988). *Accord* *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 389–90 (1999); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 354, 543 N.W.2d 445, 448 (1996); *Suzuki v. Holthaus*, 221 Neb. 72, 75, 375 N.W.2d 126, 128 (1985).

“The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.” Same quotation: *Colwell v. Mullen*, 301 Neb. 408, 414, 918 N.W.2d 858, 864 (2108); *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 860 (2002) (allegation of attorney malpractice). *Accord* *Behrens v. Blunk*, 284 Neb. 454, 459, 822 N.W.2d 344, 348 (2012).

If a claim for professional negligence is not to be considered time barred, that plaintiff must either file within 2 years of the alleged act or omission or show that its action falls within an exception to [Neb. Rev. Stat. § 25-222.]” *Colwell*, 301 Neb. at 414, 918 N.W.2d at 864. For more on this, see NJI2d Civ. 12.01, Comment & Authorities, part VI.

For a general discussion of when a cause of action accrues, see NJI2d Civ. 5.04, Comment.

■ **Architects:** With regard “to an architect who has a duty to inspect throughout construction [this statute of limitations] begins to run when the construction is completed.” *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 239, 404 N.W.2d 32, 34 (1987). *Accord* *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 504, 519 N.W.2d 530, 538 (1994).

■ **Auditors:** “In cases involving negligently prepared audits, the statute begins to run when the audit report is delivered to the client.” *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 275, 557 N.W.2d 1, 10 (1996).

F. EQUITABLE TOLLING OF THE STATUTE

1. In General

[Equitable tolling] permits a court to excuse a party’s failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstances beyond his or her control, the plaintiff cannot be expected to file suit on time. Unlike the doctrine of equitable estoppel, equitable tolling requires no fault on the part of the defendant. Equitable tolling, however, does require due diligence on the part of the claimant.

In re Estate of Fuchs, 297 Neb. 667, 679, 900 N.W.2d 896, 905 (2017).

2. The Discovery Rule

Regarding the “discovery exception” to the professional malpractice statute of limitations, see part VIII(G) of this Comment & Authorities, below.

3. The Continuing Treatment or Representation Exception

Regarding the “continuing treatment exception” to the professional

malpractice statute of limitations, see part VIII(H) of this Comment & Authorities, below

4. Children: Tolling During Minority

Regarding the age of the potential plaintiff, Nebraska statutes provide that “‘If a person entitled to bring any action . . . is, at the time the cause of action accrued, within the age of twenty years . . . such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.’” *Carruth v. State*, 271 Neb. 433, 442, 712 N.W.2d 575, 582 (2006) (quoting Neb. Rev. Stat. § 25-213 (Reissue 2016)) (alteration in *Carruth*). This “tolls the running of the statute of limitations period.” *Carruth*, 271 Neb. at 442, 712 N.W.2d at 582. *Accord* *Perez v. Stern*, 279 Neb. 187, 190–91, 777 N.W.2d 545, 549–51 (2010).

Such a potential plaintiff's limitation period begins to run on his or her 21st birthday. *Carruth*, 271 Neb. at 435, 712 N.W.2d at 578. (When the plaintiff's cause of action is not discoverable at the time of the occurrence, but the plaintiff does discover the cause of action within the limitation period that began to run after his or her 21st birthday, then the discovery rule does not apply, *i.e.*, the statute runs from the date of the plaintiff's 21st birthday. *Carruth*, 271 Neb. at 442, 712 N.W.2d at 582.)

5. Appeal of an Action upon Which a Legal Malpractice Action is Based

Regarding the statute of limitations in a malpractice action against an attorney, in *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985), the court said that an appeal of the action with regard to which the malpractice was allegedly committed did not defer the running of the statute. “Non-‘discovery’ of all damages is not the equivalent of nondiscovery of a cause of action.” *Id.* at 76, 375 N.W.2d at 129. Legal malpractice in Nebraska is discussed generally at Nebraska Association of Trial Attorneys, Professional Malpractice (Nov. 18, 1983) (C.L.E. materials).

6. Fraudulent Concealment

Regarding fraudulent concealment and the statute of limitations, see part VIII(J) of this Comment & Authorities, below. Fraudulent concealment does not toll the running of the statute. Rather, it bars its assertion.

G. THE DISCOVERY RULE

Nebraska follows the occurrence rule, under which a professional negligence suit accrues at the time the act of omis-

sion in rendering or failing to render professional services takes place. A plaintiff may be relieved of the strictures of filing within 2 years after the negligent act or occurrence by virtue of the “discovery exception.” The discovery exception permits an action to be commenced within 1 year from the earlier of the date of discovery of the cause of action or the date of discovery of facts which would reasonably lead to such discovery. The discovery exception is applicable only where the cause of action is not discovered and could not have reasonably been discovered during the 2-year limitation period

Gering-Fort Laramie Irr. Dist. v. Baker, 259 Neb. 840, 845, 612 N.W.2d 897, 902 (2000) (citations omitted). *Accord*, e.g., *Dondlinger v. Nelson*, 305 Neb. 894, 901, 942 N.W.2d 772, 782 (2020); *Bonness v. Armitage*, 305 Neb. 747, 756, 942 N.W.2d 238, 245 (2020); *Colwell v. Mullen*, 301 Neb. 408, 414, 918 N.W.2d 858, 864 (2018); *Guinn v. Murray*, 286 Neb. 584, 597–98, 837 N.W.2d 805, 817 (2013); *Carruth v. State*, 271 Neb. 433, 438, 712 N.W.2d 575, 580 (2006); *Gordon v. Connell*, 249 Neb. 769, 774, 545 N.W.2d 722, 725 (1996).

“[I]f the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. . . .” Neb. Rev. Stat. § 25-222 (Reissue 2016). *Accord* *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 860 (2002); *Shlien v. Bd. of Regents*, 263 Neb. 465, 473-74, 640 N.W.2d 643, 651 (2002) (stating that the discovery rule applies to actions pursuant to Political Subdivisions Tort Claims Act and State Tort Claims Act, *see* NJI2d Civ. 8.72, Comment); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 390 (1999); *Weaver v. Cheung*, 254 Neb. 349, 353–56, 576 N.W.2d 773, 776–78 (1998); *World Radio Labs., Inc. v. Coopers & Lybrand*, 251 Neb. 261, 275, 557 N.W.2d 1, 10 (1996) (stating that the 2-year limitation may be extended if facts constituting the basis of the action were not discovered and could not reasonably be discovered within 2 years of alleged negligent acts and the action may be brought within 1 year from discovery); *Nichols v. Ach*, 233 Neb. 634, 639, 447 N.W.2d 220, 224 (1989); *Seagren v. Peterson*, 225 Neb. 747, 749, 407 N.W.2d 790, 792 (1987).

The discovery rule “is a tolling provision.” *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 860 (2002). *Accord* *Behrens v. Blunk*, 284 Neb. 454, 460, 822 N.W.2d 344, 349 (2012).

[A] plaintiff seeking to invoke the “discovery” clause to toll the statute of limitations for professional negligence must allege more than a conclusion that the cause of action was not and reasonably could not have been discovered with the 2-year period. The petition must allege facts explaining *why* this is so.

Giese v. Stice, 252 Neb. 913, 925, 567 N.W.2d 156, 165 (1997) (emphasis

in original). *Accord* *Nuss v. Alexander*, 269 Neb. 101, 106–07, 691 N.W.2d 94, 99 (2005) (“ . . . must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.”).

“In a professional negligence case, ‘discovery of the act or omission’ occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.” *Bonness*, 305 Neb. at 758, 942 N.W.2d at 246.

Discovery refers to knowledge of the existence of injury or damage, rather than knowledge of a legal right to seek redress in court. *E.g.*, *Dondlinger*, 305 Neb. at 901, 942 N.W.2d at 778; *Bonness*, 305 Neb. at 758, 942 N.W.2d at 246; *Andres v. McNeil Co.*, 270 Neb. 733, 743, 707 N.W.2d 777, 786 (2005); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453–54, 590 N.W.2d 380, 390 (1999); *Gordon v. Connell*, 249 Neb. 769, 774, 545 N.W.2d 722, 725 (1996) (stating that the trigger is knowledge of the existence of an injury, not knowledge of the legal right to seek redress); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 357–58, 543 N.W.2d 445, 449–50 (1996); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 417–18, 507 N.W.2d 275, 281–82 (1993); *Sherbeck v. Schaper*, 232 Neb. 754, 761–62, 442 N.W.2d 364, 369 (1989); *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988).

The statute begins to run with the discovery of either facts constituting the basis of the cause of action or facts sufficient to cause a reasonable person to begin an inquiry that would lead to the discovery of facts constituting the basis of the cause of action. *Behrens v. Blunk*, 284 Neb. 454, 460, 822 N.W.2d 344, 349 (2012); *Shlien*, 263 Neb. at 473, 640 N.W.2d at 650; *Gering-Fort Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 846, 612 N.W.2d 897, 902–03 (2000); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 390 (1999) (citing cases); *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 910, 546 N.W.2d 310, 314 (1996); *Gordon v. Connell*, 249 Neb. 769, 774, 545 N.W.2d 722, 725 (1996) (“ . . . discovery occurs when the party knows of sufficient facts to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to [discovery]”); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 357–58, 543 N.W.2d 445, 449–50 (1996); *Norfolk Iron & Metal Co. v. Behnke*, 230 Neb. 414, 421, 432 N.W.2d 18, 22 (1988); *Georgetowne Ltd. P’ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988).

The statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. Under the discovery rule, the action accrues when the injured party recognizes, or, in the exercise of reasonable diligence, should have discovered the existence of the injury, not when the injured party recognizes whose negligence was responsible for injury; the focal point is

when the injury occurs, not when the tortfeasor is identified. *Teater v. State*, 252 Neb. 20, 26, 559 N.W.2d 758, 762 (1997). *See also* *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 330, 597 N.W.2d 602, 607 (1999) (an action for fraud must be filed within four years of when the cause of action accrues, and it accrues when there is discovery of either the facts constituting the fraud or facts sufficient to put the reasonable person on an inquiry that would, if followed, lead to discovery of the fraud).

"It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed." Same quotation: *Dondlinger*, 305 Neb. at 901, 942 N.W.2d at 778 *Bonness*, 305 Neb. at 758, 942 N.W.2d at 758; *Guinn*, 286 Neb. at 597-98, 837 N.W.2d at 817. *Accord, e.g.*, *Behrens v. Blunk*, 284 Neb. 454, 460, 822 N.W.2d 344, 349 (2012); *Nuss v. Alexander*, 269 Neb. 101, 106, 691 N.W.2d 94, 99 (2005); *Gering-Fort Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 846, 612 N.W.2d 897, 903 (2000); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 505, 519 N.W.2d 530, 539 (1994).

Although we have not explicitly so stated, it is implicit in our prior rulings that in those cases in which the discovery rule applies, the beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act of omission.

Shlien, 263 Neb. at 473, 640 N.W.2d at 650.

"In compliance with the plain meaning of the statute, . . . the 2-year statute of limitations is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period." *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 860 (2002). "[In *Ames v. Hehner* the] court held that the running of the 2-year statute of limitations barred the plaintiff's action, even though she discovered the cause of action just 4 months before the expiration of the limitations period." *Carruth v. State*, 271 Neb. 433, 438, 712 N.W.2d 575, 580 (2006) (referencing *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989)). *See also, e.g.*, *Weaver v. Cheung*, 254 Neb. 349, 353-56, 576 N.W.2d 773, 776-78 (1998).

"[F]or the purpose of extending a statute of limitations, discovery does not mean the final resolution of damages; it can be triggered at some time before the full extent of the damages is sustained." *Seagren v. Peterson*, 225 Neb. 747, 750, 407 N.W.2d 790, 792 (1987). *Accord* *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 274 Neb. 130, 141, 738 N.W.2d 434, 445 (2007). "A lack of knowledge of the extent of damages is not the equivalent of a lack of discovery of a cause of action" *Gering-Fort Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 847, 612 N.W.2d 897, 903 (2000). "In a cause of action for professional negligence legal injury is the wrongful act or omission which causes the loss. Legal

injury is not damage; damage is the loss resulting from the misconduct.” Same quotation: *Dondlinger*, 305 Neb. at 901, 942 N.W.2d at 778 (footnote omitted); *Bonness*, 305 Neb. at 758, 942 N.W.2d at 246 (footnote omitted). *Guinn*, 286 Neb. at 597–98, 837 N.W.2d at 817 (citation omitted).

In a legal malpractice claim related to criminal defense, the statute of limitations is not tolled during incarceration. “The fact that the plaintiff is imprisoned subsequent to his or her conviction does not affect that plaintiff’s ability to reasonably recognize that he or she might have a viable claim for legal malpractice against his or her trial counsel.” *Seevers v. Potter*, 248 Neb. 621, 630, 537 N.W.2d 505, 511 (1995). It is not tolled until such time as a criminal defendant who obtains postconviction relief actually obtains such relief. The discovery rule does not necessarily mean that the criminal defendant could not reasonably have discovered the cause of action until he or she is awarded postconviction relief; that is, discovery of the cause of action and the award of postconviction relief are not synonymous. *Id.*, at 625–31, 537 N.W.2d at 508–511.

More generally, Neb. Rev. Stat. § 25-213 (Reissue 2016) states this general rule:

[I]f a person entitled to bring a cause of action mentioned in Chapter 25. . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by Chapter 25 after such disability is removed. Regarding this statute, the court has held that “a showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required to entitle a prisoner to have the statute of limitations tolled during imprisonment.”

Gordon v. Connell, 249 Neb. 769, 775–76, 545 N.W.2d 722, 726 (1996) (citing cases).

This “within the age of twenty years” provision means that the potential plaintiff’s limitation period begins to run on his or her 21st birthday. When the plaintiff’s cause of action is not discoverable at the time of the occurrence, but the plaintiff does discover the cause of action within the limitation period that began to run after his or her 21st birthday, then the discovery rule does not apply. *Carruth v. State*, 271 Neb. 433, 442, 712 N.W.2d 575, 582 (2006).

Even under the discovery rule, however, no such action may be commenced more than ten years after the triggering date. Neb. Rev. Stat. § 25-222 (Reissue 2016). *See also Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997) (statute of limitations and repose for medical malpractice is

Neb. Rev. Stat. § 44-2828 (Reissue 2010) and for professional negligence in general is Neb. Rev. Stat. § 25-222 (Reissue 2016); this case alleges physician negligence and fraudulent concealment; court finds that, however plaintiff tries to recast it, this is medical malpractice case; court cites and discusses § 25-222; §§ 44-2828 and 25-222 are substantively the same).

In no case may the action “be commenced to recover damages based on alleged professional negligence . . . more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.” So says the statute of repose for actions alleging professional negligence. *See* Neb. Rev. Stat. § 25-222 (Reissue 2016) (including a 2-year statute of limitations and a 10-year statute of repose). *See also* § 25-222’s twin Neb. Rev. Stat. § 44-2828 (Reissue 2010), the latter of which applies to health care providers.

H. THE CONTINUING TREATMENT OR REPRESENTATION EXCEPTION

“This court has also, upon occasion, considered whether a continuous relationship might operate to toll the statute of limitations set forth in [Neb. Rev. Stat.] § 25-222. In order for [a continuing] relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.” *Colwell v. Mullen*, 301 Neb. 408, 414, 918 N.W.2d 858, 865 (2108).

In medical malpractice actions Nebraska has adopted the continuing treatment doctrine and merged it with the occurrence rule. The primary considerations underlying this doctrine are allowing the physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship. This exception—this tolling of the statute of limitations in § 25-222—does not apply to the negligence of hospital nurses and subsequent admissions to the hospital do not toll the running of the statute of limitations. *Casey v. Levine*, 261 Neb. 1, 6-11, 621 N.W.2d 482, 487–89 (2001). In medical malpractice actions, *see* *NJI2d Civ. 12.01*; it discusses § 25-222’s twin Neb. Rev. Stat. § 44-2828 (Reissue 2010), the latter of which applies to health care providers.

“[T]he continuous treatment or continuous representation rule is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship.” *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 269, 475 N.W.2d 899, 900 (1991). *Accord* *Dondlinger v. Nelson*, 305 Neb. 894, 901–02, 942 N.W.2d 772, 780 (2020); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 504, 519 N.W.2d 530, 538 (1994). Otherwise, plaintiffs could just sit on their rights “knowing that the clock would not start to run until they” (or their attorney) terminated the attorney-client relationship. *Dondlinger*, 305 Neb. at 902, 942 N.W.2d at 779.

“Continuity does not mean the mere continuity of the general

professional relationship.” *Behrens v. Blunk*, 284 Neb. 454, 462–63, 822 N.W.2d 344, 350–51 (2012); *Accord*, e.g., *Colwell*, 301 Neb. at 419, 926 N.W.2d at 867 (The continuation of a “general professional relationship . . . is insufficient to support the application of this doctrine.”). “[T]here must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.” *Behrens*, *supra*. *Accord* *Bellino v. McGrath North Mullin & Kratz, PC*, 274 Neb. 130, 141, 738 N.W.2d 434, 445 (2007) (“In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence”; attorney malpractice; plaintiff “continued to reasonably rely on the attorney’s legal advice”; continuous representation rule applies); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 455–57, 590 N.W.2d 380, 391–92 (1999); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 354, 543 N.W.2d 445, 448 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 504, 519 N.W.2d 530, 538 (1994) (discussing the continuous representation rule as regards an architect with responsibility to design the building and to inspect it throughout construction, the statute begins to run when construction is completed; this rule is inapplicable where claimant discovers alleged negligence prior to termination of professional relationship).

See also, e.g., *Frezell v. Iwersen*, 231 Neb. 365, 369–70, 436 N.W.2d 194, 198 (1989) (“The continuous treatment doctrine applies when there has been either a misdiagnosis upon which incorrect treatment is given or when there has been a continuing course of negligent treatment. It does not apply where there have been only isolated acts of negligence.”); *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989) (discussing a continuing course of treatment that adheres to an error in diagnosis); *Tiwald v. Dewey*, 221 Neb. 547, 550–51, 378 N.W.2d 671, 673 (1985) (discussing continuous and repeating wrongful treatment, as opposed to separate isolated acts of negligence).

In no case may the action “be commenced to recover damages based on alleged professional negligence . . . more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.” So says the statute of repose for actions alleging professional negligence. *See* Neb. Rev. Stat. § 25-222 (Reissue 2012) (covering “[a]ctions on professional negligence, including a 2-year statute of limitations and a 10-year statute of repose). *See also* the fraternal-twin provision in Neb. Rev. Stat. § 44-2828 (Reissue 2010) (covering “Actions to recover damages; limitation of action”).

I. THE CONTINUING TORT DOCTRINE

On a somewhat related matter, the Court has held that the “continuing tort doctrine” applies in non-professional negligence tort actions. “[A] claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period.” *Alston v. Hormel Foods Corp.*, 273 Neb. 422,

429, 730 N.W.2d 376, 383 (2007). *Accord* Colwell v. Mullen, 301 Neb. 408, 415, 918 N.W.2d 858, 865 (2108). If some of the damage caused by the continuing tort falls within the statute of limitations and some falls without the statute, the statute does not bar suit on the part of the tortuous act or omission that falls within the statute.

This is not a tolling doctrine, but a doctrine of accrual. *Cowell*, 301 Neb. at 415, 918 N.W.2d at 865; *Alston*, 273 Neb. at 427, 730 N.W.2d at 382. The “continuing tort doctrine” is discussed at NJ12d Civ. 2.02D, Comment & Authorities.

Regarding criticism of the continuing tort doctrine, *see* Dondlinger v. Nelson, 305 Neb. 894, 905–09, 942 N.W.2d 772, 781–83 (2020) (Miller-Lerman, J., concurring), *id.* at 909–11, 942 N.W.2d at 783–84 (Papik, J., concurring; joined by Stacy, J.)

J. EQUITABLE ESTOPPEL BARRING ASSERTION OF THE STATUTE

Fraudulent concealment of facts, deception used to conceal material facts, may furnish a basis for equitable estoppel. Equitable estoppel may be a bar to use of a statute of limitations or repose. *Schendt v. Dewey*, 246 Neb. 573, 581–82, 520 N.W.2d 541, 548 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997) (statute of limitations and repose for medical malpractice is Neb. Rev. Stat. § 44-2828 (Reissue 2010) and for professional negligence in general is Neb. Rev. Stat. § 25-222 (Reissue 2016); this case alleges physician negligence and fraudulent concealment; court finds that, however plaintiff tries to recast it, this is medical malpractice case; court cites and discusses § 25-222; §§ 44-2828 and 25-222 are substantively same).

[A] claim of fraudulent concealment would delay the running of this statute of repose [Neb. Rev. Stat. § 25-222 (Reissue 2016)] as it pertained to a cause of action for malpractice. . . .

The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the malpractice. In addition, equitable estoppel arises from active or affirmative efforts to conceal the malpractice. It also arises from a failure to disclose material between the physician and the patient.

Failure of a physician to disclose material information that he knows, or in the exercise of reasonable care should have known, results in constructive fraudulent concealment. Constructive fraud, and accordingly, the basis for estoppel, terminates when the physician-patient relationship terminates or when a patient learns of the malpractice or discovers information which would lead to the discovery of the malpractice through the exercise of reasonable diligence, whichever occurs first.

Schendt v. Dewey (Schendt II), 252 Neb. 979, 984, 568 N.W.2d 210, 213 (1997) (citations omitted). *Accord* Andres v. McNeil Co., 270 Neb. 733, 744, 707 N.W.2d 777, 787 (2005). Gering-Fort Laramie Irr. Dist. v. Baker, 259 Neb. 840, 848–49, 612 N.W.2d 897, 904 (2000) (second paragraph of quotation).

Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired and that the defendant committed some affirmative act of fraudulent concealment which prevented the plaintiff from discovering his or her cause of action.

Upah v. Ancona Bros. Co., 246 Neb. 585, 594–95, 521 N.W.2d 895, 902 (1994) (not a professional malpractice case; petition fails to allege act of fraudulent concealment), *disapproved of on other grounds by* Welsch v. Graves, 255 Neb. 62, 582 N.W.2d 312 (1998).

“Generally, for fraudulent concealment to delay running of the statute of limitations, the concealment must be manifested by an affirmative act or misrepresentation.” *Upah*, 246 Neb. at 600, 521 N.W.2d at 905. *Duree v. Wilkinson Dev.*, 285 Neb. 880, 886, 830 N.W.2d 72, 78 (2013) (involving an ordinary negligence action; containing a valuable discussion of tort law, fraudulent concealment, and the statute of repose). “Unless there is a fiduciary relationship between the parties, mere silence is not enough to overcome the applicable period of limitations.” *Id.* at 595, 521 N.W.2d at 902. “[I]f a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the party with a duty to disclose constitutes fraudulent concealment.” *Id.* at 600, 521 N.W.2d at 905. *See also* Muller v. Thaut, 230 Neb. 244, 430 N.W.2d 884 (1988) (discussing this bar in context of statute of limitations to a wrongful death action).

In the normal situation, an action for fraud must be filed within four years of when the cause of action accrues, and it accrues when there is discovery of either the facts constituting the fraud or facts sufficient to put the reasonable person on an inquiry that would, if followed, lead to discovery of the fraud. *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 330, 597 N.W.2d 602, 607 (1999).

Different aspects of estoppel are discussed at six different places herein: *See* NJI2d Civ. 1.45, (judicial estoppel: False Testimony (Falsus in Uno, Falsus in Omnibus)); NJI2d Civ. 6.26–6.28 (“Partner by Estoppel”); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation; citing equitable estoppel cases); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract). *See generally* the Index under the heading Equitable Estoppel.

K. THE EFFECT OF SUBROGATION ON THE RUNNING OF THE STATUTE OF LIMITATIONS

In a case of first impression in Nebraska, *Motor Club, Assoc. v. Fillman*, 5 Neb.App. 931, 568 N.W.2d 259 (1997) discusses the effect of subrogation on the running of the statute of limitations and concludes that the period of limitation that was applicable to the subrogor, is applicable to the subrogee. *Id.* at 935–39, 568 N.W.2d at 263–265 (subrogation is substitution of one party for another; claim by subrogation is derivative of claim from which it runs; statute of limitations follows subrogation).

L. THE CONSTITUTIONALITY OF THE STATUTE OF LIMITATIONS

The statute of limitations is constitutional. *Schendt v. Dewey*, 246 Neb. 573, 580, 520 N.W.2d 541, 547 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997) (does not violate open courts provision of Nebraska Constitution) (statute of limitations for medical malpractice is Neb. Rev. Stat. § 44-2828 (Reissue 2010) and for professional negligence in general is Neb. Rev. Stat. § 25-222 (Reissue 2016); this case alleges physician negligence and fraudulent concealment; court finds that, however plaintiff tries to recast it, this is medical malpractice case; court cites and discusses § 25-222; §§ 44-2828 and 25-222 are substantively same); *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 238, 404 N.W.2d 32, 34 (1987); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). *See also* *Tylle v. Zoucha*, 226 Neb. 476, 481–82, 412 N.W.2d 438, 441 (1987); *Smith v. Dewey*, 214 Neb. 605, 607–08, 335 N.W.2d 530, 532 (1983).

M. THE STANDARD OF REVIEW ON APPEAL

On appeal, the district court's judgment on the issue of the statute of limitations will not be set aside unless it is clearly wrong. *Blankenau v. Landess*, 261 Neb. 906, 908-09, 626 N.W.2d 588, 592 (2001) (must be decided on the facts of each case; not set aside unless clearly wrong); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 354, 543 N.W.2d 445, 448 (1996); *Georgetowne Ltd. P'ship v. Geotechnical Servs., Inc.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988). (Keep in mind that these cases predate the statutory amendment that turns statute-of-limitations factual questions into jury questions. *See* the discussion above, in part VIII(A) of this Comment.)

N. WHICH STATE'S STATUTE APPLIES TO AN OUT-OF-STATE CLAIM BROUGHT IN NEBRASKA?

The law of the state where a cause of action arises governs the substantive rights of the parties. The law of the state where the claim is tried governs procedural matters. Because application of the statute of limitations is a procedural matter, the law of the forum controls. *E.g.*, *Whitten v. Whitten* 250 Neb. 210, 212–13, 548 N.W.2d 338, 339–40

(1996) (laws prescribing time rights may be enforced relate to remedies only and not substantive rights; statute of limitations does not create or extinguish right, but only places limitation on remedy; lawsuit here barred by Nebraska's statute). (*Whitten* is not a professional negligence case, but one involving a motor vehicle accident and the statute of limitations in Neb. Rev. Stat. § 25-207 (Reissue 2016)). *Accord* *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005) (“[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.”); *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005).

O. WHAT LAW GOVERNS WHEN A CAUSE OF ACTION
ACCRUES, THE STATUTE IS CHANGED, AND THEN THE
CAUSE OF ACTION IS FILED?

What if a cause of action accrues before the effective date of a new statute of limitations or repose, but is brought after its effective date? In *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997), the common-law unlimited time in which to discover a cause of action applied when cause of action accrued; a ten-year statute of repose applied when the cause of action was discovered. The *Schendt* Court stated: “First, the legislature may not deprive a defendant of a bar which has already become complete. Second, the legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.” *Id.* at 577, 520 N.W.2d at 545 (citation omitted). This is part of the constitutional right to due process. *Id.* Therefore, “if a cause of action has accrued before the effective date of a newly enacted or amended statutory limitation period, and if the statute does not allow the plaintiff a reasonable time in which to file the action, a court will allow the plaintiff a reasonable time after the effective date of the statute in which to file the action.” *Id.* at 579, 520 N.W.2d at 546.

P. ATTEMPTING TO RECAST A CAUSE OF ACTION TO AVOID
THE RELATIVELY SHORT PROFESSIONAL-NEGLIGENCE
STATUTE OF LIMITATIONS

The limitation in the statute of limitations for professional negligence is relatively short. There are a number of cases arguing various theories that might bar the accrual of the cause of action or toll the running of the statute. Those are discussed above. There are also a number of cases wherein plaintiffs try to recharacterize the cause of action, asserting a basis for recovery under which a different, longer statute of limitations can be applied. These cases are discussed here.

First, “[w]hich statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.” Same quotation: *Nuss v. Alexander*, 269 Neb. 101, 104–05, 691 N.W.2d 94, 98 (2005); *Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 268 Neb. 499, 504, 684 N.W.2d 543, 548

(2004); *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 334, 609 N.W.2d 664, 668 (2000).

There are a number of cases where, in order to avoid the professional-negligence statute of limitations, plaintiffs have tried to recharacterize professional negligence into some other cause of action. "Merely because a cause of action is couched in terms of a cause of action other than negligence does not make it so." *Gravel v. Schmidt*, 247 Neb. 404, 407, 527 N.W.2d 199, 202 (1995). In *Gravel*, the plaintiff attempted to recast attorney malpractice into breach of contract. The court held that a cause of action that arises principally out of a professional's alleged negligence cannot be severed into a separate claim in order to receive the benefit of a longer statute of limitations. *Id.* *Gravel* cites and discusses many Nebraska cases. *Accord Nuss*, 269 Neb. at 106, 691 N.W.2d at 99; *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 448-50, 590 N.W.2d 380, 387-88 (1999) (lengthy discussion, citing cases).

"If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies." *Egan v. Stoler*, 265 Neb. 1, 6, 653 N.W.2d 855, 859-60 (2002). *Accord, e.g., Nuss*, 269 Neb. at 105-06, 691 N.W.2d at 99; *Parks*, 268 Neb. at 505, 684 N.W.2d at 549 (rejecting defendant's argument that the professional-negligence statute of limitations should have applied instead of the breach-of-contract statute); *Reinke*, 256 Neb. at 449, 590 N.W.2d at 388.

"In determining whether the special statute of limitations for professional negligence applies to a plaintiff's claims, we must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based." *Parks*, 268 Neb. at 499, 684 N.W.2d at 549.

"We have held that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations." *Hill v. Women's Med. Ctr. of Nebraska*, 254 Neb. 827, 832, 580 N.W.2d 102, 106 (1998). *Accord Nuss*, 269 Neb. at 106, 691 N.W.2d at 99.

In *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), *appeal after remand*, 252 Neb. 979, 568 N.W.2d 210 (1997), the plaintiff attempted to recast medical malpractice into fraudulent representation, converting the cause of action into one of fraudulent concealment or deceit. As a medical malpractice action, the case had a statute of limitations/statute of repose problem. Malpractice is malpractice, whatever the plaintiff labels it, at least to this extent:

Fraudulent representations by a physician as to previous negligence or as to the plaintiff's condition do not convert the cause of action from one of malpractice to one of deceit.

Misrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice.

Schendt, 246 Neb. at 581, 520 N.W.2d at 548 (citation omitted).

Similarly, in *Hill v. Women's Med. Ctr. of Nebraska*, 254 Neb. 827, 580 N.W.2d 102 (1998), where the gravamen of the complaint involved the duty to obtain informed consent for an abortion, the plaintiff attempted to turn a medical-malpractice action into one for breach of contract. "The district court correctly determined that Hill's action . . . was one for professional negligence and that a 2-year statute of limitations applied." *Id.* at 833, 580 N.W.2d at 107.

See also *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 704, 523 N.W.2d 27, 29 (1994) (cannot divide single professional relationship into various parts and apply different statute of limitation to different parts; attempt to recast financial-consultant negligence into breach of fiduciary duty and fraudulent misrepresentation), *disapproved of on other grounds by Jorgensen v. State Nat'l Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1988); *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989) (attempt to recast medical malpractice into ordinary negligence); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987) (attempt to recast medical malpractice into battery); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982) (attempt to recast medical malpractice into misrepresentation); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964) (attempt to recast medical malpractice into fraud).

IX. LIABILITY FOR INJURY TO THIRD PERSONS

"The court retains a conservative view of the liability of attorneys for injuries caused to third parties." Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law*, Nebraska Tort Law 1987-88, Review and Comments 1 (1988). *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) was a legal malpractice case. Defendant "represented two brothers in the negotiations for a lease . . . secured by two real estate mortgages signed by the brothers' parents and other relatives. The brothers could not make their payments under the lease and the mortgages were foreclosed. The parents and relatives sued the defendant for malpractice." Harvey Perlman, *Annual Institute on the Annual Survey of Nebraska Law*, Nebraska Tort Law 1987-1988, Review and Comments 1 (1988). The court affirmed summary judgment for the defendant, holding that the defendant did not owe a duty to the parents and relatives of the clients. Dean Perlman's Commentary on this case, *id.* at 2, states:

The court retains a conservative view of the liability of attorneys for injuries caused to third parties. In earlier cases the court has held that a lawyer owes no duty of care toward the opposing party, *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d

687 (1980), or to the beneficiary of a will drafted by the attorney, *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983). Although *Landrigan* is correctly decided and does not raise difficult issues, other jurisdictions have expanded attorney liability to third persons in specialized circumstances. See, e.g., *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (1958) (attorney liable to beneficiaries of will for failure to comply with proper formalities in making a valid will). And by analogy the Nebraska Supreme Court has recently been willing to expand the duty to third persons in other contexts. *James v. [Lieb]*, 221 Neb. 47, 375 N.W.2d 109 (1985) (bystanders recover for emotional distress).

"A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty." *Gravel v. Schmidt*, 247 Neb. 404, 408, 527 N.W.2d 199, 202 (1995). *Accord Swanson v. Ptak*, 268 Neb. 265, 271, 682 N.W.2d 225, 231 (2004) ("[T]he duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury from negligent draftsmanship."); *Bauermeister v. McReynolds*, 253 Neb. 554, 566, 571 N.W.2d 79, 88 (1997); *Earth Science Labs., Inc. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 801, 523 N.W.2d 254, 256 (1994); *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988) (citing cases).

"[A]n accountant's duty of reasonable care is to his client and generally does not extend to third parties absent fraud or other facts establishing a duty to them." *Citizens Nat'l Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 480, 441 N.W.2d 180, 182 (1989) (rule regarding attorney's duty of care to third parties made applicable to accountants). "[O]ther facts," *id.*, that cause such a duty to a non-client third party to arise "will necessarily be established on a case-by-case basis." *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 415, 507 N.W.2d 275, 280 (1993). Such a duty "arises by virtue of a contract implied from the conduct of the parties." *Id.* at 416, 507 N.W.2d at 281. In *St. Paul Fire and Marine Ins. Co.*, an accountant personally delivered a client's financial statement to a third party, to induce the third party to invest in the client. The court held that this action, together with the failure to use reasonable care in preparing financial statements, was sufficient to state a cause of action on the part of the third party, for negligence against the accountant.

X. LIABILITY FOR INJURY CAUSED BY THIRD PERSON

Neb. Rev. Stat. § 25-21,187 (Reissue 2016) "restrict[s] the [tort] liability of professional architects, professional engineers, and professional land surveyors" when the cause of the injury is a third party's "violation of a safety practice," unless the professional involved had assumed responsibility for the supervision of the safety practice involved.

XI. ASSIGNMENT OF PROFESSIONAL-NEGLIGENCE CLAIM

"Although generally the law supports assignability of rights, it does

not permit assignments for matters of personal trust or confidence, or for personal services.” *Earth Science Labs., Inc. v. Adkins & Wondra*, P.C., 246 Neb. 798, 801, 523 N.W.2d 254, 256 (1994).

Public policy prevents assignment of legal malpractice claims and prevents transfer of such claims by succession. *Community First State Bank v. Olsen*, 255 Neb. 617, 622, 587 N.W.2d 364, 367 (1998) (because document grants both proceeds of action and right to prosecute it, document is an assignment); *Earth Science*, 246 Neb. at 801, 523 N.W.2d at 256. In the *Earth Science Labs.*, the plaintiff corporation purchased assets of a bankrupt company and filed a legal-malpractice action over matters arising out of the attorney-client relationship between the defendant law firm and the bankrupt company. The court held that the defendant owed no duty to the plaintiff because the plaintiff was not a client and did not become a client by purchasing the assets of the bankrupt company. The court cited public policy considerations concerning the personal nature of and the confidentiality involved in the attorney-client relationship. “[An] agent holding a power of attorney is an ‘attorney in fact’ as distinguished from an attorney at law.” *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 509, 623 N.W.2d 681, 688 (2001). The public policy considerations are different regarding an attorney in fact and the nonassignability rule does not apply to a claim that a principal’s funds have been converted by an attorney in fact. *Id.* at 511, 623 N.W.2d at 689. In this regard, see NJI2d Civ. 6.03.

XII. DAMAGE DONE DURING, BUT OUTSIDE OF, A PROFESSIONAL SERVICES RELATIONSHIP

It is not enough that the damage would not have occurred if there had not been a professional-service relationship between the plaintiff and the defendant. The damage must have occurred in the course of the provision of the professional service. *R.W. v. Schrein*, 264 Neb. 818, 824–25, 830–31, 652 N.W.2d 574, 580–81, 584 (2002); *Iwanski v. Gomes*, 259 Neb. 632, 640–42, 611 N.W.2d 607, 613–14 (2000). *Schrein and Iwanski* are discussed at NJI2d Civ. 12.01, Comment & Authorities.

“In determining whether the special statute of limitations for professional negligence applies to a plaintiff’s claims, we must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based.” *Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 268 Neb. 499, 506, 684 N.W.2d 543, 549 (2004).

CHAPTER 13

EMINENT DOMAIN

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- 13.01 Eminent Domain—Property Taken—Issues, Burden of Proof, and Condemnee's Compensation
- 13.02 Eminent Domain—General Definition of Fair Market Value
- 13.04 Eminent Domain—Evidence
- 13.06 Eminent Domain—Easement Taken—Issues, Burden of Proof, and Condemnee's Compensation
- 13.07 Eminent Domain—Easement Taken—Definition of Fair Market Value
- 13.08 Eminent Domain—Inverse Condemnation—Issues, Burden of Proof, Effect of Findings, and Plaintiff's Compensation
- 13.10 Special Benefits
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- 13.25 Eminent Domain—Total Taking of Leasehold Interest—Issues, Burden of Proof, and Lessee's Compensation
- 13.26 Eminent Domain—Partial Taking of Leasehold Interest—Issues, Burden of Proof, and Lessee's Compensation
- 13.27 Eminent Domain—Taking of or Damage to Leasehold Interest—Definition of Fair Market Value
- 13.28 Eminent Domain—Growing Crops—Lessee's Compensation
- 13.40 Interest

NJI2d Civ. 13.01

EMINENT DOMAIN—PROPERTY TAKEN—ISSUES, BURDEN OF PROOF, AND CONDEMNEE'S COMPENSATION

I. ISSUES

The plaintiff, (insert name of condemnnee), was the owner of certain property that was taken by the defendant, (insert name of condemnor). The defendant took that property on (here insert date of taking).

The property taken by the defendant is (insert description of property, or reference to exhibit that describes property, or both).

The defendant's legal right to take this property is not in question. The only question you must answer is how much money[, if any,] should be paid to the plaintiff to compensate (him, her, it) for the taking of this property.

II. BURDEN OF PROOF

The plaintiff has the burden of proving by the greater weight of the evidence how much money should be paid to compensate for the taking of this property.

III. OWNER'S COMPENSATION

The plaintiff is entitled to recover:

1. The fair market value[, if any,] of the property taken, figuring that value as of (here insert date of taking).
2. Any decrease in the fair market value of the remaining property, to the extent that the decrease was proximately caused by the taking.
3. (His, Her, Its) reasonable abstracting expenses.

COMMENT & AUTHORITIES

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- XX. ADVERSE POSSESSION

I. THE CONSTITUTIONAL SOURCE OF THE RIGHT

A. THE UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution states, “nor shall private property be taken for public use without just compensation.” By itself, this limitation on government’s inherent power to take private property applies to the Federal Government alone.¹ The Court has, however, incorporated the Federal Takings Clause into the Fourteenth Amendment’s Due Process Clause, which, of course, renders the Federal Takings Clause applicable to state and local government.²

In *Cooper v. Aaron*, the Supreme Court held that “[t]he federal judiciary is supreme in the exposition of the law of the Constitution[.]”³ Therefore, the federal judiciary’s interpretation of the Constitution is the supreme law of the land, “‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”⁴

Consequently, the federal individual-right found in the Takings Clause applies lock, stock, and barrel to takings by state and local government. Because the Federal Constitution has particular application in this chapter of NJI2d Civ., this Comment & Authorities will include more United States Supreme Court cases than other chapters.

B. THE NEBRASKA CONSTITUTION

The protections provided to a property owner by the Constitution and statutes of Nebraska is equal to, and greater than the protections provided by the Constitution and statutes of the Federal Government. Since the Federal Takings Clause has been incorporated into the Fourteenth Amendment, State or local government cannot provide less protection of the property owner than does the Federal Constitution (as interpreted). But state and local government can provide more protection. The Federal Constitution sets the floor, not the ceiling. And many States do provide more protection for the property owner. Nebraska is among them.

The Nebraska Constitution’s protection of the property owner is

13.01

¹See *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833).

²See, e.g., *Lingle, Gov. of Hawaii v. Chevron U.S.A.*, 544 U.S. 528, 536 (2005), citing *B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 306

n.1 (2002) (citing, *inter alia*, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998).

³*Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁴*Id.* (quoting the Supremacy Clause, U.S. Const. art. VI, cl. 2).

broad than that of the Federal Constitution's.⁵ Nebraska's Constitution protects against state action taking *or damaging* private property.⁶ Nebraska statutes also provide extra protection. For example, the Unicameral passed a statute stating: "A condemner may not take property through the use of eminent domain . . . if the taking is primarily for an economic development purpose."⁷

II. THE AIM OF THE TAKINGS CLAUSE

One principal purpose—a core value, if you will—of the Takings Clause is expressed as follows: "Every citizen has the constitutional right to acquire, own, possess, and enjoy property."⁸ Another is preventing "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

⁵Bargmann v. State, Dep't. of Roads, 257 Neb. 766, 774, 600 N.W.2d 797, 804 (1999).

⁶"The property of no person shall be taken *or damaged* for public use without just compensation therefor." Neb. Const. art. I, § 21 (emphasis added). See generally Neb. Rev. Stat. §§ 76-701, et seq. (Reissue 2009). See also, e.g., Strode v. City of Ashland, 295 Neb. 44, 63, 886 N.W.2d 293, 307 (2016); Henderson v. City of Columbus, 285 Neb. 482, 490, 827 N.W.2d 486, 493 (2013); Scofield v. State, Dept. of Natural Res., 276 Neb. 215, 231, 753 N.W.2d 345, 358 (2008); Neb. Pub. Serv. Comm'n v. Neb. Pub. Power Dist., 256 Neb. 479, 489–90, 590 N.W.2d 840, 848 (1999) (the State may not, by legislative fiat "convert property . . . without just compensation"); Strom v. City of Oakland, 255 Neb. 210, 216–17, 583 N.W.2d 311, 316–17 (1998) (citing and discussing a lot of United States Supreme Court constitutional case law on the subject of eminent domain; stating "[t]he words 'or damaged' . . . include all actual damages resulting from the right of eminent domain which diminish the market value of private property"); Walkenhorst v. State, 255 Neb. 986, 990, 537 N.W.2d 474, 480 (1998).

Regarding the history of such provisions, see 2A-6 J. Sackman,

NICHOLS ON EMINENT DOMAIN § 6.02 (rev. 3d ed. 2010).

⁷Neb. Rev. Stat. § 76-710.04 (Cum Supp. 2014). This was a direct reaction to the United States Supreme Court's judgment in *Kelo v. City of New London*, 545 U.S. 469 (2005), which held that taking property for such a purpose does not violate the Federal Takings Clause. *Kelo* is discussed at part IX of this Comment & Authorities, below. Section 76-710.04 essentially says that the law in Nebraska is different; such a taking does violate our law.

⁸*Estermann v. Bose*, 296 Neb. 228, 239, 892 N.W.2d 857, 867 (2017) (citing Neb. Const. art. I, § 25.) (the quotation continues, "A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain, both of which must be for a public purpose." *Id.* at 239–240, 892 N.W.2d at 867.). "The power of eminent domain must be exercised 'in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right.'" *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 245, 631 N.W.2d 131, 140 (2001).

whole.’”⁹ This applies to permanent takings and temporary takings alike.¹⁰

III. THE TAKINGS CLAUSE APPLIES TO ALL THREE BRANCHES OF GOVERNMENT

The Takings Clause applies to actions taken by all branches of government: legislative, executive, and judicial. “It is concerned simply with the act, and not the governmental actor. . . . [A] legislative, executive, or judicial restriction of property use may [constitute a taking].”¹¹

IV. GOVERNMENT HAS INHERENT POWER TO TAKE PRIVATE PROPERTY: THE TAKINGS CLAUSE DOES NOT GRANT POWER, BUT LIMITS IT

“Eminent domain is the inherent power of a governmental entity to take privately owned, especially land, and convert it to public use, subject to reasonable compensation for the taking.”¹² The Takings Clause is not a power source, that is, it does not grant the power of eminent domain. The power predates and carries through the ratification of the Constitution. It “is inherent in organized government.”¹³

⁹Lingle, *Gov. of Hawaii v. Chevron U.S.A.*, 544 U.S. 528, 537 (2005) (citing cases); *Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 336 (2002) (citations omitted). This same quotation appears in a number of United States Supreme Court opinions, including *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (City Planning Commission’s conditioned approval of store expansion, upon condition that store owner provide public greenway and bike pathway, was compensable taking); it first appeared in *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Accord, e.g.*, *Arkansas Game and Fish Com’n v. U.S.*, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (citing cases); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Eastern Enter. v. Apfel*, 524 U.S. 498, 522 (1998) (“The aim of the” Takings Clause . . .) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) *Henderson v. City of Columbus*, 285 Neb. 482, 491–92, 827 N.W.2d 486, 494–95 (2013) (quoting *Arkansas Game & Fish, supra*); *Strom v. City of Oakland*, 255

Neb. 210, 217, 583 N.W.2d 311, 316 (1998). *See also* *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N.W. 582, 583–84 (1907) (discussing the spirit in which the Takings Clause was framed, the Court stated that “no plea of public benefit should be permitted to impoverish the owner of private property . . . If the public desire to erect works for public use, then the public, the party benefited, must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of the indebtedness or expenses and thus equalize the burden.”).

¹⁰Regarding temporary takings see part VIII(D) of this Comment & Authorities, below.

¹¹*Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (paragraph break omitted).

¹²*Hike v. State (Hike II)*, 297 Neb. 212, 218, 899 N.W.2d 614, 621 (2017).

¹³Lib. of Cong., Cong. Research Serv., S. Doc. No. 92-82, *The Constitu-*

Taking private property is not itself an end; rather it is a means to an end; and the end is “public use.”¹⁴

“A takings analysis begins with an examination of the nature of the owner’s property interest. No compensation is owed in a takings claim if the State’s affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State’s law or property and nuisance already place upon land ownership.”¹⁵

While the power of eminent domain is inherent in organized government, there are limits on this power.¹⁶ The Constitution imposes four of them. (1) The taking must be for a “public use.”¹⁷ (2) The condemnor must pay the property owner “just compensation.”¹⁸ (3) Eminent domain may only be used in the execution of an enumerated power.¹⁹ That is, it is “limited by the grants of power in the Constitution, so that property

tion of the United States Analysis and Interpretation 1199 (1973). *Accord* Cincinnati v. Louisville & N. R. Co., 223 U.S. 390, 400 (1912) (“It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process . . . [and] compensation.”); *Hike v. State* (Hike I), 288 Neb. 60, 66, 846 N.W.2d 205, 214 (2014); *Pinnacle Enters., Inc. v. City of Papillion*, 286 Neb. 322, 333, 836 N.W.2d 588, 596 (2013) (“A condemnation proceeding is ‘the exercise of eminent domain by a governmental entity.’ Eminent domain is ‘[t]he inherent power of a governmental entity . . .’”); *Kohl v. State, Dept. of Roads*, 214 Neb. 348, 350-51, 334 N.W.2d 173, 176 (1983); *Father Flanagan’s Boys’ Home v. Millard Sch. Dist.*, 196 Neb. 299, 302, 242 N.W.2d 637, 640 (1976); *Campbell v. City of Lincoln*, 182 Neb. 459, 465, 155 N.W.2d 444, 449 (1968); *Burger v. City of Beatrice*, 181 Neb. 213, 217, 147 N.W.2d 784, 788 (1967).

¹⁴U.S. Const. amend. V; Neb. Const. art. I, § 21. *See* *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the

end.”). *See also* *Estermann v. Bose*, 296 Neb. 228, 240, 892 N.W.2d 857, 867 (2017).

¹⁵*Hill v. State*, 296 Neb. 10, 19, 894 N.W.2d 208, 867 (2017). *Accord*, *Murr v. Wisconsin*, 582 U.S. —, — (2017) (slip op. at 8). *See also, e.g.*, *Prokop v. Lower Loup NRD*, 302 Neb. 10, 36, 921 N.W.2d 375, 396 (2019) (“A takings analysis begins with an examination of the nature of the owner’s property interest.”).

For more on what does and does not constitute a taking, *see* part VIII(E) of this Comment & Authorities, below.

¹⁶“The State’s eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments.” *Estermann v. Bose*, 296 Neb. 228, 240, 892 N.W.2d 857 (2017) (citations omitted).

¹⁷*See, e.g.*, *Estermann*, 296 Neb. at 240, 892 N.W.2d at 867.

¹⁸*See, e.g., id.*

¹⁹*Berman v. Parker*, 348 U.S. 26, 33 (1954).

may only be taken for the effectuation of a granted power[.]”²⁰ For just three examples in a federal condemnation, the power “To establish post offices,”²¹ “To regulate commerce . . . among the several states,”²² and “To raise and support armies.”²³ (4) And, like all legislative, executive, and judicial powers, this one is limited by the restraints put on government by other parts of the Constitution. A federal taking that is racially motivated, for example, would almost certainly violate the Equal Protection Clause of the Fourteenth Amendment and as incorporated into the Due Process Clause of the Fifth Amendment.²⁴

There are other limits imposed by the Legislature. While the power of eminent domain is inherent in organized government, it may only be exercised pursuant to legislative authorization.²⁵ Legislative authorization can include procedures the government must follow,²⁶ definitions of what constitutes “property” for purposes of the protections of the Takings Clause,²⁷ delegation to another governmental body or to a private entity,²⁸ and more.

“The power of eminent domain must be exercised ‘in strict accordance with its essential elements in order to protect the constitutional

²⁰LIB. OF CONG., CONG. RESEARCH SERV., S. Doc. No. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1178 (1973). *See also*, e.g., *Lingle v. Chevron U.S.A.*, 544 U.S. 528; 531 (2005); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (regulating the owner’s use of property is a taking when government denies all economically viable use of property); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), each noting that a regulation of private property effects a taking if it does not substantially advance legitimate state interests.

²¹U.S. Const. art. I, cl. 7.

²²U.S. Const. art. I, cl. 3.

²³U.S. Const. art. I, cl. 12.

²⁴*See Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 400 (1912) (“ . . . provided there be due process of law . . .”) LIB. OF CONG. RESEARCH SERV., S. Doc. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1199 (1973) (“ . . . provided there be due process . . .”).

²⁵*Estermann*, 296 Neb. at 240, 892 N.W.2d at 867 (“Only the Legislature can authorize a private or public

entity to exercise the State’s power of eminent domain.”). *See also* LIB. OF CONG., CONG. RESEARCH SERV., S. Doc. No. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1199 (1973). “[T]he power of eminent domain may be exercised only on the occasion, and in the mode or manner, prescribed by the Legislature and . . . statutes conferring and circumscribing such power must be strictly construed.” *Engelhaupt v. Village of Butte*, 248 Neb. 827, 828, 539 N.W.2d 430, 432 (1995). *Accord* *SID No. 1 v. Neb. Pub. Power Dist.*, 253 Neb. 917, 922, 573 N.W.2d 460, 465 (1998).

²⁶*See, e.g., Burlington N. & Santa Fe Ry.*, 262 Neb. 235, 241, 2465, 631 N.W.2d 131, 137, 140 (2001) (stating that eminent domain proceedings “‘must be conducted in the manner prescribed by the statute delegating the power.’”); LIB. OF CONG., CONG. RESEARCH SERV., S. Doc. No. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1199 (1973).

²⁷*See* part VII(A) of this Comment & Authorities, below.

²⁸*See* part V of this Comment & Authorities, immediately below.

right of the citizen to own and possess property against an unlawful perversion of such right.’ ”²⁹

In addition, see the discussion of inverse condemnation, which appears below.³⁰ And regarding which questions are for the trier of law and which are for the trier of fact, see “Questions of Law Versus Questions of Fact,” also below.³¹

V. GOVERNMENT CAN DELEGATE THE POWER OF EMINENT DOMAIN

The Legislature can delegate the power of eminent domain. It can delegate the power to another governmental body³² and to private entities.³³ The Transcontinental railroad was built on land much of which was taken by private railroads delegated the power of eminent domain by the Congress of the United States or of various states along the route.³⁴ Privately owned pipelines can acquire land by eminent

²⁹Burlington N. & Santa Fe, 262 Neb. at, 245, 631 N.W.2d at 140.

³⁰Inverse condemnation presents a particular opportunity for due process of law problems. See part VI of this Comment & Authorities, below. Regarding inverse condemnation, see also *NJI2d Civ.* 13.08.

³¹See part X of this Comment & Authorities, below.

³²See *Estermann v. Bose*, 296 Neb. 228, 240, 892 N.W.2d 857, 867 (2017); LIB. OF CONG., CONG. RESEARCH SERV., S. Doc. No. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1199 (1973); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (finding no Takings Clause violation where a District of Columbia statute created an administrative agency that seized private property through eminent domain); *Burlington N. & Santa Fe*, 262 Neb. at, 241, 631 N.W.2d at 137.

³³*Estermann v. Bose*, 296 Neb. 228, 240, 892 N.W.2d 857, 867 (2017); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (the City authorized “a private nonprofit entity,” *id.* at 473, “to acquire property by exercising eminent domain in the City’s name,” *id.* at 475) (*Kelo* is discussed in depth

at part IX of this Comment & Authorities, below). See also LIB. OF CONG., CONG. RESEARCH SERV., S. Doc. No. 92-82, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1199 (1973) (stating that government may delegate the power “to private corporations, such as public utilities, railroad and bridge companies, and other such associations, when they are promoting a valid public interest or furnishing a public service.”) (citing United States Supreme Court cases from as early as 1810).

³⁴See, e.g., *Kelo*, 545 U.S. at 478 (“[T]he condemnation of land for a railroad with common-carrier duties is a familiar example.”); *Olcott v. Supervisors*, 83 U.S. 678, 694 (1872) (stating “it is a doctrine universally accepted that a State legislature may authorize a private corporation to take land for the construction of such a [rail]road”); *Burlington N. & Santa Fe*, *supra*; *Gustin v. Scheele*, 250 Neb. 269, 276, 549 N.W.2d 135, 140 (1996) (“Railroads, although they are private corporations, also can acquire land by eminent domain for their use. Neb. Rev. Stat. § 74-308 (Reissue [2009]).” (discussing state constitution, statutes, and cases)).

domain if they are common carriers.³⁵ The Legislature can delegate the power to a Natural Resources District.³⁶

When government does delegate the power of eminent domain, the eminent domain proceedings “‘must be conducted in the manner prescribed by the statute delegating the power.’”³⁷

The United States Supreme Court has given eminent domain as an example of a “public function.”³⁸ Therefore, if the state delegates the power of eminent domain to a private party, the taking by the private party will be considered state action for purposes of constitutional and statutory protections that require state action. For example, the Equal Protection Clause restricts state acts of racial discrimination, but not purely private acts (though the latter often violate Federal and/or State law). Purely private acts of discrimination do not violate the Constitution because they do not satisfy the Fourteenth Amendment’s state action requirement. However, racial discrimination by a private actor’s exercise of the delegated power of eminent domain is considered state action; government can delegate the power to a private actor, but the delegated exercise of that power will still be state action.

VI. INVERSE CONDEMNATION

“[A] ‘condemnation’ proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain.”³⁹ The government or its delegate files a condemnation action. Sometimes, however, government takes property without filing a condemnation action—they just take it. The condemnor “says it is not taking property and pays no compensation.”⁴⁰ This is commonly called “inverse condemnation.” It “is a shorthand description of the manner in which a property owner recovers just compensation for a taking of [or, in Nebraska, damage to] his

³⁵Thompson v. Heineman, 289 Neb. 798, 845, 857 N.W.2d 731, 765 (2015). The acquisition must be for a public purpose and the owner must be paid just compensation. *Id.* at 843–45, 857 N.W.2d at 764–65. Common carriers are defined and discussed at NJI2d Civ. 10.01 Comments & Authorities.

³⁶*Estermann*, 296 Neb. at 240, 892 N.W.2d at 867.

³⁷*Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 262 Neb. at 246, 631 N.W.2d at 140. See part IV of this Comment & Authorities, above.

³⁸*Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

³⁹*United States v. Clarke*, 445 U.S. 253, 255 (1980) (emphasis in original). *Accord*, e.g., *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987).

⁴⁰*Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 740 (2010). *Accord*, e.g., *Village of Memphis v. Frahm*, 287 Neb. 427, 436, 843 N.W.2d 608, 616 (2014); *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 750–51, 807 N.W.2d 170, 179 (2011) (“‘Inverse condemnation’ is shorthand for a governmental taking of a landowner’s property without the benefit of condemnation proceedings.”);

property when condemnation proceedings have not been instituted.”⁴¹ “[It] is inverse because it is the landowner, not the government entity, who institutes the proceeding.”⁴²

“Inverse condemnation [is] available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.”⁴³ “[It] is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner’s property without the benefit of condemnation proceedings.”⁴⁴ “[T]he initial question in an inverse condemnation proceeding is whether the governmental entity’s actions constituted the taking or damaging of private property for public use.”⁴⁵ “And a takings analysis begins with an examination of the nature of the owner’s property interest.”⁴⁶

“Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged.”⁴⁷

Western Fertilizer and Cordage Co. v. City of Alliance, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993) (“Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the property taken, because of the eminent domain power of the condemnor, he has a constitutional right, as a substitute, to just compensation for what was taken.”).

⁴¹2A-6 J. Sackman, NICHOLS ON EMINENT DOMAIN § 6.03[2] (rev. 3d ed. 2010). *Accord* Russell v. Franklin Cty. 306 Neb. 554, 946 N.W.2d 648 (2020) (including a discussion of “what differentiates permanent and temporary damage to land,” *id* at 554–58, 946 N.W.2d at —); Hike v. State (Hike II), 297 Neb. 212, 221, 899 N.W.2d 614, 622–23 (2017); Henderson v. City of Columbus, 285 Neb. 482, 488, 827 N.W.2d 486, 492 (2013); Lockard v. Neb. Pub. Power Dist., 249 Neb. 971, 975, 546 N.W.2d 824, 827 (1996); Whitehead Oil Co. v. City of Lincoln,

245 Neb. 680, 684, 515 N.W.2d 401, 405 (1994), *overruled on other grounds*, Scofield v. Dep’t of Natural Res., 276 Neb. 215, 229, 753 N.W.2d 345, 357 (2008); Krambeck v. City of Gretna, 198 Neb. 608, 612, 254 N.W.2d 691, 694 (1977).

⁴²San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 638 n.2 (1981).

⁴³Henderson, 285 Neb. at 488, 827 N.W.2d at 492.

⁴⁴Cappel v. State, 298 Neb. 445, 452, 905 N.W.2d 38, 46 (2018).

⁴⁵Russell, 306 Neb. at 552, 946 N.W.2d at —; Cappel, 298 Neb. at 452, 905 N.W.2d at 46; Henderson, 285 Neb. at 489, 827 N.W.2d at 493.

⁴⁶Prokop v. Lower Loup NRD, 302 Neb. 10, 36, 921 N.W.2d 375, 396 (2019). *Accord* Cappel, 298 Neb. at 452, 905 N.W.2d at 46.

⁴⁷Danish Vennerforning & Old Peoples Home v. State, Dept. of Roads, 191 Neb. 774, 780, 217 N.W.2d 819, 823 (1974), *rehearing*, 201 Neb. 233, 266 N.W.2d 914 (1978), *rehearing*, 205 Neb. 839, 290 N.W.2d 791 (1980).

The plaintiffs are different—the condemnee instead of the condemnor—, but the substantive rules are just the same—“public use,” “just compensation,” in aid of an enumerated legislative power, no violation of some other part of the Constitution—whether the condemnation is inverse or otherwise.⁴⁸

Inverse condemnation, by the way, presents a particular opportunity for a taking without sufficient notice to the property owner and/or a sufficient opportunity for the property owner to be heard and, therefore, procedural due process problems.⁴⁹

Inverse condemnation is discussed in more detail in the Comment & Authorities to NJI2d Civ. 13.08, below.

VII. “PROPERTY” DEFINED

A. WHERE THE DEFINITION OF PROPERTY IS FOUND

The Takings Clause protects private property interests. It does not

⁴⁸See *Stop the Beach Renourishment*, 560 U.S. at 740 (stating that a taking may occur as a result of a judicial change in property law. When this does happen, the property owner can file a separate lawsuit arguing that a taking has occurred as a result of the first litigation. The second lawsuit would be in the nature of an inverse condemnation action).

⁴⁹See the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The intersection between inverse condemnation and due process of law is the subject of *Blanchard v. City of Ralston*, 4 Neb. App. 692, 549 N.W.2d 652 (1996) (city removed plaintiff’s house (not her residence) as public nuisance; plaintiff not given sufficient notice of what was wrong and sufficient opportunity to make the necessary repairs), *aff’d*, 251 Neb. 706, 559 N.W.2d 735 (1997).

Regarding inverse condemnation and the United States Constitution, see also, e.g., *Arkansas Game and Fish Comm’n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (involving Army Corps of Engineers recurring temporary flooding of Game & Fish Commission property); *Dolan v. City of Tigard*, 512 U.S. 374, 304 (1994) (granting a building permit

only on the condition that part of the property be dedicated for a public purpose or use can be a taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (regulating the owner’s use of property is a taking when government denies all economically viable use of property); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (involving a county ordinance passed subsequent to a flood that destroyed church property, which ordinance created an “interim flood protection area” that included the church’s property and barred reconstruction within the area); 2A J. Sackman, NICHOLS ON EMINENT DOMAIN ch. 6 § 6.03[2] (Matthew Bender, 3d ed. 1984). See also, e.g., the following cases each of which finds that the regulation did not constitute inverse condemnation. *Agins v. Tiburon*, 447 U.S. 255 (1980); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984).

Regarding inverse condemnation and the Nebraska Constitution, that is the subject of NJI2d Civ. 13.08. See that instruction and its Comment & Authorities, below.

create them. Property interests are created outside the Constitution by “independent source[s] such as state law.”⁵⁰ Nebraska statutes on eminent domain define property as “any such interest in real or personal property as the condemnor is empowered by law to acquire for public use.”⁵¹ In addition, the alleged holder of the property interest must be entitled to, or “vested” in, the interest.⁵² “[A]lthough the underlying substantive interest is created by an independent source such as state law, [in regard to a federal taking,] *federal constitutional law* determines whether that interest arises to the level of a legitimate claim of entitlement[.]”⁵³

⁵⁰*Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). (The quotation in text refers to the United States Constitution. It also applies, of course, to State constitutions; the Court held that “interest income generated by funds held in IOLTA [Interest on Lawyers Trust Account] is the ‘private property’ of the owner of the principal.” *id.* at 172). *Accord, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env’t Protection*, 560 U.S. 702, 707, 130 S. Ct. 2592, 2597 (2010) (stating that “generally speaking, state law defines property interests); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (analyzing Takings Clause issue on the basis that the definition of property under the Fifth and Fourteenth Amendments typically “stem[s] from independent source[s] such as state law”) (citations omitted); *Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005) (stating that property interests are found in “an independent source such as state law”) (multiple quotation marks omitted); *Whitehead Oil Co. v. City of Lincoln (Whitehead II)*, 245 Neb. 680, 686, 515 N.W.2d 401, 406 (1994), *overruled on other grounds by Scofield v. Dep’t of Natural Res.*, 276 Neb. 215, 229, 753 N.W.2d 345, 357 (2008). *See also, e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, (1985); *Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 191, 376 N.W.2d 539, 548 (1985) (owner of overlying land’s right to use ground water is “appurtenance constituting property protected by” the Takings Clause).

⁵¹Neb. Rev. Stat. § 76-701 (Reissue 2009). *See Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 468, 106 N.W.2d 727, 735 (1960).

⁵²*Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire” and “more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)); *Tracy v. City of Deshler*, 253 Neb. 170, 176, 568 N.W.2d 903, 908 (1997) (“[P]ayment of just compensation pursuant to Neb. Const. art. I, § 21, applies only to vested property rights.” Plaintiff operated a garbage-hauling business, which had a contract with and permit from the city; subsequently, the city entered into a contract with plaintiff’s competitor; plaintiff alleged this was an unconstitutional taking of his garbage-collection business; because plaintiff engaged in a business that was properly subject to a conditional permit, he did not have a reasonable expectation of a continuing right to haul garbage; “a permit with the type of restrictive conditions imposed [on this permit, by state law,] does not constitute a vested property right in any constitutional sense.” *Id.*)). *See also, Ramapo Water Co. v. New York*, 236 U.S. 579, 584 (1915) (finding a property right to be vested “and indestructible except by legitimate exercise of the power of eminent domain”).

⁵³*Castle Rock* 545 U.S. at 757 (emphasis added in *Castle Rock*; mul-

"A takings analysis begins with an examination of the nature of the owner's property interest."⁵⁴

B. THE RIGHT APPLIES TO TAKINGS OF REAL PROPERTY AND PERSONAL PROPERTY

1. Real Property

It is such black-letter law that it hardly needs stating that the Takings Clause of both the United States and the Nebraska Constitution applies to real property. If support for this proposition is needed *see* many of the cases cited throughout this chapter of NJI2d Civ.

2. Personal Property

The Takings Clause also applies to some takings of personal property. There are three takings-situations in which personal property is involved, two of which require compensation and one of which does not. Compensation is required when government takes real property that has personal property affixed thereto and when government directly takes personal property. Compensation is not required when government takes just the real property and coincidentally takes unaffixed personal property thereon.

a. Government Takes Real Property that has Affixed Personal Property

When real estate taken by the government has affixed personal property, it is a compensable taking as to both the real estate and the affixed personal property. The same rules that apply to the taking of the real estate also apply to the taking of the affixed personal property.⁵⁵

tiple and internal quotation marks omitted) (quoting *Memphis Light, Gas & Water Civ. v. Croft*, 436 U.S. 1, 9 (1978)).

Murr v. Wisconsin, 582 U.S. — (2017) discusses how to decide what unit of land is the proper subject of litigation when there is more than one adjacent parcel.

⁵⁴*Prokop v. Lower Loup NRD*, 302 Neb. 10, 36, 921 N.W.2d 375, 396 (2019). *Accord Cappel*, 298 Neb. at 452, 905 N.W.2d at 46 (holding that "the regulation in question did not directly affect private property, but, rather, the use of a public resource. Water in Nebraska is a public resource

dedicated for certain uses. And irrigation is one such use. The right to appropriate surface water is not an ownership of property." *Id.* at 456, 905 N.W.2d at 48.).

⁵⁵*See United States v. General Motors Corp.*, 323 U.S. 373 (1945) (upholding award for costs incurred by, *inter alia*, dismantling fixtures as a result of a government condemnation of a warehouse for wartime use. "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures

b. Government Directly Takes Personal Property

In some cases, government takes only personal property—takes it directly, as opposed to coincidentally. In *Horne v. Department of Agriculture*⁵⁶ the Federal Government took raisins from the appellants, both raisins they had grown on their own property and raisins they were handling for other growers.⁵⁷ The sole purpose of the taking was to get the raisins; no real property was wanted or taken. Finding this a compensable taking, the Court said that the government must “pay just compensation when it physically takes possession of . . . personal property.”⁵⁸ The Takings Clause “protects ‘private property’ without any distinction between different types.”⁵⁹

In some cases, government directly takes real and personal property at the same time. In *Kohl v. State, Dept. of Roads*⁶⁰ the Department of Roads took title to part of the condemnee’s salvage yard, his “salvage yard inventory, and all of the salvage yard fixtures and equipment.”⁶¹ The taking had dual purposes: taking part of the condemnee’s real estate (real property) and his inventory (unaffixed personal property). The Court wrote that “whether its agency acted properly or not,” the State did take not only the condemnee’s real property, but also his inventory. The condemnee did not contest defendant’s authority to do so.⁶² Therefore, the state must provide just compensation for the taking of the inventory. In this situation, said the court, the same measure of compensation will be applied to the taking of the personal property as is applied to the taking of real property.⁶³

c. Government Takes Real Property and Coincidentally Takes Unaffixed Personal Property Thereon

“A taking of real estate does not affect ownership of personal property kept on the premises but not affixed thereto . . . Generally,

thereon erected.” *id.* at 383-84).

⁵⁶*Horne v. Department of Agriculture*, 576 U.S. 351 (2015).

⁵⁷*Id.* at —, 135 S. Ct. at 2424.

⁵⁸*Id.* at —, 135 S. Ct. at 2425.

⁵⁹*Id.* at —, 135 S. Ct. at 2416 (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”). *See also, id.* at —, 135 S. Ct. at 2430 (distinguishing between direct appropriations and an exchange of a property interest for “a ‘valuable Government benefit in exchange—[such as] a license to sell dangerous chemicals”). *See generally, id.* at —,

135 S. Ct. at 2425–30.

⁶⁰*Kohl v. State, Dept. of Roads*, 214 Neb. 348, 334 N.W.2d 173 (1983).

⁶¹*Id.* at 348–49, 334 N.W.2d at 176.

⁶²*Id.* at 350, 334 N.W.2d at 176.

⁶³*See Source Gas Dist. LLC v. City of Hastings*, 287 Neb. 595, 605, 844 N.W.2d 256, 263 (2014) (including, *inter alia*, Hastings’ annexation of a gas company’s property and finding personal property of the company subject to condemnation; the personal property involved was part of the system for gas distribution and presumably needed to run the gas system).

personal property which is used on land taken by eminent domain cannot be considered in the determination of the compensation.”⁶⁴

d. Summing Up the Three Situations Discussed Above

Using raisins as an example (*see Horne*, above), in the first situation discussed above, if government took the land and the grape vines used to produce raisins were affixed to the land, the value of the vines would be compensable. In the second situation, if the government specified that it was taking the land and the raisins, or that it was just taking the raisins, then the value of the raisins would be compensable. In the third, had government taken the land, with an affixed barn, and, coincidentally, there were unaffixed raisins in the barn, then, as a general rule, the value of the raisins taken would not be compensable.

C. CONTRACT RIGHTS AS PROPERTY RIGHTS

“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”⁶⁵

VIII. “TAKING” DEFINED

A. PREFACE

Let me preface this discussion with four important points. First, a property right can be “taken” “even when [the taking] arguably increase[s] the market value of the property at issue.”⁶⁶ Second, government need not take an entire piece of property; taking only a part of the property is compensable.⁶⁷ Third, not every “government interference

⁶⁴2A J. Sackman, NICHOLS ON EMINENT DOMAIN ch. 5 § 5.0[5][d] (Matthew Bender, 3d ed. 1984). *Accord* Kohl v. State, Dept. of Roads, 214 Neb. 348, 350, 334 N.W.2d 173, 176 (1983). *See* Nat’l R.R. Passenger Corp. v. Faber Enters., Inc., 931 F.2d 438, 442-43 (7th Cir. 1991) (finding that common carrier did not have to compensate condemnee for depreciations to personal property that resulted from condemnation when property was unaffixed to property).

⁶⁵*United States Trust Co. v. New Jersey*, 431 U.S. 1, 19, n.16 (1976) (*see also id.* at 29, n.27). Sometimes related, a state or political subdivision firing an employee is not a taking for which an inverse condemnation claim will lie. *Craw v. City of Lincoln*, 24

Neb. App. 788, 799–803, 899 N.W.2d 915, 923–25 (2017) (citing and discussing cases).

⁶⁶*Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (*quoting* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437, n.15 (1982) (involving a state statute that allowed cable companies to install cable on buildings so tenants could get television reception)).

⁶⁷*E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or

with property is a taking.”⁶⁸ Fourth, regarding what constitutes a taking and, in Nebraska, damage in inverse condemnation, *see* what appears here, and *see also* part VI of this Comment & Authorities and NJI2d Civ. 13.08, which is the instruction to be used in cases of inverse condemnation.

B. *PER SE* OR CATEGORICAL TAKINGS

In general, when government or its delegate takes physical possession or occupation of property, whether permanent or temporary in nature, it is a taking *per se* and gives rise to a categorical duty to compensate the former owner.⁶⁹ There are three kinds of *per se* takings. These three are sometimes called takings *per se* or direct appropriations or possessory takings. They trigger the Takings Clause—without further inquiry. In each of these three categories the decision as to whether there is a taking is categorical, not *ad hoc*.

merely a part thereof.”) (citation omitted); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831–32 (1987) (Taking an easement across the owner’s land is a compensable taking).

⁶⁸*E.g.*, *Arkansas Game and Fish Com’n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). For example, when Congress amended statutes providing Aid to Families with Dependent Children (AFDC), which amendment reduced the non-contractual benefit-payments to some recipients, the Court held that “given the unquestioned premise that the Government has a right to reduce AFDC benefits generally, that result does not constitute a taking of private property without just compensation.” *Bowen v. Gillard*, 483 U.S. 587, 605 (1987). *See also* part VIII(E) of this Comment & Authorities, below. The Takings Clause applies only to a taking that occurs as a result of the exercise of the right of eminent domain. *See Andrus v. Allard*, 444 U.S. 1, 64 (1979) (finding that the effect of a treaty depriving owners of bird parts the ability to earn a profit from their display is not a taking under the Fifth Amendment). *See also Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984); *Mugler v. Kansas*, 123 U.S. 623, 668–669 (1887), each quoted in a footnote at part VIII(C) of this Com-

ment & Authorities.

Likewise, *e.g.*,

Neb. Const. art. I, § 21, is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging of property that occurs as the result of an entity’s exercise of its right of eminent domain. Therefore, a threshold issue in an inverse condemnation case seeking compensation for damage to property is whether the actions that are alleged to have caused damage to property constitute an exercise of the governmental entity’s right of eminent domain.

Henderson v. City of Columbus, 285 Neb. 482, 491, 827 N.W.2d 486, 494 (2013).

⁶⁹*E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (finding, *inter alia*, that compensation must be paid to leaseholders whose rights have been terminated as a result of the government’s physical occupation of the leasehold, despite the lessees’ interests being temporary in nature). Regarding temporary takings, *see* part VIII(B) of this Comment & Authorities, below.

■ The first *per se* taking is the obvious one: government takes title to private property.⁷⁰

■ The second is nearly as obvious: government effects or authorizes a permanent physical occupation or invasion of private property or “physically takes possession of an interest . . . in personal property.”⁷¹ The size of the physical invasion does not matter to whether it is a taking—a small wire, a large pylon, or a slagheap.⁷² The amount of the property taken or the size of the occupation or invasion of the property go not to whether there has been a taking, but to the amount of compensation owed. If a state statute requires that building owners allow installation of cable television wires on their apartment buildings, then, because it effects a permanent physical invasion it is a compensable taking.⁷³ Unless the owner lets them do it for free—waives this right—the state actor has to pay for any diminution in the value of the apartment building.

The damages may be very little or, as in the cable television example, the “taking” may increase the value of the property. But that

⁷⁰*E.g.*, *Horne v. Dept. of Agric.*, 576 U.S. —, —, 135 S. Ct. 2419, 2425 (2015); *Arkansas Game & Fish*, 568 U.S. at 31; *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 713 (2010). *See also* *Tahoe-Sierra*, 535 U.S. at 324 (stating that “[p]hysical appropriations are rare, easily identified, and usually represent a greater affront to individual property rights”).

⁷¹*Horne*, 576 U.S. at 351, 135 S. Ct. at 2425. *Accord, e.g.*, *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005); *Stop the Beach Renourishment, Inc.*, 560 U.S. at 713; *Tahoe-Sierra Pres. Council, Inc.* 535 U.S. at 322; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Our cases establish that even a minimal ‘permanent physical occupation of real property’ requires compensation under the Clause.”); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831–32 (1987) (Taking an easement across the owner’s land is a compensable taking); *Strode v. City of Ashland*, 295 Neb. 44, 62, 886 N.W.2d 293, 307 (2016); *Scofield v. State, Dept. of Natural Resources*, 276 Neb. 215, 231–32, 753 N.W.2d 345, 358–59 (2008); *Strom v. City of Oakland*, 255 Neb. 210, 218, 583

N.W.2d 311, 317 (1998).

⁷²“A permanent physical invasion—however minor. . .” *Lingle*, 544 U.S. at 549, “however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.” *Id.* at 538. *Accord* *Cappel v. State*, 298 Neb. 445, 454–55, 905 N.W.2d 38, 47 (2018) (quoting *Lingle* at length); *Preister v. Madison Cty.*, 258 Neb. 775, 781–82, 606 N.W.2d 756, 761 (2000) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) as follows: “Over 100 years ago . . . the U.S. Supreme Court held that ‘where real estate is actually invaded by superinduced additions or water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution’”), *overruled on other grounds*, *Simon v. City of Omaha*, 267 Neb. 718, 727, 677 N.W.2d 129, 137 (2001).

⁷³*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

goes to the amount of money the condemnor must pay—how much compensation is “just compensation”—and not to whether there is a taking.

Where the condemnation takes an easement, by the way, *see* NJI2d Civ. 13.06 and 13.07. When it takes a leasehold interest, *see* NJI2d Civ. 13.25 through 13.27.

■ A third *per se* taking occurs when government permanently denies the property owner all economically beneficial or productive use of the property.⁷⁴ This kind of taking often comes in the form of land-use regulations. Here is an example. Government lets you keep the property and the title—say it is Mississippi Gulf Coast beachfront property at risk from hurricanes—but they say that you must keep the property in its natural state. The effect of this regulation is that you cannot use the property in any economically beneficial or productive way. You cannot build a home, a hotel, or a golf course.⁷⁵

Another example: The city regularly, but not permanently, floods your property.⁷⁶ (The City, not Mother Nature: The City pays, Mother Nature does not.) Regular flooding of your property might deny you all economically beneficial use of the property. (As discussed above, this may also constitute a permanent physical invasion of your property.⁷⁷)

A third example: The State authorizes a mining company to dig under your property, making it unsafe to occupy the property. You still own the surface, you still own the property, but the company—under authority of State law—digs under it and leaves it unsafe for any economically beneficial or productive use.⁷⁸

The *per-se*-taking rule applies to a taking of title or possession or a permanent physical invasion, or the permanent denial of all economi-

⁷⁴*E.g.*, *Arkansas Game & Fish*, 568 U.S. at 32; *Tahoe-Sierra*, 535 U.S. at 330; *Palazzolo*, 533 U.S. at 617, 121 S. Ct. at 2457 (“[W]ith certain qualifications, . . . a regulation which ‘denies all economically beneficial or productive use of land’ will require compensation.”); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”); *Parkridge Investors Ltd. P’ship v. Farmers Home Admin.*, 13 F.3d 1192, 1199 (8th Cir. 1994); *Strode*, 295 Neb.

at 62, 886 N.W.2d at 307; *Strom*, 255 Neb. at 218, 583 N.W.2d at 317; *In re Nebraska Public Serv. Comm’n*, 260 Neb. 780, 800, 619 N.W.2d 809, 823 (2000). Regarding temporary takings, *see* part VIII(B) of this Comment & Authorities, below.

⁷⁵*See Lucas, supra*.

⁷⁶Regarding temporary takings, *see* part VIII(B) of this Comment & Authorities, below.

⁷⁷This is discussed above in this same part of this Comment & Authorities.

⁷⁸*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

cally beneficial or productive use of one's property. But it does not apply to either nonpossessory regulatory takings⁷⁹ or an exchange of a property interest for "a 'valuable Government benefit' . . . [such as, says the Court,] a license to sell dangerous chemicals."⁸⁰ So, let us turn to nonpossessory regulatory takings.

C. NONPOSSESSORY REGULATORY TAKINGS

Not every "government interference with property is a taking."⁸¹ For a prominent example, "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."⁸² "Treating [all such circumstances] as *per se* takings would transform government regulation into a luxury few governments could afford."⁸³

There is a clear distinction between the physical appropriation or acquisition of property for public use, a permanent physical invasion of property, and regulation that denies all economically beneficial or productive use of property, on the one hand, and a regulation that limits private use, on the other.⁸⁴ "[Typical] land-use regulations [without physical invasion] are not, in effect, an exercise of the power of

⁷⁹*Horne*, 576 U.S. at 351, 135 S. Ct. at 2427-28.

⁸⁰*Id.* at —, 135 S. Ct. at 2430.

⁸¹*Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012).

⁸²*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, n.20 (1987). *Accord Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984) ("[A]bsen[t] [] an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment."); *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor

restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.").

⁸³*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

⁸⁴*Tahoe-Sierra*, 535 U.S. at 323. The former is a *per se* decision—always a taking. The latter is an *ad hoc* decision—whether it is a taking or not depends on the specific facts of the case. *E.g.*, *Murr v. Wisconsin*, 582 U.S. —, — (2017); *Arkansas Game & Fish*, 568 U.S. at 31-32; *Tahoe-Sierra*, 535 U.S. at 323-24.; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019-20, n.8 (1992); *Bowen v. Gilliard*, 483 U.S. 587, 605 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *Penn Central*, 438 U.S. at 123-24.

eminent domain if (1) the regulations substantially advance legitimate state interests and (2) do not deny an owner economically viable use of his land.”⁸⁵ Regulations that “substantially advance legitimate state interests do not effect a taking merely because the regulation caused a diminution in property value alone.”⁸⁶

In *Strom v. City of Oakland*, the Nebraska Supreme Court quotes the United States Supreme Court on the subject of regulatory takings:

“The question of what constitutes a ‘taking’ . . . has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”⁸⁷

“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. A regulation, then, can be so burdensome as to become a taking.”⁸⁸

Here are some of the factors courts consider when deciding if a temporary physical invasion or regulation is, in fact, a taking. These factors “help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property.”⁸⁹ They help determine when “ ‘Government [is] forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ”⁹⁰

- “The economic impact of the regulation.”⁹¹

⁸⁵*Strom v. City of Oakland*, 255 Neb. 210, 219, 583 N.W.2d 311, 317 (1998).

⁸⁶*Strom*, 255 Neb. at 220, 583 N.W.2d at 318.

⁸⁷*Strom*, 255 Neb. at 216, 583 N.W.2d at 316 (quoting and omitting citations from *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24, 98 S. Ct. 2646, 2659 (1978). *Accord*, e.g., *Henderson v. City of Columbus*, 285 Neb. 482, 488, 491–92, 827 N.W.2d 486, 492–94 (2013) (quoting *Arkansas Game & Fish*, 568 U.S. at 34, 39.

⁸⁸*Murr v. Wisconsin*, 582 U.S. —,

— (2017).

⁸⁹*Lingle*, 544 U.S. at 542.

⁹⁰See part II of this Comment & Authorities, above.

⁹¹E.g., *Penn Central*, 438 U.S. at 124. See also, e.g., *Murr v. Wisconsin*, 582 U.S. —, — (2017); *Lingle*, 544 U.S. at 538; *Strode v. City of Ashland*, 295 Neb. 44, 62, 886 N.W.2d 293, 307 (2016) (“[A] land use regulation[] ‘do[es] not effect a taking merely because the regulation caused a diminution in property value alone.’” *Quoting Strom*, 255 Neb. at 220, 583 N.W.2d at 318.).

- Whether the government's action interferes with a present use (as opposed to an anticipated future use).⁹²
- The extent to which the acts of the government interfere with distinct and "reasonable investment-backed expectations."⁹³
- Had the property owner begun to change his or her use of the property from a use then still allowed to a use now forbidden? Had the owner invested in the changed use (time, effort, money), or was the changed use simply a possibility, an idea in the back of the owner's head.⁹⁴
- The duration of the invasion or interference with the use of the property.⁹⁵
- "[T]he degree to which the invasion is intended or is the foreseeable result of authorized government actions."⁹⁶
- Whether the regulation in question is a prohibition of a noxious use.⁹⁷
- Is it a taking by a "public program adjusting the benefits and burdens of economic life to promote the common good[?]"⁹⁸
- Whether government has forced some people to bear a public burden that should be borne by the public at large.⁹⁹
- The extent to which the regulation promotes the public "health, safety, morals, or general welfare."¹⁰⁰

Connolly v. Pension Benefit Guar. Corp. sums this up, stating that

⁹²*E.g.*, *Penn Central*, 438 U.S. at 136.

⁹³*E.g.*, *Arkansas Game & Fish*, 568 U.S. at 39. *Accord Murr*, 582 U.S. at —; *Lingle*, 544 U.S. at 538; *Penn Central Transp. Co.*, 438 U.S. at 124; *Strode*, 295 Neb. at 62, 886 N.W.2d at 307.

⁹⁴*E.g.*, *Penn Central*, 438 U.S. at 136 ("[T]he extent to which the regulation has interfered with distinct investment-backed expectations[.]").

⁹⁵*E.g.*, *Tahoe-Sierra*, 535 U.S., at 342.

⁹⁶*E.g.*, *Arkansas Game & Fish*, 568 U.S. at 39.

⁹⁷*Penn Central*, 438 U.S. at 144-45.

⁹⁸*Strode*, 295 Neb. at 65, 886 N.W.2d at 309; *Strom*, 255 Neb. at 216, 583 N.W.2d at 316 (quoting and omitting citations from *Penn Central*, 438 U.S. at 123-24, 98 S. Ct. at 2659. *Accord*, e.g., *Tahoe-Sierra*, 535 U.S. at 324.

⁹⁹*E.g.*, *Lingle*, 544 U.S. at 543. See part II of this Comment & Authorities, above.

¹⁰⁰*Strode*, 295 Neb. at 63, 886 N.W.2d at 308. See *Murr*, at — (acknowledging "the government's well-established power to 'adju[s]t' rights

whether the act is a compensable taking involves consideration of “(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.”¹⁰¹

Just to be clear, the decision here is not categorical, but ad hoc. And the list of considerations just above is non-exclusive. Consider anything that might persuade a judge to move the case to your client's preferred side of the taking-to-not-a-taking linear scale. Consider anything that is relevant to whether the state act involved is a compensable taking or a non-compensable general property-use regulation. You are limited only by the facts of the case and your own imagination.

D. TEMPORARY TAKINGS

A taking is a taking, whether it is permanent or temporary. That is, a temporary interference with property can be a compensable taking.¹⁰² “A temporary taking has been defined as ‘the occupancy of land . . . or a diminution in value . . . that is temporary in nature.’ ”¹⁰³ Federal and Nebraska constitutional limits on eminent domain apply to

for the public good.’ ”).

¹⁰¹*Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) *Id.* at 225 (internal quotation marks omitted; quoting *Penn Central Central*, 438 U.S. at 124, 98 S. Ct. at 2659 (1978)). *Accord Tahoe-Sierra*, 535 U.S. at 326; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874 (1984); *Scofield*, 276 Neb. at 232-33, 753 N.W.2d at 359-60. In such cases, courts “must focus on the parcel as a whole.” *Tahoe-Sierra*, 535 U.S. at 327, 122 S. Ct. 148 (internal quotation marks omitted). *See also particularly* *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001) and the cases cited and discussed therein.

¹⁰²*See Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (involving Army Corps of Engineers recurring temporary flooding of Game & Fish Commission property); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (“compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.”); *Lucas v. South Carolina*

Coastal Council, 505 U.S. 1003, 1033 (1992) (Kennedy, J. concurring in the judgment) (“It is well established that temporary takings are as protected by the Constitution as are permanent ones.”); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (finding in case involving a county ordinance prohibiting building or enlarging any buildings located, as the church's was, within the outer boundary of an interim flood protection area, that “temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (finding no taking where New York City's Landmarks Law prevented expansion above historic building); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (involving condemnation of a laundry plant during WWII for temporary use by the Army).

¹⁰³*Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 245, 631 N.W.2d 131, 140 (2001) (citation omitted) (digging up private property is a

temporary as well as permanent takings.¹⁰⁴ “A temporary taking must be accomplished in a manner consistent with the exercise of the power of eminent domain.”¹⁰⁵ First, of course, the temporary interference with the property must be found to be a taking, as, of course, not every interference with property is a taking.¹⁰⁶

On the subject of temporary takings by inverse condemnation, see part VI of this Comment & Authorities, above, and see *NJI2d Civ. 13.08*, Comment & Authorities, below, which mentions temporary takings by inverse condemnation.

For a discussion of what differentiates permanent and temporary damage to land and the calculation of damages, see *Russell v. Franklin County*.¹⁰⁷

E. STATE ACTS THAT ARE NOT A TAKING

“A takings analysis begins with an examination of the nature of the owner’s property interest. No compensation is owed in a takings claim if the State’s affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State’s law or property and nuisance already place upon land ownership.”¹⁰⁸

Another category of state action that clearly does not implicate the Takings Clause is a regulatory “taking” in the form of “‘restrictions . . . reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly

temporary taking for which an easement must be obtained).

¹⁰⁴*Id.*

¹⁰⁵*Id.* at 245, 631 N.W.2d at 140. Frequent flooding may be a compensable taking. *Henderson v. City of Columbus*, 285 Neb. 482, 494–95, 827 N.W.2d 486, 493 (2013) (citing and discussing cases).

¹⁰⁶See, e.g., *Arkansas Game & Fish*, 568 U.S. at 31 (“We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.”); *Tahoe-Sierra*, 535 U.S. at 321 (finding that a temporary

taking of the economic use of land through the imposition of a moratorium on development of said land does not rise to the level of categorical or per se taking); *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010) (finding that State erosion-control actions adding 75 feet of sand to beaches was not a “taking” of beachfront property owners’ rights to receive accretions to their property or rights to have contact of their property with the water remain intact, as no such property rights existed under state law).

¹⁰⁷*Russell v. Franklin Cty.*, 306 Neb. 546, 554–58, 946 N.W.2d 648, — (2020).

¹⁰⁸*Hill v. State*, 296 Neb. 10, 19, 894 N.W.2d 208, 215 (2017).

situated property.’”¹⁰⁹ Three examples of these regulatory non-takings include most zoning and similar laws,¹¹⁰ historic preservation,¹¹¹ and state acts destroying one class of property to save another, when the Legislature judges the latter to be of greater value, as the destruction of some property to stop an advancing fire before it destroys even more property, or the destruction of diseased trees in an effort to stop the spread of the disease to even more, and more valuable, trees.¹¹² These regulate a landowner’s use of his or her land, but do not “take” it. The relevant considerations are these: How widespread is the benefit and how widespread are the burdens? Do the former outweigh the latter?

In a third category are the cases where a private party exchanges a property interest for a valuable government interest—such as the government’s interest in protecting the public by controlling the licensing of the sale of dangerous chemicals.¹¹³

F. THE DATE OF THE TAKING

In a condemnation where the condemnor files a condemnation petition the date of the taking is the date the petition is filed.¹¹⁴ The date of the taking in an inverse condemnation action is the subject of NJI2d Civ. 13.08, Comment & Authorities, part VIII.

IX. “PUBLIC USE” DEFINED

Most takings are obviously public-use takings: government taking land to put in public roads, parking lots, or sidewalks, to build public hospitals, libraries, or police stations, to install public-utility transmission lines, submerge land by constructing a flood-control dam, or build an Air Force base. And: “Private property may be taken to eradicate

¹⁰⁹*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023 (1992) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 134 n.30 (1978)); *Horne v. Dept. of Agric.*, 576 U.S. 351, —, 135 S. Ct. 2419, 2427–28 (2015).

¹¹⁰*See, e.g. Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (stating that zoning laws constitute a taking only if they “do[] not substantially advance legitimate state interests or den[y] an owner economically viable use of his land[.]” (citation omitted)).

¹¹¹*Lucas*, 505 U.S. at 1023; *Penn Central*, 438 U.S. at 134 n.30.

¹¹²*Miller v. Schoene*, 276 U.S. 272 (1928).

¹¹³*See Horne*, 576 U.S. at 351, 135 S. Ct. at 2430 (government protecting the public by licensing the sale of dangerous chemicals).

¹¹⁴*Langenheim v. City of Seward*, 200 Neb. 740, 743, 265 N.W.2d 446, 449 (1978). *Accord* *Application of Burt Cty. Pub. Power Dist.*, 163 Neb. 1, 13, 77 N.W.2d 773, 782–83 (1956). Regarding inverse condemnation, where no such petition is filed, *see* NJI2d Civ. 13.08, Comment.

blighted areas.”¹¹⁵ But, some are not so obviously in service of a public use.¹¹⁶

In *Kelo v. City of New London* the Court upheld the City’s use of the power of eminent domain in the following situation. New London had a development plan that designated a non-blighted development area. The plan had the city’s development agent acquire as much property in the development area as it could buy on the open market and use the power of eminent domain to acquire the rest. Parts of the land taken were to be given to and developed by private developers. Petitioners argued that taking the land to give it to a private developer was not a “public use.” The Court disagreed.¹¹⁷

Note that this was the private company exercising eminent domain “in the city’s name.”¹¹⁸ While the property as a whole was taken to revitalize a part of New London, the entity to which the city delegated the power of eminent domain took the property with the express purpose of transferring some of it to private owners. The Court noted that “[o]n the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.”¹¹⁹ The “development plan was not adopted ‘to benefit a particular class of identifiable individuals.’”¹²⁰ And it serves a public purpose (including “new jobs and increased tax revenue”).¹²¹ “Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”¹²² And the ultimate disposition of the property serves a public purpose.

“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”¹²³ Nonetheless, the definition of “public use” is a broad one. “The federal government may take private property

¹¹⁵2A James L. Sackman, NICHOLS ON EMINENT DOMAIN Ch. 7, § 7.06[26] (Matthew Bender, 3d ed. 1984) (initial caps removed).

¹¹⁶*Id.* at § 7.02[1] (stating that under the Takings Clause of the United States Constitution, “‘public use’ does not mean ‘use by the public’”).

¹¹⁷*Kelo v. City of New London*, 545 U.S. 469 (2005).

¹¹⁸*Id.* at 484.

¹¹⁹*Id.* at 478.

¹²⁰*Id.*

¹²¹*Id.* at 483.

¹²²*Id.* at 484.

¹²³*Dahlen v. Shelter House*, 598 F.3d 1007, 1010 (8th Cir. 2010) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229,

by eminent domain in aid of any of the powers expressly or impliedly granted to it by the United States Constitution.”¹²⁴

After *Kelo* and in so far as the United States Constitution is concerned, this includes economic revitalization. Regarding takings by state and local governments, state constitutions and state and local laws can be more restrictive of the taking power than is the United States Constitution, and the federal courts typically defer to state or local government determinations that local takings are for a public use.¹²⁵

In general, the following criteria seem to be important to constituting a valid “public use” for the exercise of eminent domain. (1) That the taking affect a community as distinguished from a single individual; (2) That the use to which the taken property is applied is authorized by law; and (3) That the title taken not be invested in a person or corporation as a private property to be used and controlled as private property unless the public received some public benefit as a result of the private possession.¹²⁶

How does *Kelo* affect Nebraska law? While, under the Supremacy Clause, state law (constitutional or statutory) cannot provide less protection than does the United States Constitution (including, of course, the Supreme Court’s interpretation of that Constitution), it can provide more protection.¹²⁷ And many states, including Nebraska, do provide more protection. For example, the year after *Kelo* the Nebraska Legislature passed a statute intended to protect Nebraska property owners from a *Kelo*-like taking; it states, “A condemner may not take property through the use of eminent domain . . . if the taking is primarily for an economic development purpose.”¹²⁸

X. “JUST COMPENSATION” DEFINED

A. FAIR MARKET VALUE IN GENERAL

The United States Supreme Court has noted that in a typical “condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of

245 (1984)).

¹²⁴2A James L. Sackman, NICHOLS ON EMINENT DOMAIN Ch. 7, § 7.03[10][b][iii] (Matthew Bender, 3d ed. 1984) (citing cases).

¹²⁵*Id.* at § 7.01[5] (citing cases).

¹²⁶*Id.* at § 7.02[4] (formatting altered). “*Kelo* set the federal bar

relatively low.” *Id.* at § 7.01[4].

¹²⁷See part I(A) and (B) of this Comment & Authorities, above.

¹²⁸Neb. Rev. Stat. § 76-710.04 (Cum Supp. 2014). Section 76-710.04 essentially says that the law in Nebraska is different; such a taking does violate Nebraska law.

the land remaining, less special benefits.”¹²⁹ That is true for a federal taking. In Nebraska there is a third element: the diminution in the fair market value of any property damaged.¹³⁰ When government takes part of the property, compensation is the market value of the part taken and the decrease in the market value of the whole by reason of the taking of the part.¹³¹ Damages recovered for the decrease in value of the remaining property are called “severance damages.”¹³² When seeking severance damages, the attorney will usually be concerned with proving three things: (1) that the land actually taken is part of a larger tract and not merely a separate tract adjacent to the condemnee’s remaining land;¹³³ (2) proper compensation; and (3) minimization of offsetting benefits.¹³⁴

Market value, here, is measured by the value to the condemnee at the time of the taking,¹³⁵ rather than the value to the condemnor. “It is a principle of law . . . in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full

¹²⁹Same quotation: *Hike v. State* (Hike II), 297 Neb. 212, 218, 899 N.W.2d 614, 621 (2017); *Hike v. State* (Hike I), 288 Neb. 60, 66, 846 N.W.2d 205, 214 (2014); *Moyer v. Neb. City Airport Auth.*, 265 Neb. 201, 210, 655 N.W.2d 855, 863 (2003). *See also, e.g.*, *Douglas Cty. Sch. Dist. No. 10 v. Tribedo*, 307 Neb. 716, 726, 950 N.W.2d 599, 607 (2020).

¹³⁰*Walkenhorst v. State*, 253 Neb. 986, 990-91, 992, 995, 573 N.W.2d 474, 480, 481, 482 (1998). The Federal Constitution restricts *taking* private property. The Nebraska Constitution restricts *taking or damaging* private property. *See* parts I(A) and (B) of this Comment & Authorities, *above*.

¹³¹*E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”) (citation omitted).

¹³²*See* “Severance Damages,” at part X(E) of this Comment & Authorities, *below*.

¹³³*See* “Severance Damages,” at part X(E) of this Comment & Authorities, *below*, for a discussion of how to tell the difference.

¹³⁴P. Rohan, *REAL PROPERTY PRACTICE AND PROCEDURE* § 32.02[6] (1981).

Market value is discussed immediately below in this Comment & Authority. Severance damages are discussed at part X(E) of this Comment & Authorities, *below*.

¹³⁵*Horne v. Dept. of Agric.*, 576 U.S. 351, —, 135 S. Ct. 2419, 2432 (2015) (“The [United States Supreme] Court has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking.”) (internal quotation marks and citations omitted). *United States v. Petty Moto Co.*, 327 U.S. 372 (1946) (“[J]ust compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called ‘market value.’”); *Brown v. Legal Found.*, 538 U.S. 216, 243-44 (2003); *Richard A. Epstein, Takings* 28 (1985); *R. Cunningham, W. Stoebeuck, and D. Whitman, THE LAW OF PROPERTY* § 9.1, at 510 (1984).

extent.”¹³⁶ The condemnee’s compensation is to be based on the full extent of the taking, that is, the full extent of the rights actually acquired by the condemnor.¹³⁷ Evidence that the condemnor will exercise less than all of the right acquired is inadmissible to the issue of compensation.¹³⁸

Where the condemnation takes an easement, by the way, see NJI2d Civ. 13.06 and 13.07. When it takes a leasehold interest, see NJI2d Civ. 13.25 through 13.27.

Fair market value is the measure of compensation in eminent domain cases.¹³⁹ The condemnee in an eminent domain case is entitled to recover the fair market value of the property taken, the decrease in the fair market value of any property remaining, and the diminution in the fair market value of any property damaged.¹⁴⁰ In Nebraska, this applies whether the property is “taken” or “damaged.”¹⁴¹

This includes property that a governmental entity damages in exercise of its right of eminent domain. “The Nebraska [Constitution] broadens the entitlement for just compensation beyond property that is actually ‘taken’ by the governmental entity and includes compensation for property that is damaged in the sense that the market value of the property has been diminished even if the property is not actually taken.”¹⁴²

¹³⁶*Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 199, 376 N.W.2d 539, 552 (1985) (stating that “[a]ny limitation of a right acquired and consequent use must be expressed in [the] condemnation petition.”; *id.* at 197, 376 N.W.2d at 551).

¹³⁷*Id.* at 194, 376 N.W.2d at 549. See also *Danish Vennerfornig & Old Peoples Home v. State, Dept. of Roads*, 191 Neb. 774, 778, 217 N.W.2d 819, 822 (1974) (stating that the measure of compensation “is the actual legal rights acquired by the condemner and not the use actually made of the land by the condemnor”), *rehearing* 201 Neb. 233, 266 N.W.2d 914 (1978), *rehearing*, 205 Neb. 839, 290 N.W.2d 791 (1980); *Mathis v. State, Dept. of Roads*, 178 Neb. 701, 706–07, 135 N.W.2d 17, 21 (1965) (owner’s loss, not taker’s gain).

¹³⁸*Id.* at 197, 376 N.W.2d at 551.

¹³⁹See, e.g., *Preister v. Madison Cty.*, 258 Neb. 775, 784, 606 N.W.2d

756, 763 (2000) (“[U]nder the Fifth Amendment to the U.S. Constitution, when the government has worked a complete physical taking of the land, the landowner need only show that fair market value of the land taken.”).

¹⁴⁰*Walkenhorst*, 253 Neb. at 990–91, 992, 995, 573 N.W.2d at 480, 481, 482. The Federal Constitution restricts *taking* private property. The Nebraska Constitution restricts *taking or damaging* private property. See parts I(A) and (B) of this Comment & Authorities, above.

¹⁴¹*Strom v. City of Oakland*, 255 Neb. 210, 216, 583 N.W.2d 311, 316 (1998) (stating “[t]he words ‘or damaged’ . . . include all actual damages resulting from the right of eminent domain which diminish the market value of private property”); See part I(B) of this Comment & Authorities, above, for a more complete discussion of this point.

¹⁴²*Henderson v. City of Columbus*,

There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.¹⁴³

For a discussion of what differentiates permanent and temporary damage to land and the calculation of damages, see *Russell v. Franklin County*.¹⁴⁴

B. INSTRUCTING ON THE DEFINITION OF FAIR MARKET VALUE

The instruction on the definition of fair market value is NJI2d Civ. 13.02. NJI2d Civ. 13.07 is the instruction defining fair market value in a case where an easement is taken. NJI2d Civ. 13.27 is the instruction defining fair market value in a case of a taking of, or damage to, a leasehold.

C. THE MARKET-DATA APPROACH TO FAIR MARKET VALUE

1. In General

"The fair market value is the value of the property if offered for sale upon the open market as between one who is ready and willing to sell but is not compelled to sell, and one who is ready, able, and willing to buy but is not required to buy."¹⁴⁵ "Fair market value 'is the price . . . property will bring when offered by a willing seller to a willing

285 Neb. 482, 490, 827 N.W.2d 486, 493 (2013) (referencing Neb. Const. art. I, § 21; see parts I(A) and (B) of this Comment & Authorities, above).

¹⁴³*American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 754, 807 N.W.2d 170, 181 (2011). *Accord Liberty Dev. Corp. v. Metro. Util. Dist.*, 276 Neb. 23, 33–34, 751 N.W.2d 608, 616 (2008) (taking of easement; regarding easements, see generally NJI2d Civ. 13.06 and 13.07); *Walkenhorst*, 253 Neb. at, 991, 573 N.W.2d at 480; *Westgate Recreation Assn. v.*

Papio-Missouri River NRD, 250 Neb. 10, 20, 547 N.W.2d 484, 493 (1996).

¹⁴⁴*Russell v. Franklin Cty.*, 306 Neb. 546, 554–58, 946 N.W.2d 648, — (2020).

¹⁴⁵*McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 106, 547 N.W.2d 716, 724 (1996) (multiple and internal quotation marks omitted). *Accord Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 413, 576 N.W.2d 797, 803 (1998); *Schmailzl v. State*, 176 Neb. 617, 623, 126 N.W.2d 821, 825 (1964)).

buyer, neither being obligated to buy or sell.’ ¹⁴⁶ “In determining the fair market value of the property taken, it is appropriate to consider its highest and best use.” ¹⁴⁷

[T]he market value of property includes its value for any reasonable use to which it may be put. . . . The proper inquiry is, what is the fair market value in view of any reasonable use to which it may be applied and all reasonable uses to which it is adapted? . . . The adaptability must be reasonably probable, not merely possible. And the adaptability must be reasonably expected in the immediate future. ¹⁴⁸

“[T]he unit rule is applicable whenever the market data approach is employed, and . . . this rule requires that the value of improved property be considered as a whole, without the assignment of separate costs for the land and individual improvements.” ¹⁴⁹

2. Evidence of Comparable Sales

“Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.” ¹⁵⁰

When using the comparable sales method, it is well settled that

¹⁴⁶*Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 277, 512 N.W.2d 379, 384 (1994) (quoting *Kohl v. State of Neb.*, 214 Neb. 348, 354, 334 N.W.2d 173, 178 (1983)).

¹⁴⁷*Lincoln Branch, Inc.*, 245 Neb. at 277, 512 N.W.2d at 384 (quoting *Sump v. Omaha Pub. Power Dist.*, 168 Neb. 120, 123, 95 N.W.2d 209, 212 (1959)).

¹⁴⁸*Hike v. State (Hike I)*, 288 Neb. 60, 67, 846 N.W.2d 205, 214 (2014) (footnotes omitted). *Accord Smith v. Papio-Missouri River NRD*, 254 Neb. at 411, 576 N.W.2d at 802; *Lincoln Branch, Inc.*, 245 Neb. at 277, 512 N.W.2d at 384 (“The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?” (quoting *Sump*, 168 Neb. at 123, 95 N.W.2d at 212; *Kohl v. State, Dept. of Roads*, 214 Neb. 348, 334 N.W.2d 173 (1983); *Reller*

v. Consumers Pub. Power Dist., 199 Neb. 720, 722, 260 N.W.2d 622, 623 (1978); *Harmony Lanes v. State, Dept. of Roads*, 193 Neb. 826, 830–31, 229 N.W.2d 203, 207 (1975); *Johnson v. Neb. Pub. Power Dist.*, 187 Neb. 421, 423, 191 N.W.2d 594, 597, 598 (1971).

¹⁴⁹*Westgate Recreation Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 20–21, 547 N.W.2d 484, 493–94 (1996) (while court had previously employed substance of unit rule, court had not heretofore adopted rule by name; unit rule applies only for market data approach). *Accord Walkenhorst v. State*, 253 Neb. 986, 991, 573 N.W.2d 474, 480 (1998).

¹⁵⁰*Westgate Recreation*, 250 Neb. at 17, 547 N.W.2d at 491 (quoting *Wear v. State Dept. of Roads*, 215 Neb. 69, 75–76, 337 N.W.2d 708, 713 (1983)). This same language just quoted from *Westgate Recreation* also appears in *Smith v. Papio-Missouri River NRD*,

evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. However, it is equally clear that such land must be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action, especially when the price paid depends upon the market or going value rather than other considerations.¹⁵¹

"[I]n eminent domain proceedings, where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted to the trial judge in determining the admissibility of the evidence of the other sales."¹⁵²

"In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market."¹⁵³ Regarding expert testimony of the subject of fair market value generally, *see also* the discussion below, part XVIII of this Comment & Authorities.

"The test is whether the sale has probative value with respect to the present value."¹⁵⁴

And, of course, "evidence [of other sales] should not be admitted where there is a marked difference in the situations of the properties."¹⁵⁵

Installment contracts should be carefully scrutinized before admitted as evidence [of fair market value] because they may reflect terms at variance with custom and usage and it is com-

254 Neb. 405, 413, 576 N.W.2d 797, 803 (1998); *Heye Farms, Inc. v. State*, 251 Neb. 639, 645, 558 N.W.2d 306, 311 (1997). *Accord Patterson v. City of Lincoln*, 250 Neb. 382, 388, 550 N.W.2d 650, 654 (1996).

¹⁵¹*American Central City v. Joint Antelope Auth.*, 281 Neb. 742, 754-55, 807 N.W.2d 170, 181 (2011).

¹⁵²*Patterson*, 250 Neb. at 387, 550 N.W.2d at 654. *Accord Smith v. Papio-Missouri River NRD*, 254 Neb. at 413, 576 N.W.2d at 803 (appraisal must be made near enough in time to furnish test of market value as of date in question; matter within discretion of trial court).

¹⁵³*McArthur*, 250 Neb. at 106, 547 N.W.2d at 723.

¹⁵⁴*Smith v. Papio-Missouri River NRD*, 254 Neb. at 414-15, 576 N.W.2d at 804 (no adjustment need be made because comparable was two years later than taking; test is relevance; no evidence in record that this comparable too remote in time to be relevant).

¹⁵⁵*Patterson*, 250 Neb. at 387, 550 N.W.2d at 654 (citing cases) (decision rests largely in discretion of trial court; *id.* at 388, 550 N.W.2d at 654). *Accord Smith v. Papio-Missouri River NRD*, 254 Neb. at 413, 576 N.W.2d at 803.

mon knowledge that deferred payment sales eventually cost the buyer more than if the buyer purchased upon a fair cash market value.¹⁵⁶

3. Evidence of Changes in Fair Market Value Prior to the Date of Valuation, Caused by Improvement for which the Property was Acquired

In determining “just compensation” the trier of fact shall not consider any change in the fair market value of the property “caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than [what, if any, is] due to physical deterioration within the reasonable control of the owner[.]”¹⁵⁷ As noted above,¹⁵⁸ market value is measured by the value to the owner at the time of the taking,¹⁵⁹ rather than the value to the condemnor.

This is the general rule. There is an exception to this general rule; it is stated in NJI2d Civ. 13.10. *See* NJI2d Civ. 13.10 and its Comment.

This rule applies to all compensable damages (and not just to severance damages, discussed just below).¹⁶⁰

4. Severance Damages

Regarding severance damages, *see* the heading “Severance Damages,” in part X(E) of this Comment & Authorities, below.

5. Consider All of the Evidence

When figuring the fair market value of property taken, consider all of the evidence.¹⁶¹

¹⁵⁶*McArthur*, 250 Neb. at 106, 547 N.W.2d at 724.

¹⁵⁷Neb. Rev. Stat. § 76-710.01 (Re-issue 2009). *See also* *Mobeco Indus., Inc. v. City of Omaha*, 257 Neb. 365, 369, 598 N.W.2d 445, 448 (1999).

¹⁵⁸*See* part X(A) of this Comment & Authorities, above.

¹⁵⁹*Horne v. Dept. of Agric.*, 576 U.S. 351, 368–69 (2015) (“The [United States Supreme] Court has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking.”) (internal quotation marks and citations omitted). *United States v.*

Petty Moto Co., 327 U.S. 372 (1946) (“[J]ust compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called ‘market value.’”); *Brown v. Legal Found.*, 538 U.S. 216, 243–44 (2003); Richard A. Epstein, *Takings* 28 (1985); R. Cunningham, W. Stoebeuck, and D. Whitman, *THE LAW OF PROPERTY* § 9.1, at 510 (1984).

¹⁶⁰*Mobeco Indus., Inc.*, 257 Neb. at 368, 598 N.W.2d at 448.

¹⁶¹*See, e.g., Douglas Cty. Sch. Dist. No. 10 v. Tribedo*, 307 Neb. 716, 726, 599 N.W.2d 599, 607 (2020) (contain-

If, by reason of [the property's] surroundings, its natural advantages, its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation.¹⁶²

On the other hand, "[i]n an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of the property."¹⁶³

6. Permanent vs. Temporary Damage to Land and the Calculation of Damages

For a discussion of what differentiates permanent and temporary damage to land and the calculation of damages, see *Russell v. Franklin County*.¹⁶⁴

ing a lengthy list of factors that may be considered); *Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 194, 376 N.W.2d 539, 549 (1985) (factors that "would influence a well-informed buyer in determining a price payable for the property at the time of the government's taking"); *Thacker v. State, Dept. of Roads*, 193 Neb. 817, 823, 229 N.W.2d 197, 202 (1975) (evidence of other sales; admissibility depends on similarity of situation of properties and voluntariness of price paid; wide discretion granted trial judge); *Iske v. Omaha Pub. Power Dist.*, 185 Neb. 724, 728, 178 N.W.2d 633, 636-37 (1970) (including evidence of stone or mineral deposits that bear on the market value of the land); *Lechlitter v. State*, 185 Neb. 527, 530, 176 N.W.2d 917, 919 (1970) ("Anything connected with the land that would influence its [good faith] market value."); *Iske v. Metro. Utils. Dist.*, 183 Neb. 34, 40, 157 N.W.2d 887, 892 (1968) (evidence of gravel deposits and of adaptability to commercial development); *Deremer v. State*, 182 Neb. 586, 589, 156 N.W.2d 6, 8 (1968) (impair-

ment of reasonable access to abutting owner's property); *Swanson v. State, Dept. of Roads*, 178 Neb. 671, 675, 134 N.W.2d 810, 813 (1965) ("Everything which affects the market value is to be taken into consideration." Compensation is not decided upon by adding each item together, item by item, but by considering "[t]he extent that, taken as a whole, they detract from the market value of the property.""); *Painter v. State, Dept. of Roads*, 177 Neb. 905, 914, 131 N.W.2d 587, 592 (1964) (jury view).

¹⁶²*Hike v. State* (Hike I), 288 Neb. 60, 67, 846 N.W.2d 205, 214 (2014) (citing *Johnson v. Neb. Pub. Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971)).

¹⁶³*Verzani v. State, Dept. of Roads*, 188 Neb. 162, 164-65, 195 N.W.2d 762, 765 (1972). *Accord* *Lechlitter v. State*, 185 Neb. 527, 530, 176 N.W.2d 917, 919 (1970) (profits from business cannot be shown to prove value of property).

¹⁶⁴*Russell v. Franklin Cty.*, 306 Neb. 546, 554-58, 946 N.W.2d 648, — (2020).

D. THE INCOME AND THE REPLACEMENT-COST APPROACHES TO FAIR MARKET VALUE

There are types of property that are not bought and sold on an open market and consequently do not have a reasonable market value within the rule that the fair market value is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. The fair market value of property implies proof of sales of similar property in the community as a means of fixing the value of the property taken. When the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised. This is true, as we view it, of such properties as school yards, church yards, college campuses, buildings under construction, and cemeteries Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown.¹⁶⁵

In *McArthur v. Papio-Missouri River NRD* the court approved of capitalizing the estimate of net rents from the probable use of the property as an accepted method of valuation of property with no fair market value.¹⁶⁶ In dicta in *First Baptist Church of Maxwell v. State, Dept. of Roads* the court mentioned the possibility of "replacement cost, less depreciation" as a possible measure of compensation.¹⁶⁷

It seems that the "income approach" may be used at least where there are not comparable sales and where income value derives either from the "intrinsic nature" of the land, which might, for example, include certain recreational uses, or from current uses of the property, which might, for example, include uses obligated by contract, but not yet undertaken.¹⁶⁸

It is generally held, and we agree, that the reproduction cost method as an independent test of value may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is

¹⁶⁵ *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 611-12, 114 N.W.2d 29, 31-32 (1962) (citation omitted).

¹⁶⁶ *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 107, 547 N.W.2d 716, 725 (1996). *Accord* *Walkenhorst v. State*, 253 Neb. 986,

991-92, 573 N.W.2d 474, 480-81 (1998).

¹⁶⁷ *First Baptist Church of Maxwell v. State, Dept. of Roads*, 178 Neb. 831, 837, 135 N.W.2d 756, 759-60 (1965).

¹⁶⁸ *Patterson v. City of Lincoln*, 250 Neb. 382, 387, 550 N.W.2d 650, 654 (1996).

unusually well adapted to the kind of land upon which they exist.

[We do not] limit the use of the reproduction cost method in this state only to unique buildings, as improved property may exist in the midst of an expanse of vacant land, resulting in a lack of comparable sales which would make the use of the market data approach impossible.

.....

The question is not what it would cost the condemnee to go out and purchase similar property and construct the same type of improvements on that property; rather, the question is what is the value of the property owned by the condemnee as of the date of the taking. The replacement cost method allows a condemnee, when there are no comparable sales available, to value the land and the improvements separately to arrive at the fair market value so that any enhancement of the value of the land by improvements will be taken into consideration.

.....

Cost of repair is not synonymous with market value.¹⁶⁹

For a discussion of what differentiates permanent and temporary damage to land and the calculation of damages, see *Russell v. Franklin County*.¹⁷⁰

E. SEVERANCE DAMAGES

Where part of a parcel of land is taken, the condemnee is entitled to compensation not only for the fair market value of the part taken, but also for such decrease in the value of any remaining part of the same tract of property as was proximately caused by the taking. Such damages to the remaining property are called "severance damages." When seeking severance damages, the attorney will usually be concerned with proving three things: (1) that the land actually taken is part of a larger tract and not merely a separate tract adjacent to the condemnee's

¹⁶⁹*Westgate Recreation Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 22-29, 547 N.W.2d 484, 494-98 (1996) (citations omitted). *Accord* *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 865, 678 N.W.2d 95, 101-02 (2004); *Walkenhorst v. State*, 253 Neb. 986, 992, 573 N.W.2d 474, 481 (1998)

(finding that a shelterbelt of trees was not so unique as to require a method of valuation other than fair market value).

¹⁷⁰*Russell v. Franklin Cty.*, 306 Neb. 546, 554-58, 946 N.W.2d 648, — (2020).

remaining land; (2) proper compensation; and (3) minimization of offsetting benefits.¹⁷¹

"Severance damages for land taken for public use are measured by all factors and inconveniences that would influence a purchaser."¹⁷² *Douglas County Sch. Dist. No. 10 v. Tribedo* includes a list of elements that could influence market value.¹⁷³

The question arises, then, When is a parcel of land part of a larger tract and when is it a separate tract? The main considerations are these three: Are the properties owned by the same person or entity? Are the properties contiguous? Are the parcels devoted to the same use?¹⁷⁴

The other side of this coin is this:

Ordinarily, the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. Where, however, [the property] is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given

¹⁷¹P. Rohan, *REAL PROPERTY PRACTICE AND PROCEDURE* § 32.02[6] (1981). See also, e.g., *Douglas Cty. Sch. Dist. No. 10 v. Tribedo, LLC*, 307 Neb 716, 726, 950 N.W.2d 599, 607 (2020).

¹⁷²*Douglas Cty. Sch. Dist. No. 10*, 307 Neb at 726, 950 N.W.2d at 607 (2020) ("A jury may take into account every (nonspeculative) element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Id.* (internal quotation marks omitted)).

¹⁷³*Douglas Cty. Sch. Dist. No. 10*, 307 Neb at 725, 950 N.W.2d at 607.

¹⁷⁴E.g., Neb. Rev. Stat. § 76-710.01 (Reissue 2009) (reduction value of the remainder, i.e. "severance damages"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("When government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless

of whether the interest that is taken constitutes an entire parcel or merely a part thereof.") (citation omitted); *Heye Farms, Inc. v. State*, 251 Neb. 639, 645, 558 N.W.2d 306, 311 (1997); *Y Motel, Inc. v. State, Dept. of Roads*, 193 Neb. 526, 529, 227 N.W.2d 869, 872 (1975) ("unity of use") (citations omitted); *Verzani v. State, Dept. of Roads*, 188 Neb. 162, 163-64, 195 N.W.2d 762, 764 (1972) (noting that "[t]he rule is well established that where only a part of the property is taken, the landowner may recover the value of the land appropriated and the depreciation in value of the remainder of the land"; considerations include "same proprietor, contiguous to the land taken, and devoted to the same use."); *Harmony Lanes v. State, Dept. of Roads*, 193 Neb. 826, 830, 229 N.W.2d 203, 206 (1975); *Hughes Farms, Inc. v. Tri-State Generation and Transmission Ass'n*, 182 Neb. 791, 157 N.W.2d 384 (1968); *Rath v. Sanitary Dist. No. 1 of Lancaster Cty.*, 156 Neb. 444, 453, 56 N.W.2d 741, 747-48 (1953).

greater emphasis, and has been called the controlling and determining factor.¹⁷⁵

Langenheim v. City of Seward discusses a condemnee's request for special findings, with a separate finding as to the value of the land taken and as to the value of the severance damage, that is, the reduction in the value of condemnee's remaining contiguous property.¹⁷⁶ The same rule surely applies when the taking increases the value of the property.¹⁷⁷ It is, after all, still a violation of the condemnee's constitutional right.

For a discussion of what differentiates permanent and temporary damage to land and the calculation of damages, see *Russell v. Franklin County*.¹⁷⁸

F. NOMINAL DAMAGES

Where there is proof of a taking of condemnee's property but no proof of actual damages, the condemnee may be entitled to recover nominal damages.¹⁷⁹ If this situation arises and such an instruction is asked for, it will have to be drafted. See NJI2d Civ. 4.40, which contains a nominal-damage paragraph.

G. CONSEQUENTIAL DAMAGES

Nebraska is one of the few states that provide recovery for consequential damages. The general rule, nationwide, is that consequential damages are not recoverable in cases of eminent domain, but that exceptions may be created by constitutional or statutory provisions requiring the payment of compensation for property damaged.¹⁸⁰ Nebraska's constitutional provision is of the exceptional sort: "The property of no person shall be taken or damaged for public use without just compensation therefor."¹⁸¹ In Nebraska, "not only is the condemnor li-

¹⁷⁵*Y Motel*, 193 Neb. at 529, 227 N.W.2d at 872 (citation omitted).

¹⁷⁶*Langenheim v. City of Seward*, 200 Neb. 740, 743-44, 265 N.W.2d 446, 449-50 (1978) (trial court denied such a request; Supreme Court affirmed).

¹⁷⁷See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The government argued that stringing cable wires on the condemnee's apartment building increased the value of the building; the condemnee, however, testified that "she and 'the whole block' would be able to sell their buildings for a higher

price absent the installation." *Id.* at 437 n.15.

¹⁷⁸*Russell v. Franklin Cty.*, 306 Neb. 546, 554-58, 946 N.W.2d 648, — (2020).

¹⁷⁹*Mathis v. State, Dept. of Roads*, 178 Neb. 701, 707, 135 N.W.2d 17, 20 (1965).

¹⁸⁰*Walkenhorst v. State*, 253 Neb. 986, 990, 573 N.W.2d 474, 480 (1998) (citing 29A C.J.S., *Eminent Domain* §§ 111, 136(1) (1992)).

¹⁸¹Neb. Const. art. I, § 21 (emphasis added). See part I(B) of this Comment & Authorities, above. See also,

able to compensate for the taking but also . . . , by virtue of section 21, art. I of [our] Constitution . . . , for consequential damage to other property in excess of the damage sustained by the public at large.’ ”¹⁸²

In eminent domain cases, “consequential damage” defines the kind of damage that is compensable under Article I, section 21 of the Nebraska Constitution; it does not have to do with the measure of damages. Compensation is still in the amount of the reduction of the property’s fair market value.¹⁸³ This question of consequential damages arises most often in cases of inverse condemnation and will involve NJI2d Civ. 13.08. *See* NJI2d Civ. 13.08, Comment.

H. MITIGATION OF DAMAGES

The instructions in this chapter do not include one on mitigation of damages. If such instruction is necessary, then, with a few modifications, NJI2d Civ. 4.70 may be used.

I. ABSTRACTING EXPENSES

The condemnee can recover reasonable abstracting expenses.¹⁸⁴

J. COSTS AND ATTORNEY FEES

“[A]wards of attorney fees in condemnation cases are allowed and are taxed as costs.”¹⁸⁵

K. AS A GENERAL RULE ALL COMPENSATION IS TO BE ASSESSED IN THE PRESENT LAWSUIT

The general rule is that all compensation is to be assessed in the

e.g., Douglas Cty. Sch. Dist. No. 10 v. Tribedo, LLC, 307 Neb 716, 726, 950 N.W.2d 599, 607 (2020).

¹⁸²Patrick v. City of Bellevue, 164 Neb. 196, 205, 82 N.W.2d 274, 280 (1957) (quoting Snyder v. Platte Valley Pub. Power & Irrig. Dist., 144 Neb. 308, 312, 13 N.W.2d 160, 163 (1944)). *Accord* Walkenhorst v. State, 253 Neb. 986, 990, 573 N.W.2d 474, 480 (1998). *See also* 2A-6 J. Sackman, NICHOLS ON EMINENT DOMAIN § 6.02 (rev. 3d ed. 2010).

¹⁸³Walkenhorst v. State, 253 Neb. 986, 991, 573 N.W.2d 474, 480 (1998); 2A-6 J. Sackman, NICHOLS ON EMINENT DOMAIN §§ 6.02[4]-[5] (rev. 3d ed. 2010). *See also id.* at §§ 6.35[11] and 6.36. (It is true that compensation is still in the amount of the reduction of the fair market value of the property, except in one situation: when land, no part of which is taken, is temporarily dam-

aged by a public improvement. This latter situation is discussed in the Comment to NJI2d Civ. 13.08.) For a general discussion of such damages in this context, 2A-6 J. Sackman, NICHOLS ON EMINENT DOMAIN § 6.02 (rev. 3d ed. 2010).

¹⁸⁴Neb. Rev. Stat. § 76-710.01 (Reissue 2009). Regarding attorney fees generally, *see* the Introduction to chapter 4, above.

¹⁸⁵In re Application of Sanitary and Improvement Dist. No. 384 of Douglas Cty., 256 Neb. 299, 302, 589 N.W.2d 542, 544 (1999). *See generally*, Neb. Rev. Stat. § 76-726(2) (Reissue 2009). *Armstrong v. County of Dixon*, 282 Neb. 623, 633-37, 808 N.W.2d 37, 44-47 (2011). Regarding inverse condemnation, *see Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014).

present lawsuit. For a discussion of that rule and the exceptions, *see* NJI2d Civ. 13.20.

XI. WHICH PROPERTY OWNER CAN SUE?

In a case of “[d]irect condemnation, by invocation of the State’s power of eminent domain, . . . any award goes to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser.”¹⁸⁶ In a case of inverse condemnation, by land-use regulation, the right to sue for compensation may pass to one who purchases the property after the regulation is in effect.¹⁸⁷

Direct condemnation, by invocation of the State’s power of eminent domain, presents different considerations than cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or [an inverse condemnation action] when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. . . . A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.¹⁸⁸

XII. THE LEGISLATURE CONTROLS THE TIMING AND THE MANNER OF EMINENT DOMAIN PROCEEDINGS

“[T]he power of eminent domain may be exercised only on the occasion, and in the mode or manner, prescribed by the Legislature and . . . statutes conferring and circumscribing such power must be strictly

¹⁸⁶Palazzolo v. Rhode Island, 533 U.S. 606, 628, 121 S. Ct. 2448, 2463 (2001).

¹⁸⁷*Id.*

¹⁸⁸*Id.* (regarding ripeness, stating that “[s]hould an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demon-

strates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State’s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation.”).

construed.”¹⁸⁹ Eminent domain proceedings “‘must be conducted in the manner prescribed by the statute delegating the power.’”¹⁹⁰

XIII. THE ISSUES TRIED IN A CONDEMNATION ACTION

The role of the Judicial Branch is to decide if the constitutional or statutory provisions regarding eminent domain have been violated, that is, whether the condemnation violates the Takings Clause (including the “public use” and “just compensation” questions), other parts of the Constitution, or the statutes controlling “the mode or manner prescribed by the Legislature.”¹⁹¹

“Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged.”¹⁹² A condemnation action is one way to determine these damages. (Regarding property damaged rather than taken, *see also* NJI2d Civ. 13.08.)

Regarding “the mode or manner prescribed by the Legislature,” in 1997, Nebraska’s statute of limitations was amended to provide that, “Issues of fact raised by the statute of limitations shall be tried before a jury unless trial by jury is waived by all parties. Issues of law raised by the statute of limitations shall be determined by the court without a jury.”¹⁹³ And either party may move that the statute of limitations issues “be tried separately and determined before any other issues in the

¹⁸⁹*Engelhaupt v. Village of Butte*, 248 Neb. 827, 828, 539 N.W.2d 430, 432 (1995). *Accord* SID No. 1 v. Neb. Pub. Power Dist., 253 Neb. 917, 922, 573 N.W.2d 460, 465 (1998).

Inverse condemnation is discussed in part VI of this Comment & Authorities, above, and at NJI2d Civ. 13.08.

¹⁹⁰*Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 241, 246, 631 N.W.2d 131, 137, 140 (2001).

¹⁹¹The source of the quotation in the paragraph in text is *Engelhaupt v. Village of Butte*, cited in the footnote preceding this one; *see also*, the other cases cited in that footnote. For the source of the larger point in the sentence, *see* part IV of this Comment & Authorities, above, and *Monarch*

Chem. Works, Inc. v. City of Omaha, 203 Neb. 33, 41, 277 N.W.2d 423, 427-28 (1979); *accord* *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945); *Engelhaupt v. Village of Butte*, 248 Neb. 827, 828, 539 N.W.2d 430, 432 (1995); *Burger v. City of Beatrice*, 181 Neb. 213, 217, 147 N.W.2d 784, 788 (1967); *Prairie View Tel. Co. v. County of Cherry*, 179 Neb. 382, 138 N.W.2d 468 (1965).

¹⁹²*Danish Vennerforning & Old Peoples Home v. State, Dept. of Roads*, 191 Neb. 774, 780, 217 N.W.2d 819, 823 (1974), *rehearing*, 201 Neb. 233, 266 N.W.2d 914 (1978), *rehearing*, 205 Neb. 839, 290 N.W.2d 791 (1980).

¹⁹³Neb. Rev. Stat. § 25-221 (Reissue 2008).

case.”¹⁹⁴ This amendment may create another issue for the jury in an inverse condemnation action.¹⁹⁵

XIV. COUNTY COURT

A. THE ACTION IS TO BE FILED IN COUNTY COURT

The condemnation action is begun by the condemnor filing an action in the county court of the county where the property is located.¹⁹⁶

B. THE PETITION

Article I, § 21, the Takings Clause of the Nebraska Constitution is self-executing. “[A] cause of action under the provision [can] be stated without specifically mentioning the provision [A] litigant need only “allege and prove facts constituting a cause of action” under [this] constitutional language.”¹⁹⁷

Issues other than amount of compensation may not be raised in the Supreme Court unless they were pleaded below.¹⁹⁸

“It is a principle of law . . . in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full extent.”¹⁹⁹ This means that “[a]ny limitation of a right acquired and consequent use must be expressed in [the] condemnation petition.”²⁰⁰ The condemnee’s compensation is to be based on the full extent of the

¹⁹⁴*Id.*

¹⁹⁵See part VI of this Comment & Authorities, above, and NJI2d Civ. 13.08 for a discussion of inverse condemnation; see NJI2d Civ. 13.08, Comment; see NJI2d Civ. 12.04 Comment & Authorities, above, for a general discussion of this somewhat new statute-of-limitations statute; see part XVI of this Comment & Authorities, below, regarding questions of law versus questions of fact in condemnation actions.

¹⁹⁶Neb. Rev. Stat. §§ 76-704, et seq. (Reissue 2009).

¹⁹⁷*Dishman v. Neb. Pub. Power Dist.*, 240 Neb. 452, 453, 482 N.W.2d 580, 582 (1992) (quoting *Kula v. Prososki*, 219 Neb. 626, 629, 365 N.W.2d 441, 443 (1985)), *appeal after remand* 228 Neb. 692, 424 N.W.2d 117 (1988). *Accord* *Whitehead Oil Co. v. City of Lincoln (Whitehead II)*, 245 Neb. 680, 684, 515 N.W.2d 401, 405

(1994) (self-executing) *overruled on other grounds*, *Scofield v. Dep’t of Natural Res.*, 276 Neb. 215, 229, 753 N.W.2d 345, 357 (2008); *Slusarski v. Platte Cty.*, 226 Neb. 889, 894, 416 N.W.2d 213, 216 (1987). In *Dishman* it was enough that, first, NPPD “enjoys the power of eminent domain” and, second, the petition alleged that on a certain date petitioner’s property sustained flood damage as the result of the actions of NPPD. *Dishman*, 240 Neb. at 454, 482 N.W.2d at 582. See also NJI2d Civ. 13.08, Comment.

¹⁹⁸*Houska v. City of Wahoo*, 235 Neb. 635, 639, 456 N.W.2d 750, 753 (1990) (stating this is a “fundamental rule in this state.”) (citing *Lane v. Burt Cty Rural Pub. Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956)).

¹⁹⁹*Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 199, 376 N.W.2d 539, 552 (1985).

²⁰⁰*Id.* at 197, 376 N.W.2d at 551.

taking, the full extent of the rights actually acquired by the defendant.²⁰¹ Evidence that the defendant will exercise less than all of the right acquired is inadmissible to the issue of compensation.²⁰²

Regarding an action for inverse condemnation the property owner may seek compensation “in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation.”²⁰³ Inverse condemnation is discussed in part VI of this Comment & Authorities and at NJI2d Civ. 13.08.

C. THE ROLE OF THE COUNTY COURT JUDGE

We have explained that the powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character. No trial is conducted before a judge who pronounces a judgment. No evidence is received, and no record is made. Instead, the court appoints the appraisers, which appointment is a ministerial act. And the hearing is before the appraisers, not the county court. The issues in county court are limited to the amount of damages. In addition, Neb. Rev. Stat. § 76-726 (Reissue 2009) confers upon the county court jurisdiction to award costs and fees incurred by a party resisting a condemnation.

“There can be no variance in the issues because no pleading, except the petition of the condemner, is contemplated in the administrative proceeding [before the county court].” Only when the appraiser’s report is appealed to the district court do the proceedings become “judicial.” The statutes relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.²⁰⁴

²⁰¹*Id.* at 194, 376 N.W.2d at 549. This is so and is not inconsistent with the rule that just compensation is based on the loss of value to the condemnee at the time of the taking, and not the value to the condemnor. See part X(A) of this Comment & Authorities, above.

²⁰²*Id.* at 197, 376 N.W.2d at 551.

²⁰³*Dishman*, 240 Neb. at 454, 482 N.W.2d at 582.

²⁰⁴*City of Waverly v. Hedrick*, 283 Neb. 464, 469-70, 810 N.W.2d 706, 711 (2012) (footnotes omitted). *Accord Village of Memphis v. Frahm*, 287 Neb. 427, 435-37, 843 N.W.2d 608, 616-17 (2014).

Issues other than amount of compensation may not be raised in the Supreme Court unless they were pleaded below.²⁰⁵ While much condemnation work is about the amount of compensation the state actor must pay the property owner, that is not the only issue that ever arises. For other issues, *see* part IV of this Comment & Authorities, above.

The proceedings before the county court are not judicial proceedings. The proceedings become judicial only upon appeal to the district court. However, “a condemnation proceeding is not ‘for the recovery of money only,’ ” and that does not change when the condemnee appeals to the district court.²⁰⁶ Though the condemnee’s appeal to the district court is the first “judicial proceeding,” it is “not the commencement of a new action, but simply a continuation of the condemnation proceeding filed by the [condemnor].”²⁰⁷

XV. THE APPEAL OF THE COUNTY COURT’S DECISION

A. APPEAL TO THE DISTRICT COURT

Either party may appeal from county court to district court.²⁰⁸ “The filing of the notice of appeal shall confer jurisdiction on the district court.” In a condemnation action, only the filing of the notice of appeal and, by extension, service of this notice is jurisdictional.²⁰⁹

B. THE ISSUES TRIED (DE NOVO) IN THE DISTRICT COURT

The Federal Constitution states that “private property [shall not] be taken for public use without just compensation.” U.S. Const. amend. V. The Nebraska Constitution states the “[t]he property of no person shall be taken or damaged for public use without just compensation therefor.” Neb. Const. art. I, § 21. As a general rule, there are four constitutional issues that may be present when a property owner claims that government is taking (or, in Nebraska, damaging) his or her property: (1) Is the act a taking (or damage)? (2) If it is a taking (or damage), is the taking for a public use? (3) If it is for a public use, has the condemnor paid the owner just compensation? (4) Does the taking (or damage) violate some other part of the Federal or State Constitu-

²⁰⁵E.g., *Houska v. City of Wahoo*, 235 Neb. 635, 639, 456 N.W.2d 750, 753 (1990).

²⁰⁶*Pinnacle Enters., Inc. v. City of Papillion*, 286 Neb. 322, 332–33, 836 N.W.2d 588, 588 (2013).

²⁰⁷*Id.* (still quoting *Wooden*).

²⁰⁸Neb. Rev. Stat. § 76-715 (Reissue 2009).

²⁰⁹*Pinnacle Enters. v. City of Papillion*, 302 Neb. 297, 303, 923 N.W.2d 372, 378 (2019) (quoting Neb. Rev. Stat. § 76-717 (amended 2018; 2018 Neb. Laws, L.B. 193 § 89)).

tion? And then there may be statutory issues: Does the taking violate state or federal law?²¹⁰

The appeal shall be tried de novo in the district court.²¹¹

C. SOME ISSUES ON APPEAL

By statute in Nebraska, one of the types of orders that may be reviewed on appeal is “an order affecting a substantial right made during a special proceeding[.] Neb. Rev. Stat. § 25-1902 (Reissue 2008). A condemnation action is a special proceeding within the meaning of § 25-1902.”²¹² “A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.”²¹³ “Ordinarily, a verdict or award in a condemnation case will be sustained if . . . it is within the range of the testimony of the amount of the value or damages.”²¹⁴

“When the trial court has viewed the land in question, an appellate court is required to consider and may give weight to any findings made by the trial court, provided that the record contains competent evidence to support the findings.”²¹⁵

A number of cases supporting the proposition that the appellate court will not ordinarily interfere with the jury’s verdict on the amount of compensation are cited immediately below in part XVI of this Comment & Authorities, “Questions of Fact Versus Questions of Law.”

XVI. QUESTIONS OF LAW VERSUS QUESTIONS OF FACT

In the condemnation situation, there are often issues that are decided by the court, not the jury. For example, “[i]n a condemnation case issues as to the amount of property needed and the estate or interest in such property are questions of fact for the court. Likewise, issues as to what constitutes a public use and whether a taking is lawful are

²¹⁰See part IV of this Comment & Authorities, above.

²¹¹*Same quotation:* Douglas Cty. Sch. Dist. No. 10 v. Tribedo, LLC, 307 Neb. 716, 725, 950 N.W.2d 599, 606 (2020); Neb. Rev. Stat. § 76-717 (Reissue 2009). See generally *Armstrong v. County of Dixon*, 282 Neb. 623, 633–37, 808 N.W.2d 37, 44–47 (2011).

²¹²*SID No. 1 v. Neb. Pub. Power Dist.*, 253 Neb. 917, 921, 573 N.W.2d 460, 464 (1998). *Accord, e.g., Pinnacle*, 286 Neb. at 327, 836 N.W.2d at 592–93 (2013) (discussing the meaning of

“substantial right”).

²¹³*Holman v. Papio-Missouri River NRD*, 246 Neb. 787, 789, 523 N.W.2d 510, 514 (1994).

²¹⁴*Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 278, 512 N.W.2d 379, 384 (1994) (multiple quotation marks omitted).

²¹⁵*Preister v. Madison Cty.*, 258 Neb. 775, 784, 606 N.W.2d 756, 763 (2000) (citing *Riha v. First Tier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995)).

judicial issues for the court.”²¹⁶ In that regard, the Comment to NJI 13.11 (1969) stated that the argument that the taking is not for a public purpose “is invariably raised by an action for an injunction brought before the condemnation action or immediately after it has been brought.”²¹⁷ If more property is taken than is needed for the “public use,” it seems to this author that taking the excess is unconstitutional because it is not taken for a “public use.” See “Public Use” Defined, at part IX, of this Comment & Authorities, above.

What constitutes a property interest under the federal or Nebraska constitution is also a question for the court—and such interests are not defined by the United States Constitution. Property interests are not created and defined by the federal Constitution, but rather by “existing rules or understandings that stem from an independent source such as state law.”²¹⁸ This issue is discussed in detail at part VII, “Property” Defined, of this Comment & Authorities, above.

On the other hand, “ [t]he amount of [condemnee’s compensation] is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.”²¹⁹ This issue is discussed in detail at part X of this Comment & Authorities, “Just Compensation” Defined, above.

²¹⁶Krauter v. Lower Big Blue Natural Res. Dist., 199 Neb. 431, 439, 259 N.W.2d 472, 476 (1977) (citations omitted).

²¹⁷See, e.g., Monarch Chem. Works, Inc. v. City of Omaha, 203 Neb. 33, 41, 277 N.W.2d 423, 427 (1979) and the cases cited in the Comment to NJI 13.01 (1969) (“Whether this would present any jury questions if the problem were raised in the condemnation suit appears to be largely moot, since the question is invariably raised by an action for an injunction . . .”). See also NJI2d Civ. 13.20, Comment.

²¹⁸Whitehead Oil Co. v. City of Lincoln (Whitehead II), 245 Neb. 680, 686, 515 N.W.2d 401, 406 (1994) (multiple quotation marks omitted; quoting from two United States Supreme Court cases, citations omitted), *overruled on other grounds*, Scofield v. Dep’t of Natural Res., 276 Neb. 215, 229, 753 N.W.2d 345, 357 (2008). See also, e.g., Sorensen v. Lower Niobrara Natural Res. Dist., 221 Neb. 180, 191, 376 N.W.2d 539, 548 (1985) (owner of overlying land’s right to use ground

water is “appurtenance constituting property protected by” the Takings Clause).

²¹⁹City of Hastings v. Peter Ellis Farms, Inc., 216 Neb. 550, 552, 344 N.W.2d 640, 642 (1984) (quoting Wear v. State, Dept. of Roads, 215 Neb. 69, 76, 337 N.W.2d 708, 714 (1983)). *Accord*, e.g., In re Petition of Omaha Pub. Power Dist., 268 Neb. 43, 59, 680 N.W.2d 128, 142 (2004); Patterson v. City of Lincoln, 250 Neb. 382, 550 N.W.2d 650 (1996); McArthur v. Papio-Missouri River NRD, 250 Neb. 96, 103, 547 N.W.2d 716, 723 (1996) (“If the evidence as to whether property is adaptable for a certain use is in conflict, it is the jury’s province to determine which highest and best use and resulting valuation are more credible.”); Iske v. Omaha Pub. Power Dist., 185 Neb. 724, 732, 178 N.W.2d 633, 637–38 (1970) (presence of mineral deposits; potential for recreational development; weight and credibility of expert opinion; and any other question of fact); Jensen v. State, Dept. of Roads, 184 Neb. 802, 808, 172 N.W.2d 607, 610–11 (1969) (weight and credibility of expert

"[T]he issue whether a landowner has been deprived of all economically viable use of his property is a predominately factual question. [I]n actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury."²²⁰ This issue is discussed in detail at part VIII, "Taking" Defined, of this Comment & Authorities, above.

XVII. BURDENS OF PROOF

The burden of proving the property owner's damages rests upon the property owner.²²¹ The burden of proving matters that mitigate or reduce the property owner's damages rests upon the condemnor.²²²

XVIII. EXPERT TESTIMONY

"[A]n expert witness, when properly qualified, may testify as to the valuation of the property."²²³ "In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market."²²⁴

An owner who is shown to be familiar with the value of his or her land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation. Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless such owner possesses, as must any other witness as to value, an ac-

witness in condemnation case); *Johnson v. Iske v. Metro. Utils.*, 183 Neb. 34, 42, 157 N.W.2d 887, 893-94, 897 (1968); *Dept. of Roads v. Dillon*, 175 Neb. 444, 451-53, 122 N.W.2d 223, 228-29 (1963).

²²⁰*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21, 119 S. Ct. 1624, 1644 (1999).

²²¹*Bentz v. Neb. Pub. Power Dist.* 211 Neb. 844, 848, 320 N.W.2d 763, 766 (1982); *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 802, 277 N.W.2d 236, 240 (1979); *Mathis v. State, Dept. of Roads*, 178 Neb. 701, 705, 135 N.W.2d 17, 20 (1965); *Chaloupka v. State, Dept. of Roads*, 176 Neb. 746, 754, 127 N.W.2d 291, 297-98 (1964); *Pieper v. City of Scottsbluff*, 176 Neb. 561, 574, 126 N.W.2d 865, 873 (1964). See also *NJI2d Civ. 2.12A* and the Comment and Authorities thereto.

Presumably the burden is also

on the owner to prove constitutional violations as state acts are presumed to be constitutional.

²²²*Bentz v. Neb. Pub. Power Dist.*, 211 Neb. at 848, 320 N.W.2d at 766; *Pieper v. City of Scottsbluff*, 176 Neb. 561, 574, 126 N.W.2d 865, 873 (1964).

²²³*Patterson v. City of Lincoln*, 250 Neb. 382, 388, 550 N.W.2d 650, 655 (1996). *Accord* *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 59, 680 N.W.2d 128, 142 (2004); *Walkenhorst v. State*, 253 Neb. 986, 994, 573 N.W.2d 474, 482 (1998).

²²⁴*McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 103, 547 N.W.2d 716, 723 (1996). *Accord* *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 414-15, 576 N.W.2d 797, 804 (1998); *Walkenhorst*, 253 Neb. at 994, 573 N.W.2d at 482.

quaintance with the property and is informed as to the present state of the market.²²⁵

A member of a landowner's family who is shown to be familiar with the land's value for the use to which it was being put at the time of the condemnation may be qualified to testify in estimate of that value.²²⁶ The owner of damaged crops is qualified by reason of ownership to estimate their value.²²⁷

A corporate officer is not qualified as such to testify to the value of corporate property. Offering counsel would have to show that the witness is familiar with the property and has knowledge of property values generally in the vicinity.²²⁸

Walkenhorst v. State involved compensation for a strip of farmland with a shelterbelt of trees, acquired in order to reconstruct a highway. The State's expert witness was allowed to testify that the loss of the shelterbelt had no effect on the market value of the condemned land. This was competent evidence of a proper measure of damages. The condemnee's expert was not allowed to testify as to the separate value of the trees, that is, the value of the shelterbelt as a shelterbelt. This was evidence of an improper measure of damages.²²⁹ The general rule is that "[e]xpert testimony concerning the measure of damages in an

²²⁵*Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 850, 906 N.W.2d 285, 298 (2018) ("A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation[.]"); *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 753, 807 N.W.2d 170, 180 (2011) (footnotes omitted). *Accord* *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 414-15, 576 N.W.2d 797, 804 (1998) (landowner shown to be familiar with his or her land's value for the use to which it was being put at the time of the condemnation is competent without additional foundation to testify to an estimate of that value); *Nelson v. Metro. Utils. Dist.*, 249 Neb. 956, 959, 547 N.W.2d 133, 135 (1996). See also *Brenner v. Banner Cty. Bd. of Equalization*, 276 Neb. 275, 293, 753 N.W.2d 802, 818 (2008) (regarding taxation rather than eminent domain, "[a] resident owner who is familiar with

his or her property and knows its worth is permitted to testify as to its value without further foundation.").

²²⁶*McArthur*, 250 Neb. at 101-02, 547 N.W.2d at 722 (approving testimony of family member experienced in farming land in question and shown to be familiar with its characteristics and uses).

²²⁷*Bristol v. Rasmussen*, 249 Neb. 854, 865-66, 547 N.W.2d 120, 128 (1996) (negligence action; not condemnation action).

²²⁸*Kohl's Department Stores v. Douglas Cty. Bd. of Equalization*, 10 Neb. App. 809, 813-14, 638 N.W.2d 877, 880 (2002) (citing *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965)).

²²⁹*Walkenhorst*, 253 Neb. at 995, 573 N.W.2d at 482 (evidence of value of lost trees is relevant, but only as related to the fair market value of the land).

eminent domain action must be tied to the market value of the property remaining before and after the acquisition.²³⁰

Westgate Recreation Assn. v. Papio-Missouri River NRD discusses the boundaries of the cross-examination of a witness who testifies as an expert to comparable sales.²³¹

Expert testimony is dealt with in various places in NJI2d Civ. For a discussion of the topic in general, see NJI2d Civ. 1.42 and its Comment & Authorities. The Comment & Authorities found there contains a list of cross-references to the various places in this book where the topic of expert testimony is discussed.

Regarding the general topic of evidence to be considered in a condemnation action see *Government Has Inherent Power to Take Private Property: The Takings Clause Does Not Grant the Power, But Limits It*, at part IV of this Comment & Authorities, above. Regarding evidence of fair market value, see “Just Compensation” Defined, at part X of this Comment & Authorities, also above.

XVIV. INSTRUCTING THE JURY

The Supreme Court has approved this instruction.²³²

This instruction only applies where there has been a taking of at least some of the owner's property. Where the condemnation takes an easement, see NJI2d Civ. 13.06. Where a condemnation damages condemnee's property but takes neither any portion of condemnee's property nor an easement over any of condemnee's property, see NJI2d Civ. 13.08.

Use only those parts of this pattern instruction as are appropriate under the pleadings and the evidence. For example, as drafted, this instruction is for use in the situation where property has been taken and the condemnee is left still owning contiguous property. If the condemnee is not left owning contiguous property, then subpart 2 of part III of the instruction should be omitted, and subpart 3 renumbered. If there is no evidence of abstracting expenses, subpart 3 of part III should be omitted.

²³⁰*Id.* at 994, 573 N.W.2d at 482 (the question here is how, if at all, the presence of shelterbelt on condemned land affects the land's fair market value of land). See “Just Compensation” Defined, at part X of this Comment & Authorities, above.

²³¹*Westgate Recreation Assn. v. Papio-Missouri River NRD*, 250 Neb.

10, 18, 547 N.W.2d 484, 492 (1996).

²³²*Walkenhorst v. State*, 253 Neb. 986, 998, 573 N.W.2d 474, 484 (1998) (approving NJI2d Civ. 13.01). See also *Hike v. State (Hike I)*, 288 Neb. 60, 78, 846 N.W.2d 205, 221 (2014) (approving Part III of NJI2d Civ. 13.01 regarding compensation).

The instruction is drafted for use when there is only one condemnee. If there is more than one, the appropriate changes will have to be made. Regarding multiple condemnees, the Court has said this: “[W]here there is more than one condemnee there are necessarily as many awards as there are condemnees. These awards are several as distinguished from joint.”²³³ As always in these instructions, if it aids clarity, substitute the names of the parties for the appellations plaintiff and defendant.

One of the parentheticals in the first paragraph of the pattern instruction calls for the insertion of the date of the taking. Regarding the date of the taking, see part VIII(F) of this Comment & Authorities, above

“[T]he trial court is not required to instruct the jury on each individual item making up the condemnee’s damages.”²³⁴

For instruction on the principle that all compensation is to be assessed in the present lawsuit, see NJI2d Civ. 13.20.

XIX. SPECIAL BENEFITS

If special benefits are in issue and NJI2d Civ. 13.10 is used, then add the following clause onto the end of part III, subparagraph number 2, of this instruction:

“ . . . , less any special benefits proved by the defendant.”

XX. ADVERSE POSSESSION

On a topic somewhat related to eminent domain—a transfer of title by adverse possession rather than by a taking by government—see particularly *Brown v. Morello*.²³⁵ *Brown* states that to prove adverse possession, “[a] party claiming title by adverse possession must prove . . . that the adverse possession has been . . . (1) actual, (2) continuous, (3) exclusive, [and] (4) notorious, (5) . . . under a claim of ownership for a statutory period of 10 years.”²³⁶

Brown continues: “Evidence must show the intention of the claimant to appropriate and use the property as his or her own to the exclu-

²³³Grace Land & Cattle Co. v. Tri-State Generation and Transmission Ass’n, 191 Neb. 663, 665, 217 N.W.2d 184, 186 (1974).

²³⁴Heye Farms, Inc. v. State, 251 Neb. 639, 647, 558 N.W.2d 306, 312

(1997). *Accord Walkenhorst*, 253 Neb. at 998, 573 N.W.2d at 484.

²³⁵*Brown v. Morello*, 308 Neb. 968, 957 N.W.2d 884, — (2021).

²³⁶*Id.* at 973, 957 N.W.2d at —.

sion of all others." Possession of the land cannot be exclusive if "both parties have used the property in dispute."²³⁷ And,

acts of dominion over land allegedly adversely possessed must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in the adverse possession of another. If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, such will generally be sufficient to establish that possession was notorious.²³⁸

Adverse possession need not "be evidenced by complete enclosure and 24-hour use of the property. It is sufficient if the land is used continuously for the purposes to which it may be adapted."²³⁹

NJI2d Civ. 13.02

EMINENT DOMAIN—GENERAL DEFINITION OF FAIR MARKET VALUE

The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

[In determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by the public improvement or by the knowledge that the improvement would be (constructed, altered, et cetera).

[You must not compensate the plaintiff for any decrease in the property's fair market value caused by physical deterioration that the plaintiff could reasonably have prevented.]]

²³⁷ *Id.*

²³⁸ *Id.* (footnote omitted).

²³⁹ *Id.*

COMMENT & AUTHORITIES

See the Comment to NJI2d Civ. 13.01.

“NJI2d Civ. 13.02 is a correct statement of the law.”¹

This definition applies in all eminent domain cases except those where the defendant has either taken an easement (NJI2d Civ. 13.07) or taken or damaged a leasehold interest (NJI2d Civ. 13.27).

Use only those parts of this pattern instruction as are appropriate under the pleadings and the evidence. For example, the statement that the jury must consider “evidence of uses to which [the property] might reasonably be put in the future” should be included only when such evidence has been introduced.

The final two paragraphs of the instruction are bracketed to direct the reader to this Comment and to alert the reader to the following:

■ Sometimes it will be appropriate to give the first of the two bracketed paragraphs alone. This is the case when there is a danger that the jury will conclude that, as a result of either the public improvement for which the property was acquired or the likelihood that the property would be acquired for such improvement, the value of the property increased or decreased immediately before the date of the taking.²

■ Sometimes it will be appropriate to give the first and the second of the two bracketed paragraphs together. This is the case when there is a danger that the jury will conclude both: (1) that, as a result of either the public improvement for which the property was acquired or the likelihood that the property would be acquired for such improvement, the value of the property increased or decreased immediately before the date of the taking, and (2) that there was a decrease in the fair market value of the property due to physical deterioration that could reasonably have been prevented by the owner.

■ It is not appropriate to give the second alone.

13.02

¹Curry v. Lewis & Clark NRD, 267 Neb. 857, 863, 678 N.W.2d 95, 100 (2004) (here, giving alternate instructions and refusing NJI2d Civ. 13.02 was reversible error). *Accord* Mobeco Indus., Inc. v. City of Omaha, 257 Neb. 365, 369, 598 N.W.2d 445, 449 (1999) (the third paragraph of the pattern is a correct statement of the law; on the

facts here, refusal to give the third paragraph was reversible error); Walkenhorst v. State, 253 Neb. 986, 998, 573 N.W.2d 474, 484 (1998) (approving NJI2d Civ. 13.02); NJI2d Civ. 13.01, Comment & Authorities.

²This is discussed at Hike v. State (Hike I), 288 Neb. 60, 76, 846 N.W.2d 205, 219–20 (2014).

■ As discussed below, it is not appropriate to give the first of the bracketed paragraphs if the special benefits instruction, NJI2d Civ. 13.10, is given.

Regarding the definition of fair market value, this instruction states the general rule that the jury may not consider any change in the fair market value of the property caused by the public improvement for which the property has been taken. There is an exception to that general rule; the exception is stated in NJI2d Civ. 13.10, Special Benefits. When NJI2d Civ. 13.10 is given, the third paragraph of the above instruction must not be given. *See* NJI2d Civ. 13.10, Comment.

Regarding the right of access to property, *see* the Comment to NJI2d Civ. 13.08.

NJI2d Civ. 13.04

EMINENT DOMAIN—EVIDENCE

The evidence from which you are to find how much money[, if any,] should be paid to the plaintiff, consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that have been stipulated—that is, formally agreed to by the parties;
4. Your viewing of the premises; and
5. Any facts that have been judicially noticed—that is, facts I say you must accept as true even without other evidence.

The following things are not evidence:

1. Statements, arguments, and questions by lawyers;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom except during your viewing of the premises.

COMMENT

See the Comment & Authorities to NJI2d Civ. 13.01. *And see* NJI2d Civ. 1.02, Authorities.

The subparagraphs of this instruction are to be given as appropriate.

The bracketed words “if any” may be appropriate in a case where eminent domain has allegedly damaged property rather than actually taking all or part of it or taking an easement.

If a witness in a case is a lawyer, subparagraph 1 to the second paragraph should be changed to read as follows: “Statements, arguments, and questions of the lawyers for the parties in this case.”

“Evidence offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner’s appropriation and, therefore, inadmissible.”¹

Regarding expert testimony on the subject of the property’s value, see NJI2d Civ. 1.42, Comment & Authorities; NJI2d Civ. 13.01, Comment & Authorities, part XVIII.

Neb. Rev. Stat. § 25-1108 (Reissue 2008) codifies the court’s power to order a jury view.² Regarding the view of the premises, *Johnson v. NM Farms Bartlett, Inc.* is important. On appeal of a case where the judge viewed the premises as the trier of fact, if the record establishes neither what the judge perceived nor what findings the judge made as a result of the view, then the Supreme Court will not give any weight to the fact that the judge viewed the premises.³ As a practical matter, this seems to mean that when a judge views the premises as the trier of fact, the judge must make either written findings or an oral statement into the record stating his or her perceptions. Otherwise, the view is a nonentity for purposes of appeal.

Query how this rule interacts with Nebraska Evidence Rule 605: “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.” Neb.

13.04

¹*Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 197, 376 N.W.2d 539, 551 (1985). Regarding admissible evidence of value, see also part X of this Comment & Authorities, above.

²Regarding the use of the jury view as evidence in a condemnation action, see, e.g., *Rose v. City of Lincoln*, 234 Neb. 67, 75, 449 N.W.2d 522, 529 (1989); *Zwygart v. State*, 230 Neb. 128, 133, 430 N.W.2d 301, 305 (1988); *Bentz v. Neb. Pub. Power Dist.*, 211 Neb. 844, 849, 320 N.W.2d 763, 767 (1982); *Painter v. State, Dept. of Roads*, 177 Neb. 905, 914, 131 N.W.2d 587, 592

(1964). See also *Langdon v. Loup River Pub. Power Dist.*, 144 Neb. 325, 13 N.W.2d 168 (1944), where the court held that the refusal to permit the jury to view the property in question was not an abuse of discretion, where the record fully disclosed the nature of the premises, the surrounding community, and all facts necessary for determination of the issues. (Regarding the “abuse of discretion” standard, see generally NJI2d Civ. 1.42, Comment & Authorities.)

³*Johnson v. NM Farms Bartlett, Inc.*, 226 Neb. 680, 683, 414 N.W.2d 256, 260 (1987).

Rev. Stat. § 27-605 (Reissue 2008). *Johnson v. NM Farms Bartlett, Inc.* is an equity case reviewed de novo on the record. Its rule may well be limited to cases reviewed de novo on the record. Its rule may be limited further by *Lincoln East Bancshares, Inc. v. Rierden*,⁴ an equity case reviewed de novo on the record where the court stated: "[I]n an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property and that its examination constituted evidence bearing upon the weight given to the testimony of the various witnesses."⁵ If it was the county court judge who visited the premises, it may also be a function of the fact that the proceeding before the county court is not a judicial proceeding.⁶

NJI2d Civ. 13.06

EMINENT DOMAIN—EASEMENT TAKEN—ISSUES, BURDEN OF PROOF, AND CONDEMNEE'S COMPENSATION

I. ISSUES

The plaintiff, (insert name of condemnee), is the owner of (here describe property, perhaps by reference to an exhibit that describes the property). The defendant, (insert name of condemnor), took an easement over this property on (here insert date of taking).

The easement taken by the defendant is an easement for (here describe purpose of easement).

The defendant's legal right to take this easement is not in question. The only question you must answer is how much money[, if any,] should be paid to the plaintiff to compensate (him, her, it) for the taking of this easement.

II. BURDEN OF PROOF

The plaintiff has the burden of proving by the greater weight of the evidence how much money should be paid to compensate for the taking of this easement.

III. OWNER'S COMPENSATION

The plaintiff is entitled to recover the difference[, if any,] between the fair market value of the property before the easement was taken

⁴Lincoln East Bancshares, Inc. v. Rierden, 225 Neb. 440, 406 N.W.2d 337 (1987).

⁶See NJI2d Civ. 13.01, Comment & Authorities, at part XIV(C).

⁵Id. at 448, 406 N.W.2d at 342.

and its fair market value after the easement was taken. In addition, the plaintiff is entitled to recover (his, her, its) reasonable abstracting expenses.

COMMENT & AUTHORITIES

See NJI2d Civ. 13.01, Comment & Authorities. See the Comment & Authorities to NJI2d Civ. 13.01; Neb. Const. art. I, § 21; and Neb. Rev. Stat. § 76-710.01 (Reissue 2009).

The Nebraska Supreme Court has approved this instruction.¹

“An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.”²

This instruction is designed for use in cases where the defendant has taken a permanent easement.³ The purpose of the easement will be fully described in the petition for condemnation filed in the county court. In fact, “[t]he rights acquired and consequential liabilities for governmental acquisition of the easement are determined by the declarations in the petition of taking filed at the commencement of the proceedings in eminent domain.”⁴ A statement of that purpose may be inserted in the second paragraph of the instruction. An example of such an insert might be this:

“a right-of-way for lines for the transmission of electricity.”

“Evidence offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner’s appropriation and, therefore, inadmissible.”⁵

“[A] permissive use is not adverse and cannot ripen into an easement. If a use begins as a permissive use, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.” *Royal v. McKee*, 298 Neb. 560, 569, 905 N.W.2d 51, 58 (2017) (footnotes omitted).

13.06

¹In re Petition of Omaha Pub. Power Dist., 268 Neb. 43, 50-51, 680 N.W.2d 128, 136-37 (2004) (approving NJI2d Civ. 13.06).

²*Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 925, 844 N.W.2d 806, 813 (2014).

³Regarding a taking of a temporary easement, see part VIII(D) of the

Comment & Authorities to NJI2d Civ. 13.01, above.

⁴*Voltmer Family Farms, Inc. v. Bd. of Equalization of Richardson Cty.*, 216 Neb. 396, 400, 343 N.W.2d 755, 758 (1984). *Accord Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 197, 376 N.W.2d 539, 550-51 (1985).

⁵*Id.* at 197, 376 N.W.2d at 551.

In *Nollan v. California Coastal Comm'n* the United States Supreme Court states, among other things, the following: "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest . . . is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them."⁶

Namn, LLC v. Morello, Hillary Corp. v. United States Cold Storage, and O'Connor v. Kaufman discuss implied easements.⁷

Prescriptive easements are discussed in cases cited in this footnote.⁸

In addition to the above, see the cases footnoted here.⁹

⁶*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 3145 (1987).

⁷*Namn, LLC v. Morello*, 291 Neb. 462, 867 N.W.2d 545 (2015) ("easement implied from prior use"); *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996); *O'Connor v. Kaufman*, 250 Neb. 419, 550 N.W.2d 902 (1996).

⁸*E.g. Schellhorn v. Schmieding*, 288 Neb. 647, 654, 851 N.W.2d 67, 73 (2014) ("The law treats a claim of prescriptive right with disfavor."); *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012) (citing cases and authorities); *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977) See also *Melendez v. Hollings*, 27 Neb. App. 156, 927 N.W.2d 834 (2019).

⁹*E.g. Liberty Dev. Corp. v. Metro. Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608, (2008) ("The measure of damages for the taking of an easement is the difference between the reasonable market value of the property before and after the taking of the easement. Damages for the taking of a permanent easement and a temporary construction easement are measured as of the date of taking." *Id.* at 32, 751 N.W.2d at 616); *Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 196–99, 376 N.W.2d 539, 552

(1985) (holding that damages must reflect the actual right taken by the defendant, rather than the defendant's actual or intended use); *Reller v. Consumers Pub. Power Dist.*, 199 Neb. 720, 260 N.W.2d 622 (1978); *Ward v. Neb. Elec. Generation & Transmission Co-op., Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976); *Danish Vennerforning & Old Peoples Home v. State, Dept. of Roads*, 191 Neb. 774, 217 N.W.2d 819 (1974), *rehearing*, 201 Neb. 233, 266 N.W.2d 914 (1978), *rehearing*, 205 Neb. 839, 290 N.W.2d 791 (1980); *Danish Vennerforning & Old Peoples Home v. State, Dept. of Roads*, 191 Neb. 774, 217 N.W.2d 819 (1974), *rehearing*, 201 Neb. 233, 266 N.W.2d 914 (1978), *rehearing*, 205 Neb. 839, 290 N.W.2d 791 (1980); *Johnson v. Neb. Pub. Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971); *Wolfe v. State, Dept. of Roads*, 179 Neb. 189, 191, 137 N.W.2d 721, 723–24 (1965) (measure of damages: "The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a method which separately values the easement or right that is taken."; burden of proof; "if any"; abstracting expenses); *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 114 N.W.2d 29 (1962).

NJ12d Civ. 13.07

**EMINENT DOMAIN—EASEMENT TAKEN—
DEFINITION OF FAIR MARKET VALUE**

The “fair market value” of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value you may consider uses to which the property has been put and uses to which it might reasonably be put in the immediate future.

The property’s fair market value after the taking of the easement must reflect the full extent of the easement taken. Any compensation must be for the actual legal right acquired by the defendant, rather than for the use the defendant makes of that right.

[In determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by (the public improvement for which the easement has been taken, the knowledge that the easement might be taken by the defendant).

[You must not compensate the plaintiff for any decrease in the property’s fair market value caused by physical deterioration that the plaintiff could reasonably have prevented.]]

COMMENT & AUTHORITIES

See NJ12d Civ. 13.01, Comment & Authorities; NJ12d Civ. 13.06, Comment & Authorities.

Use only those parts of this pattern instruction as are appropriate under the pleadings and the evidence. For example, the statement that the jury must consider “evidence of uses to which [the property] might reasonably be put in the future” should be included only when such evidence has been introduced.

Regarding the use of the two final, bracketed paragraphs, see the Comment to NJ12d Civ. 13.02.

NJI2d Civ. 13.08**EMINENT DOMAIN—INVERSE CONDEMNATION—
ISSUES, BURDEN OF PROOF, EFFECT OF
FINDINGS, AND PLAINTIFF'S COMPENSATION****I. ISSUES**

The plaintiff, (insert name of person or entity whose property allegedly was damaged), is the owner of (insert description of property). The defendant is (here insert name of condemnor). The plaintiff claims that actions of the defendant in connection with the (construction, alteration, et cetera) of (here insert description of the public improvement involved) proximately caused a decrease in the fair market value of the property just described.

The defendant admits (here state what defendant admits, by pleading or otherwise, if anything).

The defendant denies (here state what defendant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state facts so determined).]

II. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That actions of the defendant in connection with the (construction, alteration, et cetera) of the (here insert description of the public improvement involved) proximately caused a decrease in the fair market value of the plaintiff's property; and

2. Considering property values as of (here insert date of taking), the amount of any such decrease in fair market value.

III. EFFECT OF FINDINGS

If the plaintiff has not met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff *has* met this burden of proof, then your verdict must be for the plaintiff, for that amount of money that will compensate the plaintiff for this decrease in the fair market value of (his, her, its) property.

COMMENT & AUTHORITIES

- I. USE NOTE AND CROSS REFERENCES
- II. INVERSE CONDEMNATION: DEFINITION
- III. TAKING AND DAMAGE: DEFINITION
- IV. AVAILABLE CAUSES OF ACTION
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- IX. STATUTE OF LIMITATIONS
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 - C. THE DIRECT CONSTITUTIONAL ACTION
 - D. THE STATUTE OF LIMITATIONS AS A JURY QUESTION
 - E. WHEN A CAUSE OF ACTION FOR INVERSE CONDEMNATION ACCRUES

I. USE NOTE AND CROSS REFERENCES

This pattern instruction is drafted for use where inverse condemnation results in a taking of the property, as opposed to a temporary taking of, or damage to, the property. In the case of a temporary taking or damage, the instruction will have to be adapted to reflect the details of the correct measure of damages. Regarding temporary takings, *see particularly* NJI2d 13.01, Comment & Authorities.

II. INVERSE CONDEMNATION: DEFINITION

Inverse condemnation is defined and discussed in general at in part VI of NJI2d Civ. 13.01, Comment & Authorities.

III. TAKING AND DAMAGE: DEFINITION

"[T]he initial question [in an inverse condemnation action] is whether the governmental entity's actions constituted the taking or

damaging of property for public use. . . . Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.”¹ For an overview of what constitutes a taking, see NJI2d Civ. 13.01, Comment & Authorities, at part VIII. This part of this Comment & Authorities focuses on the kind of taking and damage (principally damage) most often found only in cases of inverse condemnation.²

“In a condemnation action, some right in property must be taken or damaged to afford a basis for relief. The action must involve a direct interference in some property, and although it need not be a direct physical invasion of the property, there must be a taking of or damage to the property itself. There must be an actual invasion of private property rights or an impairment or destruction of a private right.”³

The United States Supreme Court has said the following about challenges alleging that inverse condemnation can be found on the face of an ordinance or regulation.

“Such facial” challenges . . . are generally ripe the moment the challenged regulation or ordinance is passed, but face an “uphill battle” since it is difficult to demonstrate that “mere enactment” of a piece of legislation “deprived [the owner] of economically viable use of [his] property.”⁴

For a discussion of when a takings claim ripens, see NJI2d Civ. 13.01 Comment & Authorities, XI.

An entry on private land may constitute a taking though temporary in its nature and for only a temporary purpose. * * * Accordingly it is held that land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner. * * * In line with this authority and the [fact that the taking clause in the

13.08

¹Henderson v. City of Columbus, 285 Neb. 482, 489, 827 N.W.2d 486, 493(2013) (see also, *id.* at 493, 827 N.W.2d at 495).

²For a good overview of general law on this point, law that is not specific to Nebraska, see 2A-6 J. Sackman, NICHOLS ON EMINENT DOMAIN § 6.01[d] (rev. 3d ed. 2010).

³Lockard v. Neb. Pub. Power Dist., 249 Neb. 971, 975, 546 N.W.2d 824, 827 (1996) (court declined to extend doctrine of inverse condemna-

tion to loss of use of money by reason of electrical service overcharges; not a taking or damaging of property for purposes of inverse condemnation action).

⁴Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 1666 n.10 (1997) (citations omitted, first to Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); second to Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 297 (1981)).

Nebraska Constitution includes the words "taken or damaged"], where one's land is damaged temporarily for public use by the construction of a public improvement by the state, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution.⁵

IV. AVAILABLE CAUSES OF ACTION

When private property has been damaged for public use, the property owner may seek compensation "in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation."⁶

Additionally, a landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain. Also, the plaintiff had the right to join with his action for equitable relief his claim for temporary damages.⁷

A. A STATUTORY ACTION FOR INVERSE CONDEMNATION

Neb. Rev. Stat. § 76-705 (Reissue 2009) provides:

If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

"[W]hen a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under

⁵Patrick v. City of Bellevue, 164 Neb. 196, 203, 82 N.W.2d 274, 279 (1957) (multiple and internal quotation marks omitted) (quoting Gledhill v. State, 123 Neb. 726, 243 N.W. 909, 911 (1932), which in turn quoted the second edition of NICHOLS ON EMINENT DOMAIN (the citation to the current edition of the Nichols treatise is 3 J. Sackman, NICHOLS ON EMINENT DOMAIN § 8.01[iii] (rev. 3d ed. 2010))). Accord Whitehead Oil Co. v. City of Lincoln (Whitehead II), 245 Neb. 680, 689-90, 515 N.W.2d 401, 408-09 (1994), overruled on other grounds, Scofield v. Dept't of Natural Res., 276 Neb. 215,

229, 753 N.W.2d 345, 357 (2008); Colburn v. City of Valentine, 183 Neb. 391, 392, 160 N.W.2d 203, 204 (1968) (temporary damage from operation of municipal dump is compensable taking).

⁶Dishman v. Neb. Pub. Power Dist., 240 Neb. 452, 454, 482 N.W.2d 580, 582 (1992). Accord, e.g., Slusarski v. County of Platte, 226 Neb. 889, 894, 416 N.W.2d 213, 216 (1987) (quoted in relevant part below).

⁷Uhing v. City of Oakland, 236 Neb. 58, 60-61, 459 N.W.2d 187, 189 (1990).

the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue [2009]), or in an action under the language of Neb. Const. art. I, § 21.”⁸

B. AN ACTION UNDER THE TORT CLAIMS ACT

When private property has been damaged for public use, the property owner may seek compensation “in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation.”⁹

When a property owner seeks to use the tort claims act as a vehicle to recover for property damage caused by the state or a political subdivision of the state, the property owner must comply with all of the conditions precedent set out in the act; failure to allege such compliance is a fatal defect to such a suit.¹⁰ As noted below, these conditions precedent need not be met when the property owner files a direct action under the Takings and Damage Clause.

When the landowner files under a tort claims act the statute of limitations is 2 years.¹¹

Both the Nebraska State Tort Claims Act and the Nebraska Political Subdivision Tort Claims Act are discussed at NJI2d Civ. 8.72.

C. A DIRECT ACTION UNDER THE SELF-EXECUTING TAKINGS-AND-DAMAGE CLAUSE OF THE NEBRASKA CONSTITUTION

1. Direct Action Available

“[W]hen private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. Art. I, § 21.”¹²

⁸*Slusarski v. County of Platte*, 226 Neb. 889, 894, 416 N.W.2d 213, 216 (1987).

⁹*Dishman v. Neb. Pub. Power Dist.*, 240 Neb. 452, 454, 482 N.W.2d 580, 582 (1992).

¹⁰*E.g.*, *Parriott v. Drainage Dist.* No. 6, 226 Neb. 123, 125, 410 N.W.2d 97, 100 (1987).

¹¹*See* Neb. Rev. Stat. § 25-218 (Reissue 2016). *See also*; *Hike v. State* (Hike II), 297 Neb. 212, 221–25, 226, 899 N.W.2d 614, 623–625 (2017) (discussing the application of § 25-218).

Regarding the tort claims acts, *see* NJI2d Civ. 8.72.

¹²*Parriott*, 226 Neb. at 126, 410 N.W.2d at 100. *Accord* *Henderson v. City of Columbus*, 285 Neb. 482, 490–91, 827 N.W.2d 486, 493–94 (2013) (“A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions.”); *Uhing v. City of Oakland*, 236 Neb. 58, 60, 459 N.W.2d 187, 189 (1990); *Slusarski v. County of Platte*, 226 Neb. 889, 894, 416 N.W.2d 213, 215–16 (1987).

2. Self-Executing Nature of Takings-and-Damage Clause

Article I, § 21 of the Nebraska Constitution is self-executing.¹³ This means that legislative action is not necessary to make available a remedy under this section of the Constitution.¹⁴ It also means that the fact that statutory remedies are made available does not prevent the property owner from filing a direct action under this constitutional provision. The fact that a property owner has not complied with either the provisions of the tort claims act or the inverse condemnation statute does not foreclose a direct action under this article I, § 21.¹⁵

3. Stating a Cause of Action in a Direct Action under the State Constitution

A cause of action herein can be stated without citing, quoting, or mentioning article I, § 21, and without quoting or referring to its language.¹⁶ "Under a code system of pleading, such as Nebraska's, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery." "[A] litigant need only" allege and prove facts constituting a cause of action "under [this] constitutional language."¹⁷

D. AN ACTION FOR AN INJUNCTION

Additionally, a landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain. Also, the plaintiff had the right to join with his action for equitable relief his claim for temporary damages.¹⁸

V. MEASURE OF COMPENSATION

A. IN GENERAL

The measure of compensation in a condemnation action is discussed

¹³*E.g.*, *Henderson*, 285 Neb. at 491, 827 N.W.2d at 494; *Uhing*, 236 Neb. at 60, 459 N.W.2d at 189; *Slusarski*, 226 Neb. at 894, 416 N.W.2d at 216 (citing cases); *Parriott*, 226 Neb. at 126, 410 N.W.2d at 100.

¹⁴*Uhing*, 236 Neb. at 60, 459 N.W.2d at 189.

¹⁵*E.g.*, *Dishman v. Neb. Pub. Power Dist.*, 240 Neb. 452, 453, 482 N.W.2d 580, 582 (1992); *Uhing*, 236 Neb. at 60, 459 N.W.2d at 189; *Parriott*, 226 Neb. at 126, 410 N.W.2d at 100.

¹⁶*Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 126, 410 N.W.2d 97, 100 (1987).

¹⁷*Dishman*, 240 Neb. at 453, 482 N.W.2d at 582 (citing *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985)). *Accord Uhing*, 236 Neb. at 60, 459 N.W.2d at 189; *Parriott*, 226 Neb. at 126, 410 N.W.2d at 100 (quoted above). *See also* NJI2d Civ. 13.01, Comment & Authorities.

¹⁸*Uhing v. City of Oakland*, 236 Neb. 58, 60-61, 459 N.W.2d 187, 189 (1990).

at great length in part X of the Comment & Authorities to NJI2d Civ. 13.01.

As a general rule, the measure of compensation for a taking, whether by inverse condemnation or otherwise, is the fair market value of what was taken.¹⁹ Even for a temporary taking, as a general rule, the measure of compensation is fair market value. In *Whitehead Oil Co. v. City of Lincoln* the city effected a temporary-regulatory taking of Whitehead Oil's property. The loss was characterized as an injury to the property's potential for producing income or expected profit. The court held that the compensable interest "is the return on the portion of fair market value that is lost as a result of the regulatory restriction." The compensation should be the market rate return on the difference between the property's fair market value without and with the regulatory restriction, computed over the period of the temporary taking.²⁰

The measure of damages for a temporary taking of real property by eminent domain is "the value of the property for the period it is held by the condemnor, . . . the difference in the value of the property before and after the taking, or . . . the fair market rental value of the property during the time it was taken."²¹

Where no part of the land is taken, but it does suffer damage compensable under Nebraska's Takings Clause,²² "the measure of compensation is not the market value but the value of the use for the period damaged."²³ If the land is cropland, the best test of its value "is the value of the crops which could and would have been grown upon [the] land."²⁴

As noted near the beginning of this Comment & Authorities, this pattern instruction is drafted for use where inverse condemnation results in a taking of the property, not a temporary taking of, or damage to, the property. In the case of the latter, the instruction will have to be adapted to reflect the details of the correct measure of damages.

See also particularly NJI2d Civ. 13.20 (all compensation to be as-

¹⁹See NJI2d Civ. 13.01, Comment & Authorities, and NJI2d Civ. 13.02.

²⁰*Whitehead Oil Co. v. City of Lincoln* (Whitehead II), 245 Neb. 680, 694, 515 N.W.2d 401, 411 (1994) (citation omitted), *overruled on other grounds*, *Scofield v. Dep't of Natural Res.*, 276 Neb. 215, 229, 753 N.W.2d 345, 357 (2008).

²¹*Liberty Dev. Corp. v. Metro. Util. Dist.*, 276 Neb. 23, 35, 751 N.W.2d 608, 617 (2008).

²²Neb. Const. art I, § 21. *See* part I(B) of the Comment & Authorities to NJI2d Civ. 13.01.

²³*Pierce v. Platte Valley Pub. Power & Irrig. Dist.*, 143 Neb. 898, 902, 11 N.W.2d 813, 816 (1943) (quoting *Gledhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932)). *Accord* *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 69 S. Ct. 1434, 1438 (1949).

²⁴*Pierce v. Platte Valley Pub. Power & Irrig. Dist.*, *supra*.

sessed now); NJI2d Civ. 13.28 (lessee's compensation for a taking of growing crops); NJI2d Civ. 4.30 (general instruction on damages to crops).

B. COSTS, INCLUDING ATTORNEY FEES

The owner who prevails in an inverse condemnation action is entitled to an award of costs and reasonable attorney fees.²⁵

VI. COMPENSABLE LOSS OF ACCESS TO PROPERTY

Not all situations involve compensable damages. The construction of a median in a street does not, nor does change to a one-way street ***. But denying an abutting owner reasonable ingress to and egress from his property does permit recovery. The latter may be a jury question.²⁶

The exercise of police power may . . . involve [a compensable] taking . . . and it may . . . involve mere noncompensable inconvenience The distinction is not whether it is a valid exercise of police power but whether or not the property itself is taken or damaged.

The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. The measure of the right . . . is reasonable ingress and egress under all the circumstances.

The plaintiffs may recover damages for loss of direct access . . . if their right of access has been destroyed or substantially impaired. Whether the right of access has been destroyed or

²⁵Village of Memphis v. Frahm, 287 Neb. 427, 436–38, 843 N.W.2d 608, 617–18 (2014) (interpreting Neb. Rev. Stat. § 76-726(2) (Reissue 2009)). See also NJI2d Civ. 13.01, Comment & Authorities X(J).

²⁶Comment, NJI 13.08 (1969) (citing “See Painter v. State Dept. of Roads, 177 Neb. 905, 131 N.W.2d 587

(1964); W.E.W. Truck Lines, Inc. v. State Dept. of Roads, 178 Neb. 218, 132 N.W.2d 782 (1965)).

See also Int’l Moving & Storage, Inc. v. City of Lincoln, 226 Neb. 213, 410 N.W.2d 483 (1987) (bridge diverted traffic to alternate means of access to condemnee’s property).

substantially impaired is a question of fact which must be determined upon the particular facts in each case.²⁷

"The right of access to existing highways may not be taken without compensation There is no right of direct access, however, to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning."²⁸

On the other hand, "As a general rule, a property owner may not recover damages for the obstruction of a street or highway unless he or she has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large."²⁹

Although "loss of access is a jury question,"³⁰ these instructions do not contain any specific language on the subject. That is because the value of loss of access is a part of the decrease in the property's fair market value. Access is a factor in a piece of property's market value.³¹ In *Thacker v. State, Dept. of Roads*³² the trial court refused the condemnor's request for a specific instruction on loss of access. The Supreme Court affirmed, saying the instruction was not necessary because others properly defined the elements and measures of damages and implicitly addressed the items covered in the one refused. Loss of access is largely, if not exclusively, an evidentiary issue: It has to do with what the appraiser will be allowed to take into account when forming his or her opinion of the property's fair market value. Not including language on the loss of access in the instruction is part of the broader

²⁷Balog v. State, Dept. of Roads, 177 Neb. 826, 833-37, 131 N.W.2d 402, 408-10 (1964) (citation omitted). See also 8A-G30 J. Sackman, NICHOLS ON EMINENT DOMAIN § G30.07[c][4] (rev. 3d ed. 2010).

²⁸Morehead v. State, Dept. of Roads, 195 Neb. 31, 34, 236 N.W.2d 623, 626 (1975) (prejudicial error to instruct on right of access in the latter of the two situations just described). See also Neb. Rev. Stat. § 39-1330 (Reissue 2008); Danish Vennerforning & Old Peoples Home v. State, Dept. of Roads, 191 Neb. 774, 779, 217 N.W.2d 819, 823 (1974), (inappropriateness of injunctive relief requiring restoration of access), rehearing, 201 Neb. 233, 266 N.W.2d 914 (1978), rehearing, 205 Neb. 839, 290 N.W.2d 791 (1980).

²⁹Anderson v. State, 247 Neb. 871, 876, 530 N.W.2d 899, 902 (1995) (citing cases) (when state closed intersection, property owner, who had to take slightly longer, more circuitous route to access property, suffered different degree of injury from that of public at large, not different kind of injury; no compensable taking).

³⁰Chaloupka v. State, Dept. of Roads, 176 Neb. 746, 755, 127 N.W.2d 291, 297 (1964).

³¹Heye Farms, Inc. v. State, 251 Neb. 639, 645-47, 558 N.W.2d 306, 311-12 (1997); Int'l Moving & Storage, Inc. v. City of Lincoln, 226 Neb. 213, 220-221, 410 N.W.2d 483, 487 (1987).

³²In *Thacker v. State, Dept. of Roads*, 193 Neb. 817, 825, 229 N.W.2d 197, 203 (1975).

rule that "the trial court is not required to instruct the jury on each individual item making up the condemnee's damages."³³

Regarding considerations of access to property, see *also* the cases footnoted here.³⁴

VII. WHERE THE FACT OF THE TAKING IS A JURY QUESTION

This instruction states only the damage issue. As written, it is to be used where there is no jury question as to the fact of a taking. What follows is an example of how Part II of this instruction is to be altered if the fact of a taking is a jury question. If a jury question is raised by plaintiff's allegation that the defendant's actions deprived the plaintiff of reasonable access, thereby constituting a taking of property, then, in place of subparagraph 1 of Part II, above, substitute the following two subparagraphs (and renumber what appears above as subparagraph 2):

"1. That the defendant's actions deprived the plaintiff of reasonable access to (his, her, its) property.

"2. That these actions of defendant proximately caused a decrease in the property's fair market value."

VIII. THE DATE OF A TAKING BY INVERSE CONDEMNATION

The value of real estate is by no means constant, and before compensation can be intelligently assessed for the taking of land by eminent domain, a point of time must be fixed as of which the property is to be valued; and it is the value at that time which the owner is entitled to receive, even if the value of the land rises or falls before the money is actually paid [In Nebraska, that date is generally the date of the taking.]

The date of the taking is important also, because the only person entitled to recover damages for condemnation is the person who was the owner of the land at the time of the taking.³⁵

³³*Heye Farms*, 251 Neb. at 647, 558 N.W.2d at 312.

³⁴*Int'l Moving & Storage, Inc., supra*; *Rossitto v. City of Omaha*, 199 Neb. 260, 258 N.W.2d 126 (1977); *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977); *Harmony*

Lanes v. State, Dept. of Roads, 193 Neb. 826, 229 N.W.2d 203 (1975); *Verzani v. State*, 188 Neb. 162, 195 N.W.2d 762 (1972); *Deremer v. State*, 182 Neb. 586, 156 N.W.2d 6 (1968).

³⁵3-8 J. Sackman, NICHOLS ON EMINENT DOMAIN § 8.5[1] (rev. 3d ed. 2010) (footnotes omitted).

Where the governmental body taking the property files a condemnation action, the date of the taking is the date of the filing of the petition.³⁶

In *Rose v. City of Lincoln* the court rejected using the date the property owner files the condemnation petition as the date of the taking in an inverse condemnation case.³⁷ In *Western Fertilizer v. City of Alliance* the court discussed in some detail how to figure the date of such a taking for purposes of the application of a statute of limitations.³⁸ On the facts of this case, the court concluded that the statute “started running only when the City exercised dominion over or obtained an interest in the property.”³⁹ In this regard, the Committee does note that in many jurisdictions “[w]hen the body empowered to act under the right of eminent domain is not required to make a formal taking, damages are assessed as of the date of the initial physical interference with the rights for which compensation is given.”⁴⁰

Regarding the date of the taking in a case where the condemnor files a condemnation action, see NJI2d Civ. 13.01, Comment & Authorities, part VIII(F).

IX. STATUTE OF LIMITATIONS

When private property has been damaged for public use, the property owner may seek compensation: in an action for tort, under the Nebraska State Tort Claims Act or the Nebraska Political Subdivision Tort Claims Act; in a statutory action for inverse condemnation, under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 2009); or in a constitutional action for inverse condemnation, a direct action under article I, § 21 of the Nebraska Constitution.⁴¹

“In such cases the action for just compensation is not barred except by adverse possession of the land taken for ten years, the requisite period to establish title by prescription.”⁴²

Regarding statutes of limitations generally, see NJI2d Civ. 2.02D and 12.04, Comment & Authorities.

³⁶See NJI2d Civ. 13.01, Comment & Authorities.

³⁷*Rose v. City of Lincoln*, 234 Neb. 67, 73, 449 N.W.2d 522, 527 (1989).

³⁸*Western Fertilizer v. City of Alliance*, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993).

³⁹*Id.* at 112, 504 N.W.2d at 819.

⁴⁰3-8 J. Sackman, NICHOLS ON EMINENT DOMAIN § 8.5[2] (rev. 3d ed. 2010) (footnote omitted).

⁴¹*Dishman v. Neb. Pub. Power Dist.*, 240 Neb. 452, 454, 482 N.W.2d

580, 582 (1992); *Slusarski v. County of Platte*, 226 Neb. 889, 894, 416 N.W.2d 213, 216 (1987); *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 125, 410 N.W.2d 97, 100 (1987); and other cases cited and discussed above in part IV of this Comment & Authorities.

⁴²*Krambeck v. City of Gretna*, 198 Neb. 608, 614, 254 N.W.2d 691, 695 (1977). Regarding adverse possession, see NJI2d Civ. 13.01, 13.06, 13.07. See also, e.g., *Siedlik v. Nissen*, 303 Neb. 784, 931 N.W.2d 439 (2019).

A. THE TORT CLAIMS ACTS

When a property owner seeks to use the tort claims act as a vehicle to recover for property damage caused by the state or a political subdivision of the state, the property owner must comply with all of the conditions precedent set out in the act; failure to allege such compliance is a fatal defect to such a suit.⁴³ As noted below, in part IX(C), these conditions precedent need not be met when the property owner files a direct action under the Takings and Damage Clause.

The statute of limitations and the statute of repose for claims under the Nebraska State Tort Claims Act and the Nebraska Political Subdivision Tort Claims Act (along with other conditions precedent for filing such an action) are discussed at N.JI2d Civ. 8.72.

B. THE STATUTORY ACTION FOR INVERSE CONDEMNATION

When private property has been damaged for public use, the property owner may seek compensation in a statutory action for inverse condemnation, under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 2009). These eminent domain statutes do not provide a special statute of limitations. "We hold that the applicable statute of limitations for an inverse condemnation proceeding under section 76-705 . . . is the 10-year period found in section 25-202"⁴⁴

C. THE DIRECT CONSTITUTIONAL ACTION

Actions commenced under article I, § 21, are subject to the 10-year statute of limitations from Neb. Rev. Stat. § 25-202 (Reissue 2008).⁴⁵ In a direct constitutional action, the property owner need not comply with the conditions precedent of the tort claims acts.⁴⁶

⁴³*E.g.*, *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 125, 410 N.W.2d 97, 100 (1987).

⁴⁴*Krambeck*, 198 Neb. at 614, 254 N.W.2d at 695 (1977). *Krambeck* references, first, an earlier publication of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 2009) and, second, an earlier publication of what is now Neb. Rev. Stat. § 25-202 (Reissue 2008). *Accord Strode v. City of Ashland*, 295 Neb. 44, 59, 886 N.W.2d 293, 306 (2016); *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993).

⁴⁵*Steuben v. City of Lincoln*, 249 Neb. 270, 272, 543 N.W.2d 161, 163 (1996); *Western Fertilizer v. City of*

Alliance, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993); *Krambeck v. City of Gretna*, 198 Neb. 608, 614, 254 N.W.2d 691, 695 (1977). (To the extent it is contrary, these cases implicitly overrule *Czarnick v. Loup River Pub. Power Dist.*, 190 Neb. 521, 209 N.W.2d 595 (1973), which relied on an earlier publication of Neb. Rev. Stat. § 25-218 (Reissue 2008) for the proposition that "a suit against the State for the taking or damaging of private property for public use must be commenced within 2 years from the time the taking or damaging of the property occurred." *Czarnick*, 190 Neb. at 523, 209 N.W.2d at 597.)

⁴⁶*E.g.*, *Dishman v. Neb. Pub. Power Dist.*, 240 Neb. 452, 454, 482

D. THE STATUTE OF LIMITATIONS AS A JURY QUESTION

In 1997, the Nebraska statute regarding the trial of statute-of-limitations issues was amended. Section 25-221 of the Revised Statutes of Nebraska has long provided that when a party claims an action is barred by statute of limitations, any party may move that the statute of limitations issues be determined before any other issues in the case. The 1997 amendment to § 25-221 adds this: "Issues of fact raised by the statute of limitations shall be tried before a jury unless trial by jury is waived by all parties. Issues of law raised by the statute of limitations shall be determined by the court without a jury." Neb. Rev. Stat. § 25-221 (Reissue 2008).

Traditionally, the sole issue for the jury in a condemnation suit is the proper amount of compensation. *See* NJI2d Civ. 13.01, Comment & Authorities. This amendment may create another issue for the jury in a condemnation action.

This amendment to § 25-221 is discussed further in the Statute of Limitations part of the Comment & Authorities to NJI2d Civ. 12.04.

E. WHEN A CAUSE OF ACTION FOR INVERSE CONDEMNATION ACCRUES

For a general discussion of when a cause of action accrues, *see* NJI2d Civ. 5.04, Comment.

The general rule in an inverse condemnation case is that "[a]n action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damage."⁴⁷

NJI2d Civ. 13.10**SPECIAL BENEFITS**

The defendant claims that the plaintiff (has received, will receive) special benefits as a result of the construction of (here insert description of the public improvement involved). The special benefits claimed here are (here insert description of the special benefits pleaded and evidenced).

N.W.2d 580, 582 (1992) (citing *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990)).

⁴⁷*Steuben v. City of Lincoln*, 249 Neb. 270, 272-73543 N.W.2d 161, 163 (1996). For an in-depth discussion of what it takes to trigger the running of

the statute of limitations in a case of inverse condemnation, *see* *Strode v. City of Ashland*, 295 Neb. 44, 54-61, 886 N.W.2d 293, 302-06 (2016); *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 108, 504 N.W.2d 808, 817 (1993).

The law distinguishes between special benefits and general benefits. Special benefits come about because of some special relationship between the plaintiff's remaining property and the (here repeat description of the public improvement). They are special to the plaintiff alone or to the plaintiff and (his, her, its) neighborhood. General benefits are shared by or available to the public generally[, or, at least, everyone within range of the (here repeat description of the public improvement)].

You must not consider general benefits: they do not affect the plaintiff's compensation[, if any].

Likewise, regarding the plaintiff's compensation for the value of property actually taken, you must not consider special benefits: they do not affect a plaintiff's compensation[, if any,] for the value of property actually taken. On the other hand, special benefits may affect a plaintiff's compensation for a decrease in the fair market value of (his, her, its) remaining property: if you find that the plaintiff will receive special benefits, then any compensation for a decrease in the fair market value of (his, her, its) remaining property must be reduced by the monetary value of the special benefit.

Special benefits cannot do more than reduce the plaintiff's compensation for any decrease in the fair market value of (his, her, its) remaining property. That is, if the monetary value of the special benefit is greater than the decrease in the fair market value of the remaining property, the plaintiff cannot be required to pay money to the defendant.

The burden of proving that the plaintiff (has received, will receive) special benefits as a result of the construction of (here repeat description of the public improvement) is on the defendant.

COMMENT & AUTHORITIES

I. IN GENERAL

This instruction does not apply where all of the condemnee's property has been taken.

The third paragraph of NJI2d Civ. 13.02—the first of its bracketed paragraphs—says that when the jury figures the amount of compensation owed to the plaintiff, they may not consider any change in the fair market value of the property caused by the public improvement for which the property has been taken. There is an exception to that general rule, and this instruction states that exception. While this instruction may be given along with NJI2d Civ. 13.02, when that is done, that third paragraph of NJI2d Civ. 13.02 must not be given: it and NJI2d Civ. 13.10 are inconsistent in part. Where it applies, NJI2d Civ. 13.10 is

the appropriate statement of the point of law covered by that third paragraph of NJI2d Civ. 13.02, and that paragraph must be omitted.

II. GENERAL VERSUS SPECIAL BENEFITS

Regarding the distinction between general and special benefits, the court has said this:

General benefits are those which result from the enjoyment of the facilities provided by a public improvement. Special benefits are those which arise from the peculiar relation of the land in question to the public improvement and are not shared by all other land within range of the public improvement.¹

Crawford v. Cent. Neb. Pub. Power & Irrig. Dist. Discusses special benefits as follows:

In Prudential Ins. Co. v. Cent. Neb. Public Power and Irrigation Dist., *supra*, we cited with approval the following from 2 Nichols, Eminent Domain, (2d ed.), § 249, p. 765 [now 3-8A J. Sackman, Nichols on Eminent Domain § 8A.02[4][a] n.29 (rev. 3d ed. 2010)]: "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways."

As stated in 18 Am.Jur., Eminent Domain, § 298, p. 943: "In cases arising under the exercise of the right of eminent domain, benefits are usually divided into but two classes, general and special, the general benefits as a rule being those derived by the community from the use of the improvement, and special benefits being those derived by particular pieces of property because of their advantageous relation to the improvement, and differing in kind rather than merely in degree from the general benefits Special benefits include both neighborhood benefits and peculiar benefits; a benefit does not

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¹Enterprise Co. v. Sanitary Dist. No. One, 176 Neb. 271, 275, 125 N.W.2d 712, 715 (1964). See also Morehead v. State, Dept. of Roads, 195

Neb. 31, 36, 236 N.W.2d 623, 627 (1975); Phillips v. State, Dept. of Roads, 167 Neb. 541, 544, 93 N.W.2d 635, 637 (1958).

cease to be special because it is participated in by every lot fronting upon the improvement."

" 'Few general rules can be laid down for ascertaining whether or not a given benefit is general or special; the question must be determined largely by the circumstances of the particular case.' 20 C.J.S., 822." *Prudential Ins. Co. v. Cent. Neb. Public Power and Irrigation Dist.*, *supra*.²

III. PLEADING AND PROVING SPECIAL BENEFITS

"Special benefits must be pleaded and proved, and general benefits may not be offset. However, the condemnees must request an instruction that general benefits may not be offset."³

There is language in *Richardson v. Big Indian Creek Watershed Conservancy Dist.*, and *Phillips v. State, Dept. of Roads* suggesting that there must be evidence evaluating the alleged special benefit "in some manner in terms of money."⁴

The Authorities to NJI 13.10 (1969) stated the following:

Although none of the cases specifically discusses the question of whether the distinction between general and special damages is a jury or a judicial question, the court in all of them did decide that the benefit was one or the other as a matter of law. For this reason the instruction is drawn in such a way as to require the judge to make that decision, within the limits of the pleadings and the evidence. At the same time it seems proper to point out to the jury that they cannot consider general benefits, and to do so it is proper to explain briefly what that distinction is.

One of the cases referred to therein, however, stated the following:

Insofar as special benefits are concerned, as a matter of law there were none except as the same may refer to drainage and . . . it is a question for a jury to determine as to whether or not any special benefits accrued to plaintiffs' lots by virtue of

²*Crawford v. Cent. Neb. Pub. Power & Irrig. Dist.*, 154 Neb. 832, 835-36, 49 N.W.2d 682, 685 (1951).

³*Frank v. State, Dept. of Roads*, 177 Neb. 488, 489, 129 N.W.2d 522, 523 (1964).

⁴*Richardson v. Big Indian Creek*

Watershed Conservancy Dist., 181 Neb. 776, 780, 151 N.W.2d 283, 286-87 (1967); *Phillips v. State, Dept. of Roads*, 167 Neb. 541, 543-44, 93 N.W.2d 635, 637 (1958). *See also Phillips*, 167 Neb. 541, 545, 93 N.W.2d 635, 637 (1958).

the improved drainage resulting thereto by reason of the improvement.⁵

NJI2d Civ. 13.20

ALL COMPENSATION TO BE ASSESSED NOW

Any compensation the plaintiff is to receive for the taking involved in this case must be awarded in this lawsuit. The plaintiff cannot later recover additional compensation for this taking.

COMMENT & AUTHORITIES

This instruction is not to be given as written above in any case where the fact of a taking is a jury question.

Where there is a special agreement that damage arising from future actions, such as repairs and maintenance, is to be excluded from consideration, a different rule would apply.¹

Since the plaintiffs must recover all of their damages in the condemnation proceeding, they are entitled, under such circumstances, to be paid for the maximum use to which the acquired easement could reasonably be put. We have heretofore recited the evidence of the project engineer as to the method and manner of the taking of the fill dirt, and the probable amount of fill dirt to be taken. As we have heretofore stated, this evidence was admissible to show the nature of the damages to the farm resulting from the taking, but it could not be shown, over objection, in mitigation of plaintiffs' damages. It is the law of this state that all damages sustained by the condemnation of property must be recovered in the condemnation proceeding.²

When part of a parcel of land is taken, all compensation for damages "to the remainder on account of proper construction [on] or operation" of the part taken must be recovered in the initial proceeding.³

Damages recoverable in a condemnation case are deter-

⁵Backer v. City of Sidney, 166 Neb. 492, 493, 89 N.W.2d 592, 593 (1958) (supplemental opinion).

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¹See Hughes Farms, Inc. v. Tri-State Generation & Transmission Ass'n, 182 Neb. 791, 157 N.W.2d 384 (1968).

²Gable v. State, Dept. of Roads, 176 Neb. 789, 793, 127 N.W.2d 475, 478 (1964). *Accord* Dept. of Roads v. Dillon, 175 Neb. 444, 453, 122 N.W.2d 223, 229 (1963).

³Moyer v. Neb. City Airport Auth., 265 Neb. 201, 209-11, 655 N.W.2d 855, 863-64 (2003) (citing cases).

mined by the extent of the taking and a condemnor's rights actually acquired, not by a condemnor's use resulting from less than full exercise of a right acquired by eminent domain. A condemnee, however, cannot recover uncertain, conjectural, or speculative damages. Thus, *res judicata* bars a subsequent inverse condemnation action which seeks to recover for damages to remainder property which would not have been speculative in the original condemnation action. But when the remainder property actually suffers damages that would have been too speculative to recover in the original condemnation proceedings, the condemnee is not barred from recovering for them in a later inverse condemnation action.⁴

The award in the initial proceeding "is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding."⁵ "Recovery is permitted because the new element was not contemplated or determined at the time of the taking or damaging."⁶ Such damages were too speculative to be recovered in the initial proceeding.⁷

On the other hand, "It is well settled by the decisions of this court that the final award in a condemnation proceeding for the acquisition of a right of way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated."⁸

Once a property owner has been compensated, the property owner cannot sue to regain possession of the land. One whose land is taken by eminent domain, and who accepts and is paid the award, cannot later contest the validity of the taking either directly or collaterally, or seek

⁴*Moyer*, 265 Neb. at 210, 655 N.W.2d at 863 (citations omitted).

⁵*Moyer*, 265 Neb. at 209, 655 N.W.2d at 863 (citing cases) (altered drainage patterns resulting from proper construction must be anticipated and recovered in the initial proceeding; altered drainage patterns from improper construction or from the condemnor adopting a new drainage plan need not be anticipated and can be recovered in a subsequent proceeding); *Hansen v. County of Cass*, 185 Neb. 565, 567, 177 N.W.2d 568, 569 (1970).

⁶*Moyer*, 265 Neb. at 209, 655 N.W.2d at 863.

⁷*Moyer*, 265 Neb. at 21, 655 N.W.2d at 864. *See also* *McGree v. Stanton-Pilger Drainage Dist.*, 164 Neb. 552, 82 N.W.2d 798 (1957) (land outside of the boundaries of a condemned right of way was subject to erosion solely because of a drainage district's diversion of a river into a pilot channel; this erosive damage constituted a second taking and was compensable).

⁸*Sorensen v. Lower Niobrara Natural Res. Dist.*, 221 Neb. 180, 193-94, 376 N.W.2d 539, 550 (1985) (quoting *Snyder v. Platte Valley Pub. Power and Irr. Dist.*, 140 Neb. 897, 901, 2 N.W.2d 327, 329 (1942)).

to recover or to retain possession of the land.⁹ This is true no matter how fundamental a defect there might have been in the eminent domain proceedings.¹⁰

NJI2d Civ. 13.25

EMINENT DOMAIN—TOTAL TAKING OF LEASEHOLD INTEREST—ISSUES, BURDEN OF PROOF, AND LESSEE'S COMPENSATION

I. ISSUES

The plaintiff, (insert name of lessee) was the lessee of (insert description of property). On (here insert date of taking), this leasehold interest was taken by the defendant, (insert name of condemnor).

The defendant's legal right to take this leasehold interest is not in question. The only question you must answer is how much money[, if any,] should be paid to the plaintiff to compensate (him, her, it) for the taking of this leasehold interest.

II. BURDEN OF PROOF

The plaintiff has the burden of proving by the greater weight of the evidence how much money should be paid in compensation for the taking of this leasehold interest.

III. LESSEE'S COMPENSATION

Figuring from (insert date of taking), you must award the plaintiff an amount of money equal to the fair market value of the remainder of the term of the lease had the leasehold interest not been taken[, minus the rent the plaintiff would have had to pay had there been no taking. If the latter amount is greater than the former, then the plaintiff is not entitled to recover any money in compensation for the taking of this leasehold interest].

⁹Duffey v. School Dist. No. One, 200 Neb. 702, 704-05, 265 N.W.2d 212, 213 (1978).

¹⁰A.M. Bishop v. Dept. of Roads, 205 Neb. 760, 761-62, 290 N.W.2d 193, 195 (1980) ("[A]n owner whose land has been taken by virtue of eminent domain proceedings, who has been paid and accepted the award, cannot thereafter contest the validity of the taking by a collateral action."); Scheer

v. Kan.-Neb. Natural Gas Co., 158 Neb. 668, 64 N.W.2d 333 (1954) (plaintiff, who had accepted final award for easement taken by gas company, later objected when said company entered his land to construct and maintain pipeline; extent of easement should have been raised in original proceeding and, not having been, first proceeding is res judicata).

[The plaintiff is also entitled to recover (his, her, its) reasonable abstracting expenses.]

COMMENT

See NJI2d Civ. 13.01, Comment & Authorities. See also NJI2d Civ. 13.02, Comment; NJI2d Civ. 4.25, Comment; NJI2d Civ. 4.26, Comment. For the definition of “fair market value” of a leasehold interest, see NJI2d Civ. 13.27.

Where the instruction says “leasehold interest,” a more specific description of the property involved may be substituted if doing so aids clarity. As a general rule, it is preferable to use the words used throughout the trial.

Part III of this instruction includes, in brackets, as an offset against plaintiff's compensation, the amount of money the plaintiff has saved by being released from his or her obligation to pay rent for the rest of the term of the lease. If there are other expenses that are to be offset against the plaintiff's compensation and that are not included as items the witnesses have factored into the fair market value of the lease, care must be taken to include them in part III of this instruction. Such expenses might include utilities, maintenance of leasehold premises, or special arrangements regarding taxes or insurance, but they should only be included as separate items when they are evidenced but not included in the witnesses' assessment of the fair market value of the lease.

The 1969 version of this instruction told the jury that a lessee's compensation could include “[t]he reasonable cost to the plaintiff of any necessary removal of personal property.” That language does not appear in the above instruction because the relevant statute was amended in 1972 by deleting the provision allowing that particular element of compensation. Neb. Rev. Stat. § 76-710.01 (Reissue 2009).

Case authority and cross references for this instruction can be found in the cases cited in this footnote.¹

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¹*E.g.*, City of Hastings v. Peter Ellis Farms, Inc., 216 Neb. 550, 552, 344 N.W.2d 640, 642 (1984); Foreman & Clark of Neb., Inc. v. City of Omaha, 203 Neb. 746, 280 N.W.2d 892, (1979); State v. Dillon, 175 Neb. 350, 357, 121 N.W.2d 798, 802-03 (1963); In re Platte

Valley Pub. Power & Irrig. Dist., 159 Neb. 609, 618, 68 N.W.2d 200, 207 (1955); State v. Platte Valley Pub. Power & Irrig. Dist., 147 Neb. 289, 23 N.W.2d 300 (1946). See also NJI2d Civ. 13.01, Comment & Authorities; NJI2d Civ. 4.25, Authorities; NJI2d Civ. 4.26, Authorities.

NJI2d Civ. 13.26**EMINENT DOMAIN—PARTIAL TAKING OF
LEASEHOLD INTEREST—ISSUES, BURDEN OF
PROOF, AND LESSEE'S COMPENSATION****I. ISSUES**

The plaintiff, (insert name of lessee) is the lessee of (insert description of property). The plaintiff claims that the actions of the defendant, (here insert name of condemnor), in connection with (here insert description of the public improvement involved), proximately caused a decrease in the fair market value of (his, her, its) leasehold interest.

The defendant admits (here state what defendant admits, by pleading or otherwise, if anything).

The defendant denies (here state what defendant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state facts so determined).]

II. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That actions of the defendant in connection with the (construction, alteration, et cetera) of the (here insert description of the public improvement involved) proximately caused a decrease in the fair market value of plaintiff's leasehold interest; and

2. The amount of the decrease in the fair market value of (his, her, its) leasehold interest.

III. EFFECT OF FINDINGS

If the plaintiff has not met this burden of proof, then your verdict must be for the defendant.

If the plaintiff has met this burden of proof, then your verdict must be for the plaintiff.

IV. LESSEE'S COMPENSATION

If your verdict is for the plaintiff, then the plaintiff is entitled to re-

cover that amount of money equal to the decrease in the fair market value of (his, her, its) leasehold interest. Any decrease in the fair market value of the leasehold interest is to be figured according to the following formula:

1. First, before (here insert date of taking), what was the fair market value of the remainder of the term of the lease[, minus the amount of rent the plaintiff was obligated to pay over the remainder of the term of the lease].

2. Second, after (here insert date of taking), what was the fair market value of the remainder of the term of the lease[, minus the amount of rent the plaintiff was obligated to pay over the remainder of the term of the lease].

3. Subtract the second number from the first number to determine the amount of compensation to which the plaintiff is entitled.

COMMENT & AUTHORITIES

See NJI2d Civ. 13.08, Comment; NJI2d Civ. 13.25, Comment & Authorities. Note particularly the discussion in the Comment to NJI2d Civ. 13.08 regarding this instruction's command: "(here insert date of taking)."

Where the instruction says "leasehold interest," a more specific description of the property involved may be substituted if doing so aids clarity. As a general rule, it is preferable to use the words used throughout the trial.

NJI2d Civ. 13.27

EMINENT DOMAIN—TAKING OF OR DAMAGE TO LEASEHOLD INTEREST—DEFINITION OF FAIR MARKET VALUE

The "fair market value" of a leasehold interest is the amount of money that a reasonable owner and a reasonable renter would agree upon as the cost of renting the property. Reasonable owners and renters are those ready and able to rent, but not required to do so.

In determining this fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future[, including any evidence of the property's value if divided into separate pieces, as compared to its value as a single piece].

[In determining the amount of compensation to be paid, you must

not consider any change in the fair market value of the leasehold interest caused by the public improvement or by the knowledge that the improvement would be (constructed, altered, et cetera).

[You must not compensate the plaintiff for any decrease in the fair market value of the leasehold interest caused by physical deterioration that the plaintiff could reasonably have prevented.]]

COMMENT & AUTHORITIES

This instruction uses the words “owner” and “renter”. Those may not be the correct words; they will not be, for example, if the lessor is not the owner. Substitute whatever words are appropriate, particularly considering what words were used during the trial.

See the Comment & Authorities to NJI2d Civ. 13.01, 13.02, 13.07, and 13.25. See also NJI 13.27 (1969).

NJI2d Civ. 13.28

EMINENT DOMAIN—GROWING CROPS—LESSEE’S COMPENSATION

The plaintiff is entitled to recover [(his, her, its) share of] the market value the crop would have had if it had matured, minus [(his, her its) share of] any salvage value, and minus any savings to the plaintiff in the cost of production and transportation to market.

COMMENT & AUTHORITIES

See NJI2d Civ. 4.30, Comment.

This instruction is to be used in conjunction with NJI2d Civ. 13.25 or 13.26, in the “Lessee’s Compensation” parts of those instructions. If the condemnee is seeking compensation for a total taking of crops or a taking of, as opposed to damage to, a part of the crop, then insert this instruction as part III of NJI2d Civ. 13.25, adapting parts I and II, if necessary. If the crops were perennial and were destroyed, then NJI2d Civ. 13.25 as written should better express the measure of damages. If the condemnee is seeking compensation for damage to crops, then add the following words to the beginning of the instruction:

“If your verdict is for the plaintiff, then”

Having made that addition, insert the instruction as part III of NJI2d Civ. 13.26.

The bracketed statement “[(his, her) share of]” is for the situation where the lessee pays his or her rent in the form of a stated percentage

of the crops, but where the lessee is responsible for the entire cost of production of the crop.

Case authority and additional cross references for this instruction can be found in the cases cited in this footnote.¹

NJI2d Civ. 13.40

INTEREST

In arriving at your verdict, do not include any amount as interest. It is my job to determine the amount of interest, if any, to which the plaintiff is entitled.

COMMENT & AUTHORITIES

United States v. 106.64 Acres of Land, More or Less, in Cherry Cty., State of Neb. says that where there is no Fifth Amendment constitutional right to just compensation and the statute authorizing compensation does not have an express provision for interest, then interest may be denied.¹

In *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110, 112 [(1948)], we reaffirmed that: "The proper procedure in a condemnation action, where an appeal is taken from the award and the case is tried to a jury in the district court, is for the court to reserve the question of interest for its determination and direct the jury not to include it in its verdict." See also, *Langdon v. Loup River Pub. Power Dist.*, 144 Neb. 325, 13 N.W.2d 168 [(1944)]; *Papke v. City of Omaha*, [152 Neb. 491, 41 N.W.2d 751 (1950)].

In the case at bar, the trial court did erroneously fail to so instruct the jury, but we cannot under the circumstances presented here, and without any competent affirmative showing with regard thereto, assume that the jury disregarded the court's specific and definite instructions upon the measure of damages and allowed interest in its verdict. In other words, we

13.28

¹*Kula v. Proski*, 228 Neb. 692, 699, 424 N.W.2d 117, 122 (1988); *Pieper v. City of Scottsbluff*, 176 Neb. 561, 574-77, 126 N.W.2d 865, 876-77 (1964); *State v. Dillon*, 175 Neb. 350, 357-58, 121 N.W.2d 798, 802-03 (1963); *In re Platte Valley Pub. Power & Irrig. Dist.*, 159 Neb. 609, 618, 68 N.W.2d 200, 207 (1955); *Snyder v. Platte Valley Pub. Power & Irrig.*

Dist., 140 Neb. 897, 904, 2 N.W.2d 327, 331 (1942). See also *NJI2d Civ. 4.30*; *Patrick v. City of Bellevue*, 164 Neb. 196, 208, 82 N.W.2d 274, 281-82 (1957).

13.40

¹*United States v. 106.64 Acres of Land, More or Less, in Cherry Cty., State of Neb.*, 264 F.Supp. 199 (D.Neb. 1967).

conclude that under the circumstances presented here the failure of the trial court to specifically reserve to itself the question of interest was not prejudicial error.²

²Lane v. Burt Cty. Rural Pub. Power Dist., 163 Neb. 1, 17-18, 77 N.W.2d 773, 783-84 (1956).

CHAPTER 14

RESERVED

CHAPTER 15

CONTRACTS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

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- 15.20 Extreme Difficulty or Impossibility of Performance
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A. STATEMENT OF THE CASE**NJI2d Civ. 15.01****STATEMENT OF THE CASE—BREACH OF
CONTRACT****I. PLAINTIFF'S CLAIMS****A. ISSUES**

This case involves (here insert a general statement of what the case involves).

The plaintiff, [insert name,] claims that, (insert statement of time, place, et cetera), (he, she, it) and the defendant, [insert name,] entered into a contract (here insert general statement of the terms of the [alleged] contract).

The plaintiff claims that the defendant breached (this, the, their, et cetera) contract (here state the breach or list the breaches of contract claimed by the plaintiff, against the defendant).

The plaintiff also claims that (he, she, it) was damaged as a result of this breach of contract, and (he, she, it) seeks a judgment against the defendant for these damages.

The defendant admits (here state what defendant admits, by pleading or otherwise, if anything).

The defendant denies (here state what defendant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state any facts so determined).]

B. BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on this claim of (here identify claim involved, perhaps with the words "breach of contract")], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff and the defendant entered into the contract;
2. The terms of the contract;
3. [Here insert a general statement of any other elements of plaintiff's proof, as discussed in the Comment, below.]

4. That the defendant breached the contract in one or more of the ways claimed by the plaintiff;
5. That this breach of contract was a proximate cause of some damage to the plaintiff; and
6. The nature and extent of that damage.

C. EFFECT OF FINDINGS

(If there will not be any affirmative defense instructions, then the following two paragraphs constitute Part C of this instruction.)

If the plaintiff has *not* met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff *has* met this burden of proof, then your verdict must be for the plaintiff.

(If there will be one or more affirmative defense instructions, then the following two paragraphs constitute Part C of this instruction:)

If the plaintiff has *not* met this burden of proof, then your verdict must be for the defendant.

On the other hand, if the plaintiff *has* met this burden of proof, then you must consider the defendant's (here insert a statement of defendant's affirmative defenses).

II. DEFENDANT'S DEFENSES

(At this point insert such instruction on defendant's defenses as is appropriate under the pleadings and the evidence.)

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- B. PLEADING BREACH OF CONTRACT
- C. WHAT LAW APPLIES?
- D. PERSONAL JURISDICTION
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 - 15. INDICATIONS OF THE PARTIES' INTENTIONS (WHEN EXTRINSIC EVIDENCE IS ADMISSIBLE)
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- 18. RELEVANCE OF TERMS OR CONDITIONS OF AN EXPIRED EMPLOYMENT CONTRACT
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- 20. CROSS REFERENCES
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- XI. PROMISSORY ESTOPPEL
- XII. WAIVER OF CONTRACT
- XIII. DEFENSES

I. IN GENERAL

A. USE OF THESE INSTRUCTIONS

This Chapter contains the contract instructions indicated in the Table of Instructions. They are written for non-U.C.C. cases. In the Comments to these instructions, wherever applicable, the Committee has attempted to reference the corresponding U.C.C. sections. Regarding the Uniform Commercial Code, see generally J. White and R. Summers, *Uniform Commercial Code* (6th ed. 2010). Regarding breach of warranty under the U.C.C., see *NJI2d Civ. 11.40–11.46*.

Contract suits against the State of Nebraska or a Nebraska state agency are governed by the State Contract Claims Act, *Neb. Rev. Stat. §§ 81-8,302* (Reissue 2014). For a discussion of that Act, see *Irving F. Jensen Co., Inc. v. State, Dept. of Roads*, 272 Neb. 162, 719 N.W.2d 716 (2006) and the cases cited and discussed therein.

For an extensive discussion of the general subject of statement-of-the-case instruction, see *NJI2d 2.01*, Comment and Authorities.

Use only those subparagraphs of the Burden of Proof part of this instruction as the pleadings and the evidence put in issue. The Burden of Proof part of this instruction contains, in brackets, these words: “on this claim of (here identify claim involved, perhaps with the words ‘breach of contract’).” Use those words only when the jury is instructed on more than one claim by the plaintiff against the defendant.

B. PLEADING BREACH OF CONTRACT

Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. For breach of contract, the plaintiff must plead the existence of a promise, its breach, damages, and compliance with any conditions precedent that activate the defendant’s duty.

Kotrous v. Zerbe, 287 Neb. 1033, 1037, 846 N.W.2d 122, 126 (2014) (footnotes omitted). *See also* Ryan v. Streck, Inc., 309 Neb. 98, 108, 958 N.W.2d 703, — (2021) (“A breach of contract action consists of a promise, its breach, damages, and compliance with any conditions precedent.”)

“As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract.” McGill Restoration, Inc. v. Lion Place Condominium Association, 309 Neb. 202, 223, 959 N.W.2d 251, — (2021).

C. WHAT LAW APPLIES?

According to the Restatement (Second) [of Conflict of Laws] § 188 (1971) analysis, the rights and duties of the contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. The relevant principles a court should consider are the place of the contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicile or residence of the parties. *See Shull [v. Dain, Kalman & Quail, Inc.]*, 201 Neb. 260, 267 N.W.2d 517 (1978)] (also applying the Restatement (Second) of Conflict of Laws § 203 (1971) regarding usury charges).

Powell v. Am. Charter Fed. Sav. & Loan Ass’n, 245 Neb. 551, 556–57, 514 N.W.2d 326, 331–32 (1994).

In this regard, Vanice v. Oehm, 247 Neb. 298, 526 N.W.2d 648 (1995), states:

[A] contract made in another state and valid under the laws of that state is valid in Nebraska and will be enforced, unless such enforcement would violate the positive law of the settled public policy of this state or would work an injury to this state or its citizens [P]ersons residing in different states [may] select the law of either state to govern their contract; when by the terms of the contract they have fixed and determined the place for performance, the law of that place will govern.

Id. at 300–01, 526 N.W.2d at 651 (citations omitted) (involving a party seeking, to foreclose a mortgage on land in Nebraska; holding that Nebraska law governs, the contrary agreement by the parties notwithstanding).

D. PERSONAL JURISDICTION

“A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdic-

tion or specific personal jurisdiction.” *Yeransian v. Willkie Farr*, 305 Neb. 693, 700, 942 N.W.2d 226, — (2020). The former “arises where a defendant’s affiliations with a state are so continuous and systematic as to render the defendant essentially at home in the forum state” *Id.* (finding “no allegations that [the defendant] has had a Nebraska presence outside of its work surrounding [this case,]” the Court held that there was “insufficient basis to establish general personal jurisdiction,” *id.* at 701, 942 N.W.2d at —.). The latter “requires that a claim arise out of or relate to the defendant’s contacts with the forum.” *Id.* It “is confined to adjudication of issues deriving from, or connected with, the very controversy that established jurisdiction.” *Id.* “[T]here must be a substantial connection between the defendant’s contacts and the operative fact of the litigation.” *Id.*

While contractual agreements may be relevant to consideration of minimum contacts that support jurisdiction, the existence of a contract with a party in the forum state does not, in and of itself, provide the necessary contacts for personal jurisdiction. To determine whether a defendant’s contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties’ prior negotiations and future contemplated consequences, along with the terms of the contract and the parties, actual course of dealings. A court looks to whether the contracting party has created continuing relationships and obligations with citizens of another state.

Id. at 701–02, 942 N.W.2d at —. (footnotes omitted).

See also, e.g., *Quality Pork Int’l v. Rupari Food Servs., Inc.*, 267 Neb. 474, 675 N.W.2d 642 (2004) (discussing the contacts necessary to establish personal jurisdiction) and cases cited in *Yeransian*, above.

E. PROOF BY CIRCUMSTANTIAL EVIDENCE

“A contract . . . can be shown by circumstantial evidence.” *Tilt-Up Concrete v. Star City/Fed.*, 255 Neb. 138, 147, 582 N.W.2d 604, 610 (1998). Circumstantial evidence is discussed at *NJI2d Civ. 1.31*, Comment.

F. CONTRACTS WITH CHURCHES

“A church may enter into contracts, which contracts are enforceable in civil court; however, the courts may not inquire into contractual matters whose enforcement would require a searching and therefore impermissible inquiry into church doctrine.” *Parizek v. Roncalli Catholic High Sch.*, 11 Neb. App. 482, 486, 655 N.W.2d 404, 408–09 (2002).

The general rule is that a subscription to a charitable or other institution must be supported by consideration in order to be a binding obligation. But an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, generally cannot be successfully defended on the ground of lack of consideration.

In re Estate of Ryan, 302 Neb. 821, 828, 925 N.W.2d 336, 341 (2019) (footnote omitted).

G. RECOVERY ON A CONTRACT BY A BENEFICIARY NOT NAMED AS A PARTY TO THE CONTRACT

“A party to a contract is generally a real party in interest with standing to raise a claim of breach of contract.” *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 57, 917 N.W.2d 435, 453 (2018). “Nebraska law states that only a party (actual or alleged) to a contract can challenge its validity.” Same quotation: *Valley Boys, Inc. v. American Family Ins.*, 306 Neb. 928, 937, 947 N.W.2d 856, 865 (2020); *Western Ethanol Co. v. Midwest Renewable Energy, LLC*, 305 Neb. 1, 11, 938 N.W.2d 329, 340 (2020). “A plaintiff does not generally have standing to bring a case on behalf of a third party.” *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 138, 953 N.W.2d 16, 29 (2021).

“We have strictly construed who may enforce a contract as a third-party beneficiary. The fact that a third party would be better off if a contract were enforced does not give him or her standing to enforce the contract.” *Equestrian Ridge*, 308 Neb. at 139, 953 N.W.2d at __ (footnote omitted). “Parties can recover as third-party beneficiaries of a contract only if it appears that the rights and interest of the third parties were contemplated and that provision was being made for them.” *Western Ethanol Co. v. Midwest Renewable Energy*, 305 Neb. 1, 11, 938 N.W.2d 329, __ (2020) (footnotes omitted). *Accord Equestrian Ridge*, 308 Neb. at 139, 953 N.W.2d at __ (drawing a distinction between “intended” versus “incidental” beneficiaries).

Circumstances where beneficiaries of a contract may recover thereon even though they are not named as parties to the contract are discussed at length in *Equestrian Ridge*, 308 Neb. at 139, 953 N.W.2d at __ (“An intended beneficiary is one whose rights and interest were apparently contemplated by the contract’s language itself. This generally means that the third party’s rights must appear by express stipulation or it must appear by reasonable intentment that the rights and interest of such unnamed parties were contemplated and that provision was made for them.” (footnotes omitted)); *Midwest Ethanol*, above; *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005). *See also* *Palmer v. Lakeside Wellness Ctr.*, 281 Neb. 780, 785-86, 798 N.W.2d 845, 850-51 (2011); *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 686, 789 N.W.2d 260, 267 (2010); *Molina v. Am. Alternative Ins. Corp.*, 270 Neb. 218, 223, 699 N.W.2d 415, 419 (2005).

H. ONE WHO IS NEITHER A PARTY TO A CONTRACT NOR AN AGENT OF A PARTY CANNOT BRING AN ACTION FOR BREACH THEREOF

“As a general rule, one who is neither a party to a contract nor an

agent of a party to a contract has no rights under the contract, and cannot bring an action for breach thereof." *Applied Underwriters v. S.E.B. Servs. Of New York*, 297 Neb. 246, 523, 898 N.W.2d 366, 372 (2017).

I. CROSS REFERENCES

Regarding the general rule that the principal is not contractually liable to a subagent hired by a general agent, see NJI2d Civ. 6.03, Comment & Authorities.

II. PUBLIC POLICY

A. IN GENERAL

A court can invalidate a contract as unconscionable and therefore void as against public policy.

"The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands."

Southern Neb. Rural Pub. Power Dist. v. Nebraska Elec., 249 Neb. 913, 921, 546 N.W.2d 315, 321 (1996) (quoting *Blanco v. Gen. Motors Acceptance Corp.*, 180 Neb. 365, 374, 143 N.W.2d 257, 262 (1966)). *Accord Mays v. Midnite Dreams*, 300 Neb. 485, 493-94, 915 N.W.2d 71, 82 (2018) ("[A] contract which is contrary to public policy is void."); *Johnson v. Nelson*, 290 Neb. 703, 711, 861 N.W.2d 705, 712 (2015) ("A contract which is clearly contrary to public policy is void."); *Hearst-Argyle Prop. v. Entrex Commc'n. Servs.*, 279 Neb. 468, 478, 778 N.W.2d 465, 472 (2010) ("only in cases free from doubt"; only when "clear[] and unmistakabl[e]"); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 266, 777 N.W.2d 573, 580 (2010); *State ex rel. Wagner v. United Nat. Ins. Co.*, 277 Neb. 308, 314, 761 N.W.2d 916, 921 (2009); *Myers v. Nebraska Inv. Council*, 272 Neb. 669, 692-93, 724 N.W.2d 776, 798-99 (2006); *Jeffrey Lake Dev., Inc. v. Central Neb. Pub. Power*, 262 Neb. 515, 523, 633 N.W.2d 102, 109 (2001) (citing cases); *Bedrosky v. Hiner*, 230 Neb. 200, 207, 430 N.W.2d 535, 540 (1988) (the Court is "reluctant to void contractual clauses on public policy alone"); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 466, 571 N.W.2d 64, 69 (1997) (only when "clearly and unmistakably" against public policy).

Public policy is the principle of law that "holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good." It is the principle under which private dealings, including the freedom to contract, "are restricted by law for the good of the community." *Hood v. AAA Motor Club Ins. Ass'n*, 259 Neb.

63, 68, 607 N.W.2d 814, 818 (2000). *Accord Johnson*, 290 Neb. at 711, 861 N.W.2d at 7; *Stewart v. Bennett*, 273 Neb. 17, 22-23, 727 N.W.2d 424, 429-30 (2007); *Am. Family Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 445, 648 N.W.2d 769, 779 (2002); *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 345, 647 N.W.2d 599, 607 (2002); *Ploen v. Union Ins. Co.*, 253 Neb. 867, 876, 573 N.W.2d 436, 443 (1998) (exhaustion clause in under-insured motorist policy does not violate public policy); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 465, 571 N.W.2d 64, 69 (1997).

Whether a contract violates public policy is a question of law. *E.g.*, *Mays v. Midnite Dreams*, 300 Neb. 485, 491, 915 N.W.2d 71, 80-81 (2018) (“An appellate court independently reviews questions of law decided by a lower court.” *Id.* at 491-92, 915 N.W.2d at 81.); *Johnson*, 290 Neb. at 711, 861 N.W.2d at 712; *SFI Ltd. P’ship* 8, 288 Neb. 698, 709, 851 N.W.2d 82, 89 (2014); *Hearst-Argyle Properties, Inc. v. Entrex Comm’n Servs., Inc.*, 279 Neb. 468, 470, 778 N.W.2d 465, 468 (2010); *Lexington Ins. Co.*, 275 Neb. at 707-08, 749 N.W.2d at 128; *Law Offices of Ronald J. Palagi, P.C., L.L.O. v. Howard*, 275 Neb. 334, 347, 747 N.W.2d 1, 14 (2008); *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390, 397 (2003); *Ploen v. Union Ins. Co.*, 253 Neb. 867, 876-77, 573 N.W.2d 436, 443 (1998).

“Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public convenience.” *SFI Ltd. P’ship* 8, 288 Neb. at 710, 851 N.W.2d at 92. “The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.” *Johnson*, 290 Neb. at 715, 861 N.W.2d at 715;

Regarding unconscionability, “[u]nconscionable’ means manifestly unfair or inequitable.” *Myers v. Nebraska Inv. Council*, 272 Neb. 669, 692, 724 N.W.2d 776, 799 (2006). Unconscionability presents a question of law. *Myers*, 272 Neb. at 692-93, 724 N.W.2d at 798-99. *See SFI Ltd. P’ship* 8, 288 Neb. at 709, 851 N.W.2d at 89. “In a commercial setting . . . substantive unconscionability alone is usually insufficient to void a contract or clause. A court must also consider whether the contract formation was procedurally unconscionable. An essential fact in determining unconscionability is the disparity in respective bargaining positions of parties to a contract.” *Myers*, 272 Neb. at 693, 724 N.W.2d at 799 (citations and paragraph break omitted). *See also* NJI2d Civ. 15. 26, Authorities.

“[I]t is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.” *Millard Gutter Company v. Farm Bureau Property & Casualty Insurance Company*, 295 Neb. 419, 431, 889 N.W.2d 596, 604 (2016). *Accord Mays v. Midnite Dreams*, 300 Neb. 485, 493-94, 496, 915 N.W.2d 71, 82

(2018) (holding that the Legislature's policy statement in the Wage and Hour Act, Neb. Rev. Stat. § 48-1201 (Reissue 2010) leads to the conclusion that "the parties may not contract away the protections afforded by" that act); *Olson v. Wrenshall*, 284 Neb. 445, 452-53, 822 N.W.2d 336, 342 (2012) (medical malpractice); *Alsidez v. Am. Family Mut. Ins. Co.*, 282 Neb. 900, 807 N.W.2d 184, 191 (2011); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 266, 777 N.W.2d 573, 580 (2010); *Stewart v. Bennett*, 273 Neb. 17, 23, 727 N.W.2d 424, 430 (2007); *Volquardson v. Hartford Ins. Co. of the Midwest*, 264 Neb. 337, 345, 647 N.W.2d 599, 607 (2002).

This coin has two sides. On the one side, "a provision of a contract enacted pursuant to a statute adopted by the Legislature of the State of Nebraska [cannot be] contrary to public policy. . . . Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. That is to say, where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides." *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 429, 344 N.W.2d 454, 457 (1984). *Accord, Alsidez, supra* (first part of quotation). *See Amen v. Astrue*, 284 Neb. 691, 696, 822 N.W.2d 419, 423 (2012) ("[T]his court cannot contradict the Legislature on matters of public policy."); *Olson, supra* (When the Unicameral has not spoken, the court is "reluctant to create or define a new public policy.").

On the other side, a legislative determination that a contract provision is against public policy will be honored. "By implication, in [Neb. Rev. Stat.] § 25-824 [Reissue 2016]], the Legislature has made a statement of public policy against granting attorney fees in actions that are not frivolous." *Stewart v. Bennett*, 273 Neb. 17, 23, 727 N.W.2d 424, 430 (2007) ("[I]n the absence of a uniform course of procedure or authorization by statute, contractual agreements for attorney fees are against public policy and will not be judicially enforced." *Id.* at 22, 727 N.W.2d at 429). *Accord Parkert v. Lindquist*, 269 Neb. 394, 397, 693 N.W.2d 529, 532 (2005); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 765, 472 N.W.2d 391, 402 (1991); *First Nat'l Bank in Ord v. Schroeder*, 218 Neb. 397, 400, 355 N.W.2d 780, 783 (1984) (a contractual provision that in the event of litigation involving the contract the prevailing party shall be entitled to costs, including attorneys' fees, is contrary to public policy and void).

"[I]n a non-judicial proceeding, [however,] a contract provision requiring payment of a reasonable attorney fee is not against public policy." *Parkert v. Lindquist*, 269 Neb. 394, 397, 693 N.W.2d 529, 532 (2005).

In addition to legislative statements of public policy, the rules of professional ethics governing the conduct of attorneys, which are promulgated by the state's high court, "establish a state's public policy with respect to the professional conduct of lawyers." *Law Offices of Ronald J. Palagi, P.C., L.L.O. v. Howard*, 275 Neb. 334, 348, 747 N.W.2d

1, 15 (2008). Court's draw "a distinction between the business principles which govern commercial enterprises and the ethical principles that govern the practice of law." *Id.* at 349, 747 N.W.2d at 16. "[T]he paramount interest the ethics rules attempt to serve" is the client's freedom to choose its attorney. Provisions in attorney employment contracts that operate as financial disincentives to that freedom of choice—such as, in this case, a provision in Howard's contract of employment as an attorney with Law Offices that if Howard left Law Offices and was retained by a Law Offices' client then all fees generated from that client would be payable to Law Offices and none to Howard—are unenforceable as against public policy. *Id.* at 350, 747 N.W.2d at 17. "[T]he client's freedom of choice is the paramount interest the ethics rules attempt to serve[.] . . . [C]ases almost uniformly hold that financial disincentive provisions in attorney agreements are unenforceable as against public policy." *Id.* at 349, 747 N.W.2d at 17. In *Law Offices*, the Court adopts this as the rule in Nebraska.

"In contract and insurance law, public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community" *Johnson*, 290 Neb. at 711, 861 N.W.2d at 712. "[I]t is against public policy to insure against liability for intentional acts." *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 345, 647 N.W.2d 599, 607 (2002). "At common law, life insurance policies issued to a party not having an insurable interest in the life of an insured are considered a wager on the life or another and therefore void as being against public policy." *Johnson*, 290 Neb. at 711, 861 N.W.2d at 712.

"Whether a limitation of liability clause in a contract is void as contrary to public policy depends upon the facts and circumstances of the contract and the parties involved." *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 465, 571 N.W.2d 64, 69 (1997) (the greater the threat to general safety, the greater the restriction allowed on party's freedom to contractually limit liability).

Use restrictions in leases as restraints on alienation are discussed in *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 138-42, 655 N.W.2d 390, 397-99 (2003) (also discussing direct restraints and indirect restraints on alienation, the difference between the two, and the effect of the difference on the question of whether the restriction violates public policy).

There is a public policy exception to the at-will employment doctrine. This is discussed at *NJI2d Civ. 4.52*, Comment.

"Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other." *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 704, 851 N.W.2d 88, 88 (2014).

Public policy favors contractual waiver of subrogation because of “the important policy goal that waivers of subrogation serve in avoiding disruption of construction projects and reducing litigation among the parties to complicated construction contracts.” This is so even in the face of a claim of gross negligence. Such a waiver provision is enforceable to bar claims of gross negligence. *Lexington Ins. Co. v. Entrex Comm’c Serv., Inc.*, 275 Neb. 702, 711, 749 N.W.2d 124, 131 (2008). Regarding waiver of contract generally, see NJI2d Civ. 15.01, Comment, part XI, above.

Under the antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer. The antisubrogation rule has been extended to “implied coinsured.” To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchases. In addition, the insurer should not be in a situation where there exists a potential conflict of interest which could affect the insurer’s incentive to provide its insured with a vigorous defense.

SFI Ltd. P’ship 8, 288 Neb. at 705, 851 N.W.2d at 88 (footnotes omitted).

On a related matter, see the discussion of the collateral source rule in the introduction to chapter 4, above. Regarding subrogation’s effect on the statute of limitations, see NJI2d Civ. 12.04, Comment & Authorities.

Regarding public policy in the context of covenants not to compete and forfeiture-for-competition clauses, see NJI2d Civ. 4.51.

Regarding public policy and the affirmative defense of duress (and also unconscionability), see NJI2d Civ. 15.26.

B. CHOICE OF FORUM—FORUM SELECTION CLAUSES

By statute, “Nebraska courts are generally directed to enforce forum selection clauses unless certain statutory exceptions apply.” *Polk Cty. Recreational Ass’n v. Susquehanna Patriot Commercial Leasing Co., Inc.*, 273 Neb. 1026, 1037, 734 N.W.2d 750, 759 (2007) (the relevant statutes are cited below). *See also* *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 349, 549 N.W.2d 172, 175 (1996) (“Forum selection clauses in contracts *may be* legally enforceable in this state.”) (emphasis added).

The statutory bases for, and limitations on, forum selection clauses are: Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-414 (Reissue 2016) (forum selection clauses placing choice of forum in Nebraska); Neb. Rev. Stat. § 25-415 (Reissue 2016) (forum selection clause placing choice of forum in a state other than Nebraska). These statutes, and

their boundaries, are discussed in *Polk Cty. Rec. Ass'n., supra*; *Ameritas Inv. Corp. v. McKinney*, 269 Neb. 564, 569–73, 694 N.W.2d 191, 199–201 (2005); *Woodmen of the World Life Ins. Soc. v. Yelich, supra*.

A forum selection clause that is in accord with the governing statute is not contrary to public policy; neither does it “deny courts their inherent authority to consider appropriate matters presented to them.” *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. at 349, 549 N.W.2d at 175; *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 428–30, 344 N.W.2d 454, 457–58 (1984) (a clause included in a contract pursuant to an otherwise valid Nebraska statute cannot be against the public policy of State of Nebraska; such statutes establish public policy).

“[M]inimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts. Instead, due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.” *Ameritas Inv. Corp. v. McKinney*, 269 Neb. 564, 571, 694 N.W.2d 191, 200 (2005). When a choice of forum clause is challenged as a violation of the Due Process Clause, the court must consider the Choice of Forum Act, Neb. Rev. Stat. § 25-414 (Reissue 2016). The Act requires that Nebraska be “a reasonably convenient place for the trial of the action.” *Id.* at § 25-414(1)(b). If that part of the Act is satisfied, then due process is satisfied as well. *Ameritas Inv. Corp.*, 269 Neb. at 572, 694 N.W.2d at 200.

A challenge to a choice of forum clause raises a jurisdictional issue. This means that a rule 12(b)(6) motion is a proper way to raise the issue. *Polk Cty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co., Inc.*, 273 Neb. 1026, 1032, 734 N.W.2d 750, 756 (2007) *Ameritas Inv. Corp.*, 269 Neb. at 573, 694 N.W.2d at 201. This is so whether the forum selected is Nebraska or another jurisdiction. *Polk Cty. Rec.*, 273 Neb. at 1032-34, 734 N.W.2d at 756–57.

“A party seeking to avoid a contractual forum selection clause bears a heavy burden of showing that the clause should not be enforced, and, accordingly, the party seeking to avoid the forum selection clause bears the burden of proving that one of the statutory exceptions applies.” *Polk Cty. Rec.*, 273 Neb. at 1037, 734 N.W.2d at 757.

“‘[M]ere inconvenience or additional expense will not permit a forum selection clause to be avoided.’” *Polk Cty. Rec.*, 273 Neb. at 1039, 734 N.W.2d at 750. “[A] forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.” *Polk Cty. Rec., supra* (multiple internal quotation marks omitted).

Convenience to witnesses generally is not a basis for avoiding enforcement of such a clause. *Polk Cty. Rec.*, 273 Neb. at 1040, 734 N.W.2d at 761. “[D]eposition testimony can be taken and used without disadvantage at trial.” *Id.*, at 1039, 734 N.W.2d at 761. Furthermore,

“the convenience of witnesses is a matter that should be within the contemplation of the parties when they agree to [such] a forum selection clause.” *Id.*, at 1040, 734 N.W.2d at 761.

III. STATUTE OF FRAUDS

A. CONVEYANCES AND CONTRACTS NOT RELATING TO REAL PROPERTY

The statute of frauds covering conveyances and contracts not relating to real property is found at Neb. Rev. Stat. § 36-202 (Reissue 2016).

The statute of frauds voids oral agreements that, by their terms, are not to be performed within one year from the date of its making. Oral agreements that are capable to be performed within one year are not invalidated by the statute of frauds. Neb. Rev. Stat. § 36-202(1) (Reissue 2016); *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 954, 857 N.W.2d 808, 813 (2015); *Linscott v. Shasteen*, 288 Neb. 276, 284, 847 N.W.2d 283, 291 (2014); *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994); *Blinn v. Beatrice Cmty. Hosp. & Health Ctr.*, 13 Neb.App. 459, 469, 696 N.W.2d 149, 157 (2005).

“[T]he written evidence required by the statute of frauds must contain the essential terms of the contract.” *Gibbons Ranches*, 289 Neb. at 954, 857 N.W.2d at 813 (2015) (holding that “when an express lease agreement contemplates the payment of rent in money, the amount of rent is an essential term of the agreement”).

“A contract is not within the statute of frauds merely because it may, or probably will, not be performed within 1 year.” *Linscott*, 288 Neb. at 284, 847 N.W.2d at 291.

The statute of frauds voids “oral contracts consisting of a ‘special promise to answer for the debt, default, or misdoings of another person.’ Neb. Rev. Stat. § 36-202(2) (Reissue [2016]).” *Hoeft v. Five Points Bank*, 248 Neb. 772, 783, 539 N.W.2d 637, 645 (1995) (an oral promise made with sufficient consideration where the promisor’s principal purpose is to promote his or her own interest, not to become a guarantor, is valid).

The statute also voids agreements “made upon consideration of marriage, except mutual promises to marry.” Neb. Rev. Stat. § 36-202(3) (Reissue 2016). *See also* *In re Estate of McConnell*, 28 Neb. App. 303, 321, 943 N.W.2d 722 (2020) (“Premarital agreements are contracts made in contemplation of marriage. *See Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012). Parties to a premarital agreement may contract with respect to several matters, including any matter ‘not in violation of public policy or a statute imposing a criminal penalty.’ Neb. Rev. Stat. § 42-1004 (Reissue 2016).” And such agreements are to be interpreted according to basic contract principals.)

It also voids “(4) every special promise by an executor or administra-

tor to answer damages out of his own estate; and (5) every agreement for repurchase of corporate stocks, bonds or other securities.” Neb. Rev. Stat. § 36-202(4) & (5) (Reissue 2016).

“Matters [such as the statute of frauds,] which seek to avoid a valid contract are affirmative defenses [and] must be specifically pled to be considered.” *Linscott*, 288 Neb.at 285, 847 N.W.2d at 292. The burden of proof is on the on the party pleading the statute. *Linscott*, 288 Neb.at 285, 847 N.W.2d at 292. “The defense of the statute of frauds is personal to the parties to the contract and their privies. It cannot be raised by a nonparty to the contract.” *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 503, 618 N.W.2d 637, 648 (2000).

“The determination of whether a contract falls within the statute of frauds is a question of law.” *Linscott*, 288 Neb. at 284, 847 N.W.2d at 291.

The statute of frauds is, of course, different from fraud in the inducement or fraudulent representation. The latter is discussed elsewhere, principally at NJI2d Civ. 15.21 and 15.22.

B. SALE OF AN INTEREST IN REAL PROPERTY

The statute of frauds applicable to the sale of an interest in land is found at Neb. Rev. Stat. § 36-103 (Reissue 2016). Regarding this statute of frauds, the land-sale statute, see particularly *Ficke v. Wolken*, 291 Neb. 482, 488-94, 868 N.W.2d 305, 311-14 (2015) (discussing the statute and an exception authorizing “specific performance of an oral contract for the sale of real estate upon the basis of past performance”); *Am. Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011). For more on specific performance, see NJI2d Civ. ch. 4, Introduction, part 4.

IV. CONTRACT ACTION OR TORT ACTION?

A. IN GENERAL

A place to start this discussion is with this. “[I]f there is a doubt as to the character of the action, it will be resolved in favor of an action on contract.” Same quotation: *Nathan v. McDermott*, 306 Neb. 216, 232, 945 N.W.2d 92, 106 (2020); *Cimino v. FirstTier Bank*, 247 Neb. 797, 805, 530 N.W.2d 606, 612 (1995).

Whether an action is one on contract or in tort is determined by the nature of the grievance, not the form of the pleadings. The key lies in the “petition’s essential and factual allegations by which the plaintiff requests relief,” not in the form of the pleading or the legal terminology used therein. Same quotation: *Henriksen v. Gleason*, 263 Neb. 840, 846, 643 N.W.2d 652, 657 (2002) (the “often dim and uncertain” dividing line “is determined by the nature of the grievance, not by the form of the

pleadings"); *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 382, 432 N.W.2d 7, 11 (1988). *Accord* *Nathan*, 306 Neb. at, 232, 945 N.W.2d at 106; *Cimino*, 247 Neb. at, 807, 530 N.W.2d at 613; *Thomas v. Countryside of Hastings*, 246 Neb. 907, 910, 524 N.W.2d 311, 313 (1994); *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 763, 463 N.W.2d 813, 816 (1990). Though in a different context, *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990) states the principle succinctly: "The character of a pleading is determined by its content, not by its caption." *Id.* at 522, 455 N.W.2d at 812. *See also* *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 144, 440 N.W.2d 187, 190 (1989); *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 354-55, 436 N.W.2d 184, 188 (1989).

"The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. They may be owed to all those within the range of harm, or to some considerable class of people. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract."

Moglia v. McNeil, 270 Neb. 241, 251, 700 N.W.2d 608, 618 (2005) (quoting William L. Prosser, *Handbook on the Law of Torts* § 92 at 613 (4th ed. 1971)).

Contract actions arise from a breach of a duty imposed on one by an agreement. They protect the plaintiff's interest in or right to performance of another's promise. Tort actions arise from a breach of a duty imposed by law. They protect the plaintiff's interest in or right to freedom from injury or damage caused by another's conduct. *Henriksen v. Gleason*, 263 Neb. 840, 847, 643 N.W.2d 652, 658 (2002); *Thomas v. Countryside of Hastings*, 246 Neb. 907, 910, 524 N.W.2d 311, 313 (1994); *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 382-83, 432 N.W.2d 7, 11 (1988).

"[I]f an action is not maintainable without pleading and establishing the contract, if the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance, whatever may be the form of the pleading, an action on the contract." *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 763, 463 N.W.2d 813, 816 (1990) (multiple quotation marks and citation omitted) (citing cases).

"Where only economic loss is suffered and the alleged breach is of only a contractual duty . . . , then the action should be in contract rather than tort." *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 122-23, 808 N.W.2d 67, 82-83 (2012). This is discussed further below in this Comment and at *NJI2d Civ. 11.20*, Comment. *See also* *NJI2d Civ. 15.01*, Authorities.

"A claim of defense arising out of tort concepts is not generally available where the claim of plaintiff is premised upon contract." *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 647, 950 N.W.2d 321, — (2020) ("To constitute a defense to an action based on contract, the matters must generally be germane to the cause of action pleaded, in addition to presenting a legal reason why the plaintiff will not recover.").

"If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort." Same quotation: *Nathan v. McDermott*, 306 Neb. at 231–32, 945 N.W.2d at 106; *Cimino v. FirstTier Bank*, 247 Neb. at 805, 530 N.W.2d at 612 (noting that the petition contained a cause of action for breach of contract plus additional averments appropriate to a tort action; holding that the action is not changed from a contract action to a tort action by the additional averments not pled as an independent tort action or alleged as an independent factual occurrence that could stand alone as a separate tort action; stating that the averments appropriate to the tort action are considered surplusage).

Some actions may be brought as either tort or contract actions. "One may sue in tort," for example, "when there has been negligence in the performance of a contract." *Thomas v. Countryside of Hastings*, 246 Neb. 907, 910, 524 N.W.2d 311, 313 (1994).

It is . . . possible to assert independent contract and misrepresentation claims. A person who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to two distinct claims that may be pursued to satisfaction consecutively.

But merely alleging both theories does not make them separate wrongs. To determine whether an action is based on a contract or a tort, a court must examine and construe the petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of the pleading. Consideration must be given to the facts which constitute the cause of action. If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is a doubt as to the character of the action, it will be resolved in favor of an action in contract. In such an instance, the statements appropriate to an action in tort will be considered surplusage.

Nathan, 306 Neb. at 231–232, 945 N.W.2d at 106 (footnotes omitted) (discussing cases).

Further, the law imposes on every contract the duty to perform

“with care, skill, reasonable expedience, and faithfulness.” *Getzschman v. Miller Chem. Co.*, 232 Neb. 885, 899, 443 N.W.2d 260, 270 (1989) (multiple quotation marks and citation omitted). *Accord* N.JI2d Civ. 15.40, citing authorities; *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 122, 808 N.W.2d 67, 82 (2012). As a general rule, “a violation of that duty may give rise to a breach of contract action or a tort action for negligent performance of the contract.” But, “[w]here only economic loss is suffered and the alleged breach is of only a contractual duty . . . , then the action should be in contract rather than tort.” *Lesiak*, 283 Neb. at 122-23, 808 N.W.2d at 83. *See also* N.JI2d Civ. 11.20, Authorities. In a case where the aggrieved party can choose to sue in tort, the contract (with its condition imposed by law), rather than general principles of tort law, may define the defendant’s duty. “While Nebraska allows a party to base a claim for nonperformance of a contractual duty on either a contract or tort theory, in both cases the contract may determine the duty which has been breached with resultant liability.” *Getzschman v. Miller Chem. Co.*, *supra*.

Regarding a duty of reasonable care that exists by reason of a contractual relationship, *see Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996). An assisted living facility had taken some of its residents on an excursion to a wildlife refuge. One resident fell in the refuge parking lot and broke her hip, and she brought an action against the owner and operator of the assisted living facility. *Williamson*, 250 Neb. at 554-55, 550 N.W.2d at 339-40.

[T]his appeal does not involve an allegation of professional negligence. [T]his case was pled and tried on the theory that [defendant] breached its contractual duty to provide assistance to [plaintiff] There is no allegation that [defendant’s employees] breached a professional standard of care; therefore, this case should be treated as an ordinary negligence case, and no evidence of a special standard of care is necessary.

Williamson, 250 Neb. at 557-58, 550 N.W.2d at 341. Here, the contractual relationship between the facility and the resident provides the duty of due care the employee of the facility owes the resident.

Regarding tortious interference with a contract or a business expectancy, *see* N.JI2d Civ. 17.02.

Actions on uninsured and underinsured motorist coverage can involve both tort and contract liability. This is discussed in *Johnson v. United States Fid. & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

The general question of the contract action versus the tort action is discussed at 74 Am. Jur. 2d, *Torts* §§ 19-22 (2001 & Supp. 2009).

See also the Authorities, below.

B. MEASURE OF DAMAGES—CONTRACT VERSUS TORT ACTION

The measure of damages differs between a tort action and a contract

action. Regarding the measure of damages in each, see the discussion in Part 2(A) of the Introduction to Chapter 4, *i.e.*, ch. 4 Intro., part (A)(2).

C. VENUE—CONTRACT VERSUS TORT ACTION

The county in which the action must be brought is sometimes dependent upon whether it is an action in tort or contract. A contract claim against a state agency must be heard in the district court for Lancaster County, whereas a tort action against a state agency is not so limited. *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 762, 463 N.W.2d 813, 816 (1990).

Regarding forum selection clauses in contracts, see the discussion above, in the Public Policy part of this Comment.

D. SUING IN CONTRACT SO AS TO AVOID THE BAR OF A SHORTER STATUTE OF LIMITATIONS IN TORT

Regarding attempting to recast a cause of action from tort to contract in an effort to avoid the relatively short professional-negligence statute of limitations, see the Statute of Limitations part of NJI2d Civ. 12.04, Comment & Authorities. *See also* the Statute of Limitations part of this Comment, immediately below.

V. STATUTE OF LIMITATIONS

Regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D and 12.04, Comment & Authorities.

With certain exceptions specified in the statute, an action upon a written contract “can only be brought within five years.” Neb. Rev. Stat. § 25-205 (Reissue 2016). *Accord, e.g.*, *City of Lincoln v. PMI Franchising*, 267 Neb. 562, 566–68, 675 N.W.2d 660, 663–64 (2004) (contract of guaranty); *In re Estate of Reading*, 261 Neb. 897, 903, 626 N.W.2d 595, 600 (2001) (the statute is not bar of its own force, but “a defense to be pleaded by the party relying upon it. It follows that judicial determination of whether a claim is barred by a statute of limitations ordinarily requires both the assertion of the claim and the responsive pleading of the defense.”); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 282, 481 N.W.2d 422, 428 (1992) (five years is general rule for action for breach of written contract; special rule for contract for sale of goods under U.C.C.); *Grand Island Sch. Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 562, 279 N.W.2d 603, 606 (1979) (within five years of date cause of action accrues).

The responsive pleading in which the defense is raised can be the answer or, depending on when the action was filed, either a demurrer or a rule 12(b)(6) motion. Effective January 1, 2003, the Nebraska Rules of Pleading in Civil Actions abolished the demurrer. *Weeder v. Central Cmty. Coll.*, 269 Neb. 114, 691 N.W.2d 508 (2005). “A rule 12(b)(6) mo-

tion is generally considered to be the modern day equivalent of the demurrer.” *Weeder*, 269 Neb. at 123, 691 N.W.2d at 515. (A rule 12(b)(6) motion may be styled a Motion to Dismiss. *Weeder*, 269 Neb. at 122–23, 691 N.W.2d at 514–15.)

“An action on an oral contract must be brought within 4 years from the date of the event giving rise to the cause of action.” *Weyh v. Gottsch*, 303 Neb. 280, 295, 929 N.W.2d 40, 52 (2019) (footnoting Neb. Rev. Stat. § 25-206 (Reissue 2016)). *Accord Hoeft v. Five Points Bank*, 248 Neb. 772, 782, 539 N.W.2d 637, 645 (1995).

In a contract action, an action for contribution is, in effect, an action at law upon an implied contract. Contribution in a contract action is discussed at NJ12d 2.05, Comment & Authorities. And regarding implied contracts generally, see part VII(C) of this Comment, below.

“A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known.” *Weyh*, 303 Neb. at 296, 929 N.W.2d at 52. *Accord, e.g., City of Lincoln v. Hershberger*, 272 Neb. 839, 842, 725 N.W.2d 787, 789 (2007) (The statute of limitations against an action on a contract of guaranty begins to run “the moment a cause of action first accrues.” “[A] guarantor’s liability arises when the principal defaults.”) (internal quotation marks omitted); *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 236, 720 N.W.2d 886, 896 (2006); *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 626, 611 N.W.2d 409, 415 (2000) (holding that an action on an insurance policy to recover underinsured motorist benefits accrues when the insurer breaches or fails to do what is required under the terms of the policy, not on the date of the underlying tort, *id.* at 629, 611 N.W.2d at 416); *Hoeft*, 248 Neb. at 782, 539 N.W.2d at 645 (“An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.”); *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 714, 502 N.W.2d 444, 449 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 278, 481 N.W.2d 422, 426 (1992); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 71, 416 N.W.2d 216, 220 (1987).

“If a contract is divisible, ‘breaches of its severable parts give rise to separate causes of action, [and] the statute of limitations will generally begin to run at the time of each breach.’” *Fuelberth v. Heartland Heating & Air Conditioning, Inc.*, 307 Neb. 1002, 1008, 951 N.W.2d 758 (2020).

“[T]he decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.” *Weyh*, 303 Neb. at 294, 295–96, 929 N.W.2d at 52.

“When an obligation is payable by installments, the statute of limi-

tations runs against each installment individually, from the time it comes due.” *Andersen v. A.M.W., Inc.*, 266 Neb. 238, 244, 665 N.W.2d 1, 6 (2003) (commissions to be paid on sale and renewal of insurance contracts; each failure to pay is a separate breach and “a separate cause of action accrued at the time of each breach”; this obligation is similar to one payable by installments).

Regarding statutes of limitations generally, *see* NJI2d Civ. 2.02D, Comment; NJI2d Civ. 12.04. In 1997, the Unicameral amended the statute governing the trial of statute-of-limitations issues. Unless waived by all parties, a jury shall determine any factual issues concerning the bar of a statute of limitations. Neb. Rev. Stat. § 25-221 (2016). This amendment retains the rule that, upon motion by any party, factual issues concerning the bar of a statute of limitations shall still be tried separately and determined first. This amendment is discussed in the Statute of Limitations part of the Comment to NJI2d Civ. 12.04.

“Procedural amendments to statutes are ordinarily applicable to pending cases. . . . Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date.” *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 986, 698 N.W.2d 58, 63 (2005). *Accord* *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005) (“[A] statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.”).

Regarding accrual of a cause of action generally, *see* NJI2d Civ. 5.04, Comment, part II.

Regarding the Uniform Commercial Code, *see* Neb. U.C.C. §§ 2-725 (Reissue 2001) (contracts for sale), 2A-506 (Reissue 2001) (leases), 3-104 (Cum. Supp. 2012) (negotiable instruments), 4-111 (Reissue 2001) (bank deposits and collections).

VI. ANTICIPATORY BREACH BY REPUDIATION, MATERIAL BREACH, AND PRIOR MATERIAL BREACH

A. ANTICIPATORY BREACH BY REPUDIATION

Regarding the breach of contract claimed by the plaintiff, one such breach that might be alleged is anticipatory breach by repudiation, sometimes also called “renunciation.” If that is the case, one or some variation of the following might be inserted at the appropriate place in the Issues part of the instruction:

“ . . . the defendant would not or could not perform (his, her) obligations under the contract.”

“ . . . the contract was (repudiated, renounced, disavowed, terminated, et cetera).”

“ . . . the defendant rejected the contract as invalid or not binding.”

“An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an unequivocal repudiation of the contract.” *TNT Cattle Co. v. Fife*, 304 Neb. 890, 912-13, 937 N.W.2d 811, 830 (2020) (“This is distinguishable from a disagreement about the interpretation or meaning of a term in a contract.”). *Accord, e.g., Weber v. North Loup River Pub. Power and Irrig. Dist.*, 288 Neb. 959, 969, 854 N.W.2d 263, 273 (2014) (“ ‘[T]o constitute repudiation, a party’s language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to . . . willingness or ability to perform is not enough . . . ’”) *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 236, 720 N.W.2d 886, 901 (2006) (“[A]nticipatory breach requires an unequivocal repudiation of the contract.”); *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 68, 654 N.W.2d 376, 382 (2002) (quoting Restatement (Second) of Contracts § 250, comment b. at 273 (1981)); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 508, 412 N.W.2d 453, 458 (1987).

“[A] repudiation is (1) a statement by the obligor to the obligee indicating that he or she will commit a breach that would of itself give the obligee a claim for damages for total breach or (2) a voluntary affirmative act which renders the obligor either unable or apparently unable to perform without such a breach.” *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 68, 654 N.W.2d 376, 382 (2002).

“Where performances are to be exchanged under an exchange of promises, one party’s repudiation of a duty to perform discharges the other party’s remaining duties to perform.” *Weber*, 288 Neb. at 969–70, 854 N.W.2d at 273. “Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, to has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.” *Weber*, 288 Neb. at 970, 854 N.W.2d at 273.

When a party bound by an executory contract repudiates his or her obligation before time for performance, the promisee has the option to treat the contract as ended so far as further performance is concerned and to maintain action at once for damages occasioned by such anticipatory breach. *In re Estate of Michels*, 223 Neb. 286, 290, 389 N.W.2d 285, 289 (1986). *See also Crowder v. Aurora Co-op. Elevator Co.*, 223 Neb. 704, 712–13, 393 N.W.2d 250, 257 (1986) (U.C.C. case); *Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 350 N.W.2d 1 (1984); *Contractors, Laborers, Teamsters & Engr’s Health & Welfare Plan v. Harkins Constr. & Equip. Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984); Restatement (Second) of Contracts §§ 250–57 (1981); L. Simpson, *Handbook of the Law of Contracts* §§ 191–94 (2d ed. 1965); 17A Am. Jur. 2d *Contracts* §§ 729–732 (2004).

“A repudiation can be nullified by a retraction of the statement before the injured party materially changes his or her position in reliance on the repudiation or indicates to the other party that he or she considers the repudiation to be final.” *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 69, 654 N.W.2d 376, 383 (2002).

“A term can be both the duty to be performed under a contract and a condition precedent to a contractual counter-party’s duty. In . . . general, the result of the nonfulfillment of a condition is that the other party’s liability is discharged, whereas the nonperformance of a promise gives the other party a damages remedy.” *Weber*, 288 Neb. at 970–71, 854 N.W.2d at 273 (footnote omitted).

“The question of whether there has been a repudiation or whether repudiation was justified is a question of fact for the jury.” *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 508, 412 N.W.2d 453, 458 (1987). *Accord Anderson Excavating v. SID No. 177*, 265 Neb. 61, 68, 654 N.W.2d 376, 382 (2002).

Regarding anticipatory breach by repudiation under the U.C.C., see Neb. U.C.C. §§ 2-610, 2-611 (Reissue 2001) and *Crowder v. Aurora Co-op. Elevator Co.*, 223 Neb. 704, 712–13, 393 N.W.2d 250, 256–57 (1986).

B. MATERIAL BREACH

And then there is “material breach.” “[A] “material breach” is a failure to do something that is so fundamental to a contract that the failure to preform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.” *Siouxland Ethanol, LLC v. Sebade Bros., LLC*, 290 Neb. 230, 236, 859 N.W.2d 586, 592 (2015) (“weigh[] the consequences of the breach in light of the actual custom or persons in the performance of contracts similar to the one involved in the specific case”). “A material breach will excuse the nonbreaching party from its performance of the contract.” *Siouxland Ethanol*, 290 Neb. at 236, 859 N.W.2d at 592. *Accord Weber*, 288 Neb. at 970, 854 N.W.2d at 273.

As a general rule, “‘whether a material breach has occurred is . . . a fact question’”; if, however, there is only one reasonable conclusion to draw, then it becomes a question of law. *Siouxland Ethanol*, 290 Neb. at 237, 859 N.W.2d Civ. at 592.

C. PRIOR MATERIAL BREACH

The “prior material breach” doctrine . . . applies when a contract contemplates an exchange of performances between the parties, and the doctrine holds that one party’s failure to perform allows the other party to cease its own performance. In

order to constitute a possible prior material breach, the obligation upon which a plaintiff has sued in the breach of contract claim must have been dependent upon the other thing that the plaintiff was to do and failed to do. . . .

‘A duty under a separate contract is not affected . . . , nor is a duty under the same contract affected if it was not one to render a performance to be exchanged under an exchange of promises Furthermore, only duties to render performance are affected.’ And the contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that applies only when the breaching party breaches the same contract on which he or she is suing.

Dick v. Koski Professional Group, P.C., 307 Neb. 599, 651, 950 N.W.2d 321, — (2020) (footnotes ellipses in the second paragraph in original).

VII. PART I(B)(3) OF THE INSTRUCTION

The third subparagraph of the Burden of Proof part of this instruction says: “[Here insert a general statement of any other elements of plaintiff’s proof . . .].” The following is a discussion of what might be inserted therein.

A. SUBSTANTIAL PERFORMANCE

One such element of plaintiff’s proof might be substantial performance. “To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff’s obligations under the contract.” Same quotation: *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 959 N.W.2d 251, — (2021); *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 342, 886 N.W.2d 240, 254 (2016); *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 849, 530 N.W.2d 619, 623 (1995). *Accord* *Lange Bldg. and Farm Supply, Inc. v. Open Circle R, Inc.*, 216 Neb. 1, 6–7, 342 N.W.2d 360, 363 (1983); *First Data Res., Inc. v. Omaha Steaks Int’l, Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981); *Schweitz v. Robatham*, 194 Neb. 668, 234 N.W.2d 834 (1975). Regarding substantial performance, the following statement might be inserted into part I(B)(3) of the instruction:

“ . . . that the plaintiff substantially performed (his, her, its) part of the contract.”

Regarding substantial performance as an element of plaintiff’s proof, *Young v. Tate*, 232 Neb. 915, 919–20, 442 N.W.2d 865, 869 (1989) points out that “[t]here may be a recovery on the contract for part performance of a divisible contract.”

Substantial performance is discussed further (including defined) at NJI2d Civ. 15.07.

B. CONDITION PRECEDENT

Another such element of plaintiff's proof might be the occurrence of a condition precedent. "A condition precedent is a condition that must be performed before the parties' agreement becomes a binding contract a condition which must be fulfilled before a duty to perform an existing contract arises. This is in contrast to a promise in a contract, the nonfulfillment of which is a breach, i.e., the failure to perform that which was required by a legal duty, and the remedy lies in an action for damages." *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 643, 950 N.W.2d 321, — (2020) ("Courts have struggled for centuries with differentiation between conditions and promises."). *See also Cimino v. FirstTier Bank*, 247 Neb. 797, 807, 530 N.W.2d 606, 613 (1995).

"Whether language in a contract is a condition precedent depends on the parties' intent as gathered from the language of the contract." Same quotation: *Dick*, 307 Neb. at 643, 950 N.W.2d at —; *Weber v. North Loup River Public Power and Irrigation District*, 288 Neb. 959, 966, 854 N.W.2d 263, 271 (2014). *Accord Estate of Stine*, 251 Neb. at 874, 560 N.W.2d at 428; *Lee Sapp Leasing, Inc. v. Catholic Archbishop of Omaha*, 248 Neb. 829, 835, 540 N.W.2d 101, 105, (1995) ("The words 'as a condition for' in the acceptance and delivery letter are clearly language intended to create a condition precedent."). "Testimony will not be allowed to vary the meaning of [an unambiguous] document." *Lee*, 248 Neb. at 835, 540 N.W.2d at 105.

"Where the parties' intent is not clear, the language is generally interpreted as promissory rather than conditional." Same quotation: *Dick*, 307 Neb. at 644, 950 N.W.2d at —; *Weber*, 288 Neb. at 966, 854 N.W.2d at 271.

Where no express conditions are contained in the contract, the defendant has the burden of proving that they exist. *Mary Young Men's Christian Ass'n of Beatrice v. Hall*, 222 Neb. 738, 741, 386 N.W.2d 863, 865 (1986).

"Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused." *D & S Realty v. Markel Ins. Co.*, 284 Neb. 1, 12, 816 N.W. 2d 1, 10 (2012). *Accord Armstrong v. Clarkson Coll.*, 297 Neb. 595, 633, 901 N.W.2d 1, 25 (2017) ("The exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under the contract."); *Weber*, 288 Neb. at 966, 854 N.W.2d at 271. "As a general rule, a condition must be exactly fulfilled before liability can arise on the contract." *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 874, 560 N.W.2d 424, 428 (1997).

Just as a contract may be waived, "[c]onditions precedent in a contract may be waived." *Weber*, 288 Neb. at 968, 854 N.W.2d at 272. "According to Williston on Contracts, 'the performance of a condition

precedent is waived where the other party has unequivocally declared by word or act that performance of the condition will not secure performance of the counterpromise.’” *D & S Realty*, 284 Neb at 19, 816 N.W.2d at 14 (footnote citation to *Williston* omitted). It does not matter whether the declaration of nonperformance was in good or bad faith. *Id.* at 18, 816 N.W.2d at 13 (insurance claim).

As to conditions precedent and the pleadings, the plaintiff may generally allege that all such conditions have been performed. To controvert this allegation, the defendant must set forth exactly which conditions he or she claims were not satisfied—a general denial is not enough. Requiring this sort of responsive pleading confines the issues to the particular conditions defendant argues are unperformed; only in this way will the plaintiff and the trial court be advised as to the exact issue to be determined. The requirement that the defendant specify the allegedly unsatisfied conditions does not shift the burden of proof on the issue of whether such conditions have been satisfied: that burden remains on the plaintiff. Neb. Ct.R. Pldg. § 6-1109(c).

Prior to 2002 the substance of the just-cited rule of court was found at Neb. Rev. Stat. § 25-836 (Reissue 2016) (repealed, Laws 2002, LB 876, § 92). While the wording of the rule of court and the statute is a bit different, the substance of each is the same. There is, then, every reason to believe that the following cases, decided under the statute, still apply under the rule of court. *Twin Towers Dev. v. Butternut Apts.*, 257 Neb. 511, 516, 599 N.W.2d 839, 844 (1999); *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 705, 538 N.W.2d 756, 760 (1995); *Production Credit Ass’n v. Eldin Haussermann Farms*, 247 Neb. 538, 545, 529 N.W.2d 26, 32 (1995); *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 10–11, 524 N.W.2d 804, 812–13 (1994) (not an affirmative defense; affirmative defense seeks to avoid valid contract; failure of condition precedent asserts that contract never arose), *overruled on other grounds*, *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 587, 789 N.W.2d 1, 17 (2010); *Rubin v. Pioneer Fed. Sav. & Loan Ass’n*, 214 Neb. 364, 368, 334 N.W.2d 424, 427 (1983) (particularly discussing the burdens of pleading and proof).

Regarding the occurrence of a condition precedent, the following might be inserted into part I(B)(3) of the instruction:

“ . . . that, if there was a condition that had to occur before performance under the contract became due, either the condition occurred or its nonoccurrence was excused.”

This insert may be tailored to the facts of the case whenever doing so aids clarity. It is the feeling of the Committee that the example regarding conditions precedent will almost always be clearer when it is tailored to the facts of the case.

“The nonoccurrence of a condition precedent cannot be excused if

occurrence of the condition was a material part of the agreed exchange.” *Lee Sapp Leasing*, 248 Neb. at 836, 540 N.W.2d at 105 (citing Restatement (Second) of Contracts § 229 (1981), which states that, unless occurrence of condition precedent “was a material part of” agreed exchange, court may excuse nonoccurrence to extent nonoccurrence “would cause disproportionate forfeiture”).

Regarding conditions precedent and conditions subsequent in an insurance policy, and both distinguished from exclusions, see *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 575-81, 789 N.W.2d 1, 9-13 (2010) (*D & S Realty I*) and *D & S Realty v. Markel Ins. Co.*, 284 Neb 1, 12, 816 N.W. 2d 1, 10-16 (2012) (appeal after remand of *D & S Realty I*). See also *Devese v. Transguard Ins. Co.*, 281 Neb. 733, 798 N.W.2d 614 (2011).

The difference between a condition and a promise (and the importance of the distinction) is discussed in *Harmon Cable Commc’ns v. Scope Cable Television, Inc.*, 237 Neb. 871, 881-84, 468 N.W.2d 350, 358-60 (1991), *appeal after remand*, 1993 WL 390494 (Neb. App. 1993).

On this subject of conditions, see generally Restatement (Second) of Contracts §§ 224-30 (1981).

See also the Authorities, below.

C. IMPLIED TERMS

Regarding implied terms, see NJI2d Civ. 15.40, Terms Imposed By Law. When the pleadings and the evidence support a claim of breach of a term imposed by law, the term-imposed-by-law allegedly breached will be stated in paragraph number 3 of part I(B) of this instruction; it will also be stated in NJI2d Civ. 15.40.

VIII. AMBIGUITY IN A CONTRACT AND QUESTIONS OF LAW VERSUS QUESTIONS OF FACT

A. AMBIGUITY

“In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.” Same quotation: *E.g.*, *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 116, 944 N.W.2d 297, — (2020); *Bierman v. Benjamin*, 305 Neb. 860, 865, 943 N.W.2d 269, — (2020); *Wintroub v. Nationstar Mortg. LLC*, 303 Neb. 15, 22, 927 N.W.2d 19, 25 (2019); *City of Sidney v. Municipal Energy Agency of Neb.*, 301 Neb. 147, 173, 917 N.W.2d 826, 843 (2018); *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 51, 917 N.W.2d 435, 450 (2018) (“Contract interpretation presents a question of law.”); *Facilities Cost Mgt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 652, 868 N.W.2d 67, 74 (2015); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 570, 805 N.W.2d 68, 82 (2011); *Fraternal Order of Police, Lodge No. 2 v. Cty. of Douglas*, 259 Neb. 822, 826, 612 N.W.2d 483, 486 (2000); *Callahan v. Washington*

Nat'l Ins. Co., 259 Neb. 145, 152, 608 N.W.2d 592, 598 (2000); *Daehnke v. Nebraska Dep't of Soc. Serv.*, 251 Neb. 298, 303, 557 N.W.2d 17, 20 (1996). *Accord, e.g.*, *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 383, 872 N.W.2d 765, 768 (2015); *Timberlake v. Douglas Cty.* 291 Neb. 387, 392, 865 N.W.2d 788, 793 (2015); *Gen. Drivers & Helpers Union, Local No. 554 v. Cty. of Douglas*, 291 Neb. 173, 178, 864 N.W.2d 661, 666 (2015); *Van Kleek v. Farmers Ins. Exch.*, 289 Neb. 730, 734, 857 N.W.2d 297, 301 (2014); *Am. Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 254, 842 N.W.2d 100, 104 (2014) ("An insurance policy's interpretation is a question of law . . .").

An unambiguous contract is not subject to interpretation or construction. *E.g.*, *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 959, 857 N.W.2d 808, 816 (2015); *Bedore*, 282 Neb. at 570, 805 N.W.2d at 82; *Keller v. Bones*, 260 Neb. 202, 208, 615 N.W.2d 883, 888 (2000); *Murphy v. City of Lincoln*, 245 Neb. 707, 711–12, 515 N.W.2d 413, 416 (1994) ("This may not be the bargain the city intended to strike, but it is bound by the agreement it made, not the agreement it thought or hoped it made.") (citing cases); *Plambeck v. Union Pac. R.R. Co.*, 244 Neb. 780, 783, 509 N.W.2d 17, 20 (1993); *Husen v. Husen*, 241 Neb. 10, 13, 487 N.W.2d 269, 271 (1992); *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 3 (1989); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 467, 428 N.W.2d 141, 150 (1988); *T.V. Transmission, Inc. v. City of Lincoln*, 220 Neb. 887, 890, 374 N.W.2d 49, 52 (1985).

A written instrument is open to construction only if it is ambiguous or, in a proper case, if there is fraud or mistake. *Pawnee Plastics, Inc. v. Am. Sav. Co.*, 210 Neb. 131, 133, 313 N.W.2d 262, 264 (1981). Regarding fraud in the inducement to contract, see *NJI2d Civ. 15.21*.

"A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms." Same quotation: *Nathan v. McDermott*, 306 Neb. 216, 229, 945 N.W.2d 92, 104 (2020); *Acklie*, 306 Neb. at 116, 944 N.W.2d at —; *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, — (2020); *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 30, 938 N.W.2d 319, — (2020); *City of Sidney*, 301 Neb. at, 174, 917 N.W.2d at 844; *Fredericks Peebles & Morgan v. Assam*, 300 Neb. 670, 685, 915 N.W.2d 770, 781 (2018); *Frohberg Elec. Co. v. Grossenburg Implement, Inc.*, 297 Neb. 356, 362, 900 N.W.2d 32, 38 (2017) (arbitration clause); *Facilities Cost Mgt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 652, 868 N.W.2d 67, 74 (2015); *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 319, 746 N.W.2d 672, 679 (2008); *Gary's Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 298, 702 N.W.2d 355, 366 (2005); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003) (citing a case); *Daehnke v. Nebraska Dep't of Soc. Serv.*, 251 Neb. 298, 304, 557 N.W.2d 17, 21 (1996) (citing cases).

"A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." Same quotation, *e.g.*, *State Farm Fire &*

Casualty Company v. TFG Enterprises, LLC, 308 Neb. 460, 467, 954 N.W.2d 899, 904 (2021); *Nathan*, 306 Neb. at 229, 945 N.W.2d at 104; *Acklie*, 306 Neb. at 116, 944 N.W.2d at —; *Bierman*, 305 Neb. at 865, 943 N.W.2d at —; *DH-1, LLC*, 305 Neb. at 30, 938 N.W.2d at —; *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 515, 925 N.W.2d 39, 44 (2019); *City of Sidney*, 301 Neb. at 174, 917 N.W.2d at 844; *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 440, 900 N.W.2d 32, 42 (2018); *Facilities Cost Mgt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 652, 868 N.W.2d 67, 74–75 (2015); *Kasel v. Union Pac. RR. Co.*, 291 Neb. 226, 232, 865 N.W.2d 734, 738 (2015); *Gen'l Drivers & Helpers Union v. Cty. of Douglas*, 291 Neb. 173, 178, 864 N.W.2d 661, 665–666 (2015); *Gibbons Ranches*, 289 Neb. at 955, 857 N.W.2d at 813; *Bedore*, 282 Neb. at 570, 805 N.W.2d at 82; *Lexington Ins. Co. v. Entrex Commc'n. Servs., Inc.*, 275 Neb. 702, 713, 749 N.W.2d 124, 132 (2008). *Accord, e.g.*, *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017); *In re Estate of Balvin*, 295 Neb. 346, 353, 888 N.W.2d 499, 505 (2016); *Ryder v. Ryder*, 290 Neb. 648, 654–55, 861 N.W.2d 449, 654 (2015); *Tierney v. Four H Land Co. Ltd. P'ship.*, 288 Neb. 586, 596, 852 N.W.2d 292, 300 (2014).

“A determination as to whether an ambiguity exists in a contract must be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.” Same quotation: *Nathan v. McDermott*, 306 Neb. 216, 229, 945 N.W.2d 92, 104 (2020); *DH-1, LLC*, 305 Neb. at 30, 938 N.W.2d at —. *Accord, e.g.*, *Acklie*, 306 Neb. at 116–17, 944 N.W.2d at —; *Benjamin v. Bierman*, 305 Neb. 879, 888, 943 N.W.2d 283, — (2020); *Bierman*, 305 Neb. at 865, 943 N.W.2d at —; *Meyer Natural Foods*, 302 Neb. at 515, 925 N.W.2d at 44–45; *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 441, 900 N.W.2d 32, 42 (2018); *Kasel*, 291 Neb. at 232, 865 N.W.2d at 738; *Gibbons Ranches*, 289 Neb. at 955–56, 857 N.W.2d at 814; *Bedore*, 282 Neb. at 570, 805 N.W.2d at 82; *Kluver v. Deaver*, 271 Neb. 595, 601, 714 N.W.2d 1, 6 (2006); *Big River Constr. Co. v. L & H Props., Inc.*, 268 Neb. 207, 212, 681 N.W.2d 751, 756 (2004); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 154, 663 N.W.2d 131, 135 (2003); *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 342, 647 N.W.2d 599, 604 (2002); *Tighe v. Combined Ins. Co. of Am.*, 261 Neb. 993, 999, 628 N.W.2d 670, 675 (2001); *Sack Brothers v. Tri-Valley Co-op.*, 260 Neb. 312, 317, 616 N.W.2d 786, 792 (2000); *Fraternal Order of Police, Lodge No. 2 v. Cty. of Douglas*, 259 Neb. 822, 827, 612 N.W.2d 483, 487 (2000); *Ruble v. Reich*, 259 Neb. 658, 664, 611 N.W.2d 844, 850 (2000); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 467, 428 N.W.2d 141, 150 (1988); *Bedrosky v. Hiner*, 230 Neb. 200, 206, 430 N.W.2d 535, 539 (1988).

“‘Complexity is not the same as ambiguity.’” *Great Plains Ins. Co. v. Kalhorn*, 203 Neb. 799, 803, 280 N.W.2d 642, 645 (1979) (emphasis omitted in *Great Plains*) (quoting *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 187, 188 N.W.2d 699, 704 (1971)).

“When the provisions of an alleged contract being sued upon are ‘so

cursory, indefinite, and conditional as to fail as a matter of law to establish an objective intent on the part of the parties to be bound thereby,' no factual issues exist and summary judgment is appropriate." *Western Security Bank v. United States Fid. & Guar. Co.*, 248 Neb. 679, 682, 539 N.W.2d 15, 17 (1995) (quoting *Viking Broad. Corp. v. Snell Publ'g Co.*, 243 Neb. 92, 97, 497 N.W.2d 383, 386 (1993)). *Accord* *Solar Motors v. First Nat'l Bank of Chadron*, 249 Neb. 758, 767, 545 N.W.2d 714, 721 (1996).

Regarding "rules of construction" for ambiguous contracts, see part X of this Comment, below.

Regarding ambiguity in a will, including patent and latent ambiguities, see NJI2d Civ. 16.01 Comment & Authorities, under the heading "Construction of a Will."

B. QUESTIONS OF LAW FOR THE COURT

The following have been held to be questions of law.

■ "The interpretation of a contract and whether the contract is ambiguous are question of law subject to independent review." Same quotation: *Nathan v. McDermott*, 306 Neb. 216, 229, 945 N.W.2d 92, 104 (2020); *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, — (2020); *Bierman v. Benjamin*, 305 Neb. 860, 863, 943 N.W.2d 269, — (2020); *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 29, 938 N.W.2d 319, — (2020). *Accord*, e.g., *Lassalle v. State*, 307 Neb. 221, 229, 948 N.W.2d 725, — (2020); *Wintroub v. Nationstar Mortg. LLC*, 303 Neb. 15, 22, 927 N.W.2d 19, 24 (2019) (subordination agreement); *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 514, 925 N.W.2d 39, 44 (2019); *Beverly Enters.—Neb.*, 300 Neb. 210, 218, 221, 912 N.W.2d 774, 785, 787 (2018) (arbitration agreement); *Frohberg Elec. Co. v. Grossenburg Implement, Inc.*, 297 Neb. 356, 360, 900 N.W.2d 32, 37 (2017) (arbitration clause); *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 421, 860 N.W.2d 391, 426 (2015) (arbitration agreement); *Gaver v. Schneider's O.K. Tire Co.*, 289 Neb. 491, 498, 856 N.W.2d 121, 127 (2014); *Beveridge v. Savage*, 285 Neb. 991, 992, 996, 830 N.W.2d 482, 484, 487 (2013) (lease); *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 748, 829 N.W.2d 676, 748 (2013) (insurance policy); *Fitzgerald v. Cmty. Redev. Corp.*, 283 Neb. 428, 442, 811 N.W.2d 178, 191 (2012); *Alsidez v. Am. Family Mut. Ins. Co.*, 282 Neb. 890, 894, 897, 807 N.W.2d 184, 188, 189 (2011) (insurance policy); *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 860, 809 N.W.2d 725, 739 (2011); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 568, 805 N.W.2d 68, 81 (2011); *Durand Assocs., Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 353, 183 N.W.2d 246, 249 (1971).

■ "Whether a contract is ambiguous is a matter of law. The meaning of an ambiguous contract is generally a question of fact." *Gary's Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 297, 702 N.W.2d 355, 365 (2005) (citation omitted). *Accord*, e.g., *Ray Anderson*,

Inc. v. Buck's, Inc., 300 Neb. 434, 440, 900 N.W.2d 32, 42 (2018); In re Estate of Balvin, 295 Neb. 346, 353, 888 N.W.2d 499, 505 (2016); *David Fiala, Ltd.*, 290 Neb. at 426, 860 N.W.2d at 426; *Gibbons Ranches*, 289 Neb. at 955, 857 N.W.2d at 813 (“[I]n interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.”); *Davenport Ltd. P’ship*, 279 Neb. at 621, 622, 780 N.W.2d at 419, 620; *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 4 (2006); *Wood v. Wood*, 266 Neb. 580, 588, 667 N.W.2d 235, 239 (2003); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 138, 655 N.W.2d 390, 397 (2003); *Malone v. Am. Bus. Info., Inc.*, 264 Neb. 127, 136, 647 N.W.2d 569, 576 (2002) (holding that the trial “court did not err in (1) instructing the jury that the plan was ambiguous as a matter of law and (2) allowing the jury to resolve the ambiguity from the evidence adduced at trial.” *Id.* at 137, 647 N.W.2d at 576.); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.* 262 Neb. 746, 753, 635 N.W.2d 112, 118 (2001); *Sack Brothers v. Tri-Valley Co-op.*, 260 Neb. 312, 317, 616 N.W.2d 786, 791 (2000); *Twin Towers Dev., Inc. v. Butternut Apts.*, 257 Neb. 511, 515, 599 N.W.2d 839, 843 (1999); *Dammann v. Litty*, 234 Neb. 664, 671, 452 N.W.2d 522, 527 (1990).

As already noted above, “‘Complexity is not the same as ambiguity.’” *Great Plains Ins. Co. v. Kalhorn*, 203 Neb. 799, 803, 280 N.W.2d 642, 645 (1979) (emphasis omitted in *Great Plains*) (quoting *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 187, 188 N.W.2d 699, 704 (1971)). See part VIII(A) of this Comment, above. And as also already noted at part VIII of this Comment, above, the sole fact that the parties suggest opposing interpretations does not mean that it is ambiguous.

“Implicit in the trial court’s conclusion that reasonable minds could reach only one conclusion is a finding that the contract is not ambiguous.” *First Nat’l Bank in Mitchell v. Kurtz*, 232 Neb. 254, 260, 440 N.W.2d 432, 436 (1989).

Regarding ambiguity in a will, see NJI2d Civ. 16.01 Comment & Authorities, under the heading “Construction of a Will.”

■ “The meaning of an unambiguous contract is a question of law.” Same quotation: *Twin Towers Dev., Inc. v. Butternut Apts.*, 257 Neb. 511, 515, 599 N.W.2d 839, 843 (1999); *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 141-42, 517 N.W.2d 113, 116 (1994) (citing cases). *Accord, e.g.*, *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 640, 950 N.W.2d 321, — (2020) (involving a shareholders agreement); *Ray Anderson, Inc.*, 300 Neb. at 440, 915 N.W.2d at 42; *David Fiala, Ltd.*, 290 Neb. at 421, 860 N.W.2d at 394 (“The meaning of a contract and whether a contract is ambiguous are questions of law.”); *Weber v. North Loup River Pub. Power and Irrig. Dist.*, 288 Neb. 959, 965, 854 N.W.2d 263, 270 (2014); *Braunger Foods v. Sears*, 286 Neb. 29, 34, 834 N.W.2d 779, 783-84 (2013); *Herman Bros., Inc. v. Great West Cas. Co.*, 255 Neb. 88, 94, 582 N.W.2d 328, 333 (1998); *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 723, 729, 566 N.W.2d 382, 383,

386 (1997); Schrempp and Salerno v. Gross, 247 Neb. 685, 690, 529 N.W.2d 764, 769 (1995); Lueder Constr. Co. v. Lincoln Elec. Sys., 228 Neb. 707, 711, 424 N.W.2d 126, 129 (1988).

■ Where evidence as to the terms of an “oral contract is not conflicting, the meaning of the contract presents a question of law.” Gerdes v. Klindt, 253 Neb. 260, 269, 570 N.W.2d 336, 343 (1997).

■ When the contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. SFI Ltd. Partnership 8 v. Carroll, 288 Neb. 698, 709, 851 N.W.2d 82, 91 (2014) (lease); Whitten v. Malcolm, 249 Neb. 48, 51, 541 N.W.2d 45, 48 (1995); Vlasin v. Len Johnson & Co., 235 Neb. 450, 451, 455 N.W.2d 772, 774 (1990); Nebraska Im-Pruv-All, Inc. v. Sass, 197 Neb. 261, 264, 247 N.W.2d 924, 926 (1976); Grantham v. Gen. Tel. Co., 191 Neb. 21, 23, 213 N.W.2d 439, 441 (1973).

■ Whether a contract violates public policy or is unconscionable is a question of law. *See* part II(A) of this Comment, above.

■ “Statutory interpretation presents a question of law . . .” J.S. v. Grand Island Pub. Schs., 297 Neb. 347, 351, 899 N.W.2d 893, 897 (2017). “The determination of whether a contract falls within the statute of frauds is a question of law.” *Linscott*, 288 Neb. 276, 284, 847 N.W.2d 283, 291 (2014). Regarding the statute of frauds, *see* part III of this Comment, above.

■ “What constitutes duress is a question of law, but existence of duress is a question of fact.” Lustgarten v. Jones, 220 Neb. 585, 591, 371 N.W.2d 668, 672 (1985). Regarding duress, *see* NJI2d Civ. 15.26, below.

■ Whether particular facts amount to modification is a question of law; whether such facts are proved is a question of fact. *See* NJI2d Civ. 15.28, below.

■ “The determination of whether goods or nongoods predominate a contract is generally a question of law.” RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC, 294 Neb. 326, 333, 886 N.W.2d 240, 249 (2016).

■ On a related matter—actions at law versus those in equity—, “When a dispute sounds in contract, the action is to be treated as one at law.” Weyh v. Gottsch, 303 Neb. 280, 294, 929 N.W.2d 40, 52 (2019). *Accord* Union Ins. Co. v. Bailey, 234 Neb. 257, 260, 450 N.W.2d 661, 664 (1990) (citing cases). *See also, e.g.,* City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 857, 809 N.W.2d 725, 737 (2011) (“A claim that the parties created an enforceable contract generally presents an action at law.”); Struve Enters. v. Travelers Ins. Co., 243 Neb. 516, 519, 500 N.W.2d 580, 583 (1993).

■ On the other hand, “An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he or she has the right to buy the property according to the terms and conditions of the option.” *Arnold v. Walz*, 306 Neb. 179, 188, 944 N.W.2d 747, — (2020). And, “A quiet title action sounds in equity.” *Id.* at 186, 944 N.W.2d at —. *Arnold* involved an option to purchase that the holder of the option did not exercise; hence, the action to quiet title. *See also* this Comment, at part X(C)(2), below.

■ On another related matter—plea agreements—, “When the facts are undisputed, the question of whether there has been a breach of a plea agreement is a question of law.” *State v. Smith*, 295 Neb. 957, 972, 892 N.W.2d 52, 63 (2017). *See Garza v. Idaho*, 139 S. Ct. 738, 741, 203 L. Ed. 2d 77 (2019) (“[A] plea agreement is essentially a contract . . .”); *United States v. Moore*, — Fed. Appx. —, —, 2020 WL 62485 (8th Cir. 2020) (“‘Plea agreements are contractual in nature, and should be interpreted according to general contract principles.’”); *Doe v. Nebraska*, 734 F. Supp. 2d 882, 934 (D. Neb. 2010); *State v. Peterson*, 280 Neb. 641, 649-50, 788 N.W.2d 560, 567-68 (2010) (involving not a plea agreement, but a cooperation agreement). *See also State v. Johnson*, 242 Neb. 924, 929, 497 N.W.2d 28, 32 (1993) (“[P]rinciples of contract law do not govern enforcement of a plea arrangement prior to the acceptance of the plea.”).

Regarding questions of law “an appellate court has an obligation to reach its conclusion independently of the determinations made by the court below.” *U.S. Pipeline v. Northern Nat. Gas Co.*, 303 Neb. 444, 463, 930 N.W.2d 460, 474 (2019) (regarding a bench trial). *Accord, e.g. Lassalle v. State*, 307 Neb. 221, 229, 948 N.W.2d 725, — (2020); *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 117, 944 N.W.2d 297, — (2020); *Meyer Natural Foods*, 302 Neb. at 514, 925 N.W.2d at 44; *Frohberg Elec., supra*; *Kasel v. Union Pac. RR. Co.*, 291 Neb. 226, 231, 865 N.W.2d 734, 738 (2015); *Gaver, supra*; *Braunger Foods, supra*; *Fitzgerald, supra*; *Alsidez, supra*; *Davenport Ltd. P’ship*, 279 Neb. at 621, 780 N.W.2d at 419; *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 227, 720 N.W.2d 886, 895 (2006); *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 4 (2006); *Johnson v. United States Fid. and Guar. Co.*, 269 Neb. 731, 748, 696 N.W.2d 431, 444 (2005); *Am. Family Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 438, 648 N.W.2d 769, 775 (2002) (interpreting an insurance contract); *Malone v. Am. Bus. Info., Inc.*, 264 Neb. 127, 136, 647 N.W.2d 569, 576 (2002) (discussing whether a contract is ambiguous); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 451, 455 N.W.2d 772, 774 (1990) (regarding the construction of a contract where neither the terms of the contract nor the facts and circumstances demonstrating the parties’ intent were disputed).

“When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.” Same quotation: *Wood v. Wood*, 266 Neb. 580, 584, 667 N.W.2d 235, 240 (2003); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003); *Ruble v. Reich*, 259 Neb. 658, 664, 611 N.W.2d 844, 850 (2000); *Kropp v. Grand Island*

Pub. Sch. Dist. No. 2, 246 Neb. 138, 142, 517 N.W.2d 113, 116 (1994). This point is discussed in detail and additional cases are cited later in this Comment, under the heading “Rules of Construction.”

Summary judgment is appropriate if a contract is so “ambiguous” that it fails as a matter of law to have meaning. This is discussed in part VII(A), above.

The resolution of an ambiguity in an insurance contract, and perhaps only an insurance contract, is a question of law for the trier of law. This is discussed immediately below, in part C of this part of this Comment.

For more, contrast this above discussion of questions of law with the discussion of questions of fact appearing immediately below in part VIII(C) of this Comment.

Regarding rules of construction, *see* part X of this Comment, below.

C. QUESTIONS OF FACT FOR THE JURY

1. IN GENERAL

In general, the determination of whether a contract exists is a question of fact. *Braunger Foods v. Sears*, 286 Neb. 29, 33, 837 N.W.2d 779, 782 (2013); *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., Co.*, 269 Neb. 692, 700, 695 N.W.2d 665, 672 (2005); *Viking Broad. Corp. v. Snell Publ'g Co.*, 243 Neb. 92, 95–97, 497 N.W.2d 383, 385–86 (1993) (this plaintiff, however, failed as matter of law to present facts sufficient to establish contract).

“The formation and terms of an implied contract are questions of fact, which an appellate court reviews for clear error.” *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 611, 901 N.W.2d 1, 16 (2017).

“If a contract is ambiguous, the meaning of the contract is a question of fact and a court may consider extrinsic evidence to determine the meaning of the contract.” *Plambeck v. Union Pac. R.R. Co.*, 244 Neb. 780, 783–84, 509 N.W.2d 17, 20–21 (1993). *Accord* *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 427, 860 N.W.2d 391, 427 (2015); *Gary's Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 298, 702 N.W.2d 355, 366 (2005) (“Whether a contract is ambiguous is a matter of law. The meaning of an ambiguous contract is generally a question of fact. . . . [W]hen a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.”) (citation omitted); *Dammann v. Litty*, 234 Neb. 664, 671, 452 N.W.2d 522, 527 (1990); *Lueder Constr. Co. v. Lincoln Elec. Sys.*, 228 Neb. 707, 710, 424 N.W.2d 126, 128 (1988); *Hensman v. Parsons*, 235 Neb. 872, 880, 458 N.W.2d 199, 205 (1990). *See* part VIII of this Comment, just

above, for more cases. The use of extrinsic evidence in the interpretation of a contract is also discussed at part X(C)(13), Extrinsic Evidence, of this Comment, below.

Regarding ambiguities in a will, see NJI2d Civ. 16.01, Comment & Authorities, under the heading “Construction of a Will.”

“The disputed terms of an oral agreement are questions of fact” *Weyh v. Gottsch*, 303 Neb. 280, 297, 929 N.W.2d 40, 53 (2019).

Where there is conflicting evidence regarding the interpretation of ambiguous or contradictory provisions of a written contract, the jury shall resolve said conflict. *David Fiala, Ltd.*, 290 Neb. at 427, 860 N.W.2d at 427; *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 48, 497 N.W.2d 657, 667–68 (1993) (having found as a matter of law that the contract was ambiguous, the court “erred in refusing to instruct the jury on the construction and interpretation of an ambiguous contract”); *Lueder Constr. Co. v. Lincoln Elec. Sys.*, 228 Neb. 707, 710, 424 N.W.2d 126, 128 (1988) (“[W]hen it is established a contract is ambiguous, the meaning of its terms is a matter of fact”); *Luschen Bldg. Ass’n v. Fleming Cos., Inc.*, 226 Neb. 840, 848, 415 N.W.2d 453, 458–59 (1987); *Olds v. Jamison*, 195 Neb. 388, 392, 238 N.W.2d 459, 462 (1976); *Knight Bros., Inc. v. State*, 189 Neb. 64, 76, 199 N.W.2d 720, 728 (1972); *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 67, 165 N.W.2d 562, 567 (1969). See also *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 142, 517 N.W.2d 113, 116 (1994).

“When a document is ambiguous, it is for the trier of fact to determine the intent of the parties from all the facts and circumstances, and such findings will be upheld on appeal unless they are clearly erroneous.” *TNT Cattle Co. v. Fife*, 304 Neb. 890, 919, 937 N.W.2d 811, 834 (2020). *Accord Hensman v. Parsons*, 235 Neb. 872, 880, 458 N.W.2d 199, 205 (1990).

“Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language. When a contract term is not defined in the contract and the parties dispute the intended meaning of the term, an expert witness may properly testify as to the expert’s interpretation of the contract language.” *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 15, 524 N.W.2d 804, 815 (1994) (citations omitted), *overruled on other grounds*, *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 587, 789 N.W.2d 1, 17 (2010). See also part X(C) of this Comment, below. See generally, NJI2d Civ. 1.42, Expert Testimony.

Questions of fact for the jury include: “reasonableness and good faith as to performance by the parties[,] . . . responsibility for delay and whether performance was prevented or delayed by an adverse party.” *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 508, 412 N.W.2d 453, 458 (1987). See also *Wurst v. Blue River Bank*, 235 Neb.

197, 204, 454 N.W.2d 665, 669 (1990); *Dammann v. Litty*, 234 Neb. 664, 671, 452 N.W.2d 522, 527 (1990).

In *Radecki v. Mut. of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998), the court noted the following: "We have stated that the question of whether there has been repudiation [of a contract] or whether repudiation was justified is a question of fact for the jury." *Id.* at 233, 583 N.W.2d at 327 (repudiation as a question of fact is discussed elsewhere in this Comment). In this case, however, the court continued, there were no facts in dispute: The defendant, an insurance company, denied benefits in good faith. The question of whether a good faith denial of benefits is a repudiation, is a question of law. It seems, then, that, on the one hand, if facts are alleged that would constitute repudiation, then whether these facts are proved or not is a question of fact. On the other hand, whether known, undisputed facts constitute repudiation is a question of law. The fact question is whether the facts exist. The question of law is whether the facts, when they do exist, constitute repudiation.

"When the issue is whether an acceptance of an offer was sufficient to create a contract, the issue is one of fact and summary judgment is not proper." *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 768, 463 N.W.2d 817, 821 (1990).

If the interpretation of the contract depends upon extrinsic facts that are in dispute, resolution of those facts must be submitted to the jury. *Able Elec. Co. v. Vacanti & Randazzo Constr. Co.*, 212 Neb. 619, 324 N.W.2d 667, 669 (1982).

Where the evidence relating to the meaning of technical terms used in a contract is conflicting, the meaning of such terms is a jury question. *State v. Commercial Cas. Ins. Co.*, 125 Neb. 43, 49, 248 N.W. 807, 810 (1933).

Whether a specific delivery date was agreed upon or whether delivery was effected within a reasonable time is ordinarily a question of fact, not a question of law. *Gustav Thieszen Irrig. Co. v. Meinberg*, 202 Neb. 666, 670-71, 276 N.W.2d 664, 667 (1979); *Kiser v. Denney*, 99 Neb. 3, 5, 154 N.W. 835, 835 (1915) (when no time is fixed, what time is reasonable is a jury question). On this issue of time, see also *NJI2d Civ.* 15.41.

Regarding the statute of limitations and questions of fact for the jury, see above, in this Comment, under the subheading "Statute of Limitations."

For more, contrast this above discussion of questions of fact with the discussion of questions of law appearing immediately above in part VIII(B) of this Comment.

2. AMBIGUITY IN AN INSURANCE CONTRACT

"A court interpreting an insurance policy must first determine, as a

matter of law, whether the contract is ambiguous.” *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017) (“There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous.”). *Kaiser v. Allstate Indemnity Company*, 307 Neb. 562, 570, 949 N.W.2d 787, — (2020).

The following general rule regarding ambiguity in contracts applies here: “[T]he language of an insurance policy should be read to avoid ambiguities, if possible” Same quotation: *State Farm Fire & Casualty Company v. TFG Enterprises, LLC*, 308 Neb. 460, 467, 954 N.W.2d 899, — (2021); *Hillabrand v. American Family Mut. Ins. Co.*, 271 Neb. 585, 593, 713 N.W.2d 494, 501 (2006).

As stated above, the Court has consistently stated the general rule of contract interpretation that once a court determines that an ambiguity exists in the meaning of a contract, the resolution of that ambiguity is a question of fact, to be resolved by the trier of fact, and the court has consistently stated this to be so.

Just as consistently, the court has stated a different rule regarding the construction of an ambiguous insurance contract: “The construction of an insurance contract is purely a question of law.” *Union Ins. Co. v. Land & Sky, Inc.*, 247 Neb. 696, 699, 529 N.W.2d 773, 775 (1995). *Accord, e.g., Kaiser*, 307 Neb. at 568, 949 N.W.2d at —; *Merrick v. Fischer*, 305 Neb. 230, 237, 939 N.W.2d 795, — (2020); *Gage Cty. v. Employers Mut. Cas. Co.*, 304 Neb. 926, 935, 937 N.W.2d 863, 870 (2020) (“The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.”); *Drake-Williams Steel, Inc. v. Continental Casualty Company*, 294 Neb. 386, 392, 883 N.W.2d 60, 64 (2016) (finding “as a matter of law that there was no ‘property damage’”); *Dutton-Lainson Co. v. Cont’ Ins. Co.*, 279 Neb. 365, 367, 385, 778 N.W.2d 433, 438, 449 (2010); *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 551, 772 N.W.2d 88, 92 (2009); *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 190, 738 N.W.2d 840, 844 (2007) (interpreting “use” of a motor vehicle); *Peterson v. Ohio Cas. Group*, 272 Neb. 700, 707-08, 724 N.W.2d 765, 772-73 (2006); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 819, 716 N.W.2d 87, 96 (2006) (interpreting “sudden”); *Poulton v. State Farm Fire and Cas. Cos.*, 267 Neb. 569, 572, 575, 675 N.W.2d 665, 669, 671 (2004); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 153, 663 N.W.2d 131, 134 (2003); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 61, 492 N.W.2d 879, 882 (1992). *See also* *Miller v. Steichen*, 268 Neb. 328, 336, 682 N.W.2d 702, 709 (2004) (“[W]hen the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.”).

This means, of course, that the construction of an ambiguous insurance contract is to be decided by the trier of law and reviewed de novo, that is, “an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.” *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 147, 548 N.W.2d

322, 323 (1996). *Accord*, e.g., most of the cases cited in the previous paragraph, and, for their uniqueness, particularly *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 719, 658 N.W.2d 711, 715 (2003); *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 723, 566 N.W.2d 382, 383 (1997); *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 599, 567 N.W.2d 548, 551 (1997). *See also*, the discussion at part X(C)(2) of this Comment, below.

Simply because multiple provisions in an insurance policy individually exclude coverage for a single peril does not mean that those provisions are necessarily ambiguous. Instead, a well-written insurance policy will likely have terms that overlap, which might support the denial of coverage on several grounds in an appropriate case. Whether those terms are individually ambiguous will depend on the susceptibility of their language to multiple reasonable meanings, not on whether the terms overlap with each other.

Kaiser, 307 Neb. at 572 949 N.W.2d at — (footnotes omitted).

This difference between the general rule and the rule regarding construction of insurance contracts can be explained as follows: *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983) is the earliest Nebraska case stating that the resolution of ambiguities in insurance policies is a question of law. For this proposition, *Denis* cites a Minnesota case, *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32 (Minn. 1979). In *Columbia Heights Motors*, however, the Minnesota Supreme Court did not state a general rule that the construction of an ambiguous insurance contract is a question of law. What the Court did is this: (1) It found that there was an ambiguity in the insurance contract in that case. (2) It found that there were two possible interpretations, one favoring the company and one favoring the insured. (3) And it applied “[t]he general rule . . . that any reasonable doubt as to the meaning of the language of an insurance policy must be resolved in favor of the insured,” *Columbia Heights Motors*, 275 N.W.2d at 36. As a result, then, the court was faced with only two possible interpretations of the contract; one favored the insured and one the insurance company; and it adopted the interpretation favoring the insured. (There is one Nebraska insurance-contract case that predates *Denis*, which states the following: “The construction of a written contract is ordinarily a question of law for the court.” *Cordes v. The Prudential Ins. Co. of Am.*, 181 Neb. 794, 798, 150 N.W.2d 905, 907 (1967). In *Cordes*, however, there was no ambiguity in the contract in question. *Id.* In context, the court was stating the general rule that the construction of an unambiguous written contract is a question of law.)

The *Columbia Heights Motors* case, *supra*, illustrates how we get the rule that the resolution of an ambiguity in an insurance contract is a question of law. It is a shortcut for the following line of reasoning: In the normal case involving the construction of an ambiguity in an insurance contract, there are only two constructions offered—one by the

company and one by the insured. Here is the chronology: (1) The court finds, as a matter of law, that there is an ambiguity. (2) The court finds that there are only two possible constructions of the ambiguous part of the contract, one of which favors the insured and the other of which favors the insurance company. (3) The court applies the rule of law that an ambiguity in the interpretation of a contract is to be resolved against the party who drafted the contract. (4) Therefore, the rule of law that the contract must be interpreted against the party that wrote the contract tells us that the insured's interpretation *must* prevail and; there is nothing for the trier of fact to resolve. (The discussion of the general rule that an ambiguous contract is construed against the party who drafted it is in this Comment, under the heading "Rules of Construction.")

Further, the statement that the resolution of ambiguity in insurance policies is a question of law and the rule that contracts—here insurance policies—are construed against the drafter—here the insurance company—are often stated back-to-back, as for example, here:

"[W]here a clause in an insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). Our rules of construction require that in the case of such ambiguities, the construction favorable to the insured prevails so as to afford coverage. *Denis, supra*. This rule has evolved from recognition of the fact that the insurer as drafter of the policy is responsible for the language creating the ambiguity. See *Denis, supra*."

Polenz v. Farm Bureau Ins. Co., 227 Neb. 703, 708, 419 N.W.2d 677, 681 (1988). "[W]hen an insurance contract is ambiguous, we will construe the policy in favor of the insured." *State Farm Fire & Casualty Company v. TFG Enterprises, LLC*, 308 Neb. 460, 467, 954 N.W.2d 899, — (2021). Cases in accord are cited below, under the heading Rules of Construction.

Beyond the situations just described, a contract is to be construed against the party who prepared it. (See the discussion of this point below, in this Comment, under the heading "Rules of Construction.") If there are more than two possible interpretations, all of the interpretations can be lined up on a scale, with the interpretation most favorable to the drafter on one end and the interpretation most favorable to the other party on the other end. The interpretation at the one end is the construction that is truly against the party who prepared it, and it is the construction that truly favors the other party. The party who prepared the contract bears the full risk of the ambiguity. If this is the case, then the general rule may be stated more broadly as follows: The resolution of an ambiguity in a contract is a question of law whenever

the ambiguous contract was drafted by one party. In such a case, the construction most favorable to the non-drafting party is the one to be adopted.

Regarding the construction of insurance contracts, see also part X(C)(2) of this Comment, "Some Rules of Construction."

3. AMBIGUITY IN A WILL

Regarding ambiguity in a will, see NJI2d Civ. 16.01 Comment & Authorities, under the heading "Construction of a Will."

IX. GENERAL RULES REGARDING THE FORMATION OF A CONTRACT

"A contract may be express, implied, written, or oral." *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 612, 901 N.W.2d 1, 17 (2017). "The formation and terms of an implied contract are questions of fact, which an appellate court reviews for clear error." *Armstrong*, 297 Neb. at 610, 901 N.W.2d at 15.

A. OFFER AND ACCEPTANCE

"To create a contract, there must be both an offer and acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties." Same quotation: *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 118, 944 N.W.2d 297, — (2020); *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 953, 857 N.W.2d 808, 812 (2015); *Linscott v. Shasteen*, 288 Neb. 276, 281, 847 N.W.2d 283, 289 (2014); *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 861, 809 N.W.2d 725, 740 (2011); *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., Co.*, 269 Neb. 692, 700, 695 N.W.2d 665, 672 (2005); *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 751, 626 N.W.2d 472, 498 (2001); *Tilt-Up Concrete v. Star City/Fed.*, 255 Neb. 138, 147, 582 N.W.2d 604, 610 (1998); *Cimino v. FirstTier Bank*, 247 Neb. 797, 807, 530 N.W.2d 606, 613 (1995); *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993). *Accord Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 140, 953 N.W.2d 16, — (2021) ("The person seeking enforcement has the burden of establishing the existence of a valid, legally enforceable agreement, consisting of an offer, acceptance, and some meeting of the minds").

"[A] fundamental and indispensable basis of any enforceable [contract] is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract." *Peters v. Halligan*, 182 Neb. 51, 55, 152 N.W.2d 103, 106 (1967). *Accord Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb. 928, 942, 947 N.W.2d 856, — (2020); *Acklie*, 306 Neb. at 118, 944 N.W.2d at —; *Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991) ("Thus, for a cause of action based on a breach of express contract, there must be an

unconditional and absolute acceptance of a definite offer constituting an agreement supported by sufficient and valid consideration.”); *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 66, 165 N.W.2d 562, 566 (1969).

“Offer” is the subject of NJI2d Civ. 15.03. “Acceptance” is the subject of NJI2d Civ. 15.04 and 15.05.

Regarding the need for offer, acceptance, and meeting of the minds on all terms and conditions, see also NJI2d Civ. 15.02.

B. MEETING OF THE MINDS

“A fundamental and indispensable basis of any enforceable agreement is that there must be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract.” *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 954, 857 N.W.2d 808, 813 (2015);

“It is axiomatic that a [written] contract is not binding unless it is signed or there is at least some manifestation of mutual assent to the terms of the unsigned writing.” *State Farm Mut. Auto. Ins. Co. v. Cheeper’s Rent-A-Car*, 259 Neb. 1003, 1010, 614 N.W.2d 302, 308 (2000).

“A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties’ conduct and the surrounding circumstances.” Same quotation: *Linscott v. Shasteen*, 288 Neb. 276, 281, 847 N.W.2d 283, 289 (2014); *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 861, 809 N.W.2d 725, 740 (2011).

[A] contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangements. [Citations omitted.] When an agreement not covered by the Uniform Commercial Code stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. [W]e [have] said:

To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. [Citations omitted.]

Further, in order that a binding contract may result from an offer and acceptance it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement.

Zimmerman v. Martindale, 221 Neb. 344, 347–48, 377 N.W.2d 94, 96–97 (1985) (quoting *Rybin Inv. Co. v. Wade*, 210 Neb. 707, 709–10, 316 N.W.2d 744, 746 (1982)). *Accord* *Gibbons*, 289 Neb. at 953–54, 857

N.W.2d at 812 (first paragraph of above lengthy quotation); *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 751–52, 626 N.W.2d 472, 498–99 (2001); *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 134–35, 511 N.W.2d 113, 116 (1994); *Professional Recruiters, Inc. v. Oliver*, 235 Neb. 508, 512, 456 N.W.2d 103, 106 (1990). *See also* *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 944, 947 N.W 2d 856, — (2020) (“Where the promisor retains an unlimited right to decide later the nature or extent of his or her performance, the promise of too indefinite for legal enforcement”).

On the other hand,

[i]n limited circumstances, the parties’ failure to specify an essential term does not prevent the formation of a contract. The Restatement (Second) of Contracts provides that “the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon.” The parties’ reference to an extrinsic standard can render an essential term reasonably certain. Sometimes, a court can also ascertain the meaning of a party’s promise by referring to the parties’ course of dealing with each other, or a general reasonableness standard.

But unless the parties have stated otherwise in an express agreement, extrinsic standards can only provide a basis for understanding a contract. The circumstances must still show that the parties manifested an intent to be bound by a contract. And their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach has occurred or provide a remedy. “The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound[.]”

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. at 861-62, 809 N.W.2d at 740-41 (footnotes omitted; brackets in *City of Scottsbluff*). *See also* *Valley Boys*, 306 Neb at 944, 947 N.W 2d at —.

An agreement to negotiate a contract cannot constitute the contract. *Schlake v. Jacobsen*, 246 Neb. 921, 930, 524 N.W.2d 316, 322 (1994) (no contract if “parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement”). “An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.” *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 752, 626 N.W.2d 472, 499 (2001). “An agreement to agree is not enforceable in Nebraska.” *Id. Accord* *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., Co.*, 269 Neb. 692, 700, 695 N.W.2d 665, 672.

"[A] contract is not indefinite if the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested." *Gerhold Concrete*, 269 Neb. at 700, 695 N.W.2d at 672.

"A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and surrounding circumstances." *Gerhold Concrete*, 269 Neb. at 700, 695 N.W.2d at 672. "Mutual assent to a contract is determined by the objective manifestations of intent by the parties, not by their subjective statements of intent." *Tilt-Up Concrete v. Star City/Fed.*, 255 Neb. 138, 147, 582 N.W.2d 604, 610 (1998).

"To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract." *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993).

Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only [S]uch powers do not render a contract illusory so long as the party reserving the power to terminate is irrevocably bound for any appreciable period of time or has materially changed any of his legal relations or otherwise rendered some performance capable of operating as consideration. Even a slight restriction on the exercise of the right of termination, such as the requirement that advance notice be given, is sufficient to prevent a unilateral right of termination from being regarded as illusory in nature.

Johnson Lakes Dev., 254 Neb. at 434-35, 576 N.W.2d at 817 (citations omitted) (requirement that lessor give 6 months advance written notice on intent to terminate lease is enough to establish requisite mutuality). *Accord Valley Boys*, 306 Neb at 942, 947 N.W. 2d at — (same first sentence; "Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable agreement."); *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 119, 944 N.W.2d 297, — (2020) (same first sentence; *accord* second sentence;); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 506, 412 N.W.2d 453, 457 (1987); *De Los Santos v. Great W. Sugar Co.*, 217 Neb. 282, 285, 348 N.W.2d 842, 845 (1984).

"An illusory promise is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely

discretionary on the part of the promisor. An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise. Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable agreement." *Acklie*, 306 Neb. at 119-20, 944 N.W.2d 297, 306 (2020) (paragraph break and footnote omitted). *Accord* *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 942, 947 N.W 2d 856, — (2020) (same second sentence).

C. IMPLIED CONTRACTS

The parenthetical in the definition instruction NJI2d Civ. 15.02 that "[t]he agreement may be written, oral, inferred from conduct, or found in some combination of those ways," applies to a case involving an implied contract. It is in brackets to alert the reader that care must be taken when using this part of the instruction. "An action in contract inevitably rests upon a promise or set of promises. A promise may be stated in words, either oral or written, or *may be inferred wholly or partly from conduct.*" *Clark & Enersen, Hamersky, Schlaebitz, Burroughs & Thomsen, Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 813, 235 N.W.2d 870, 872 (1975) (emphasis added). *Accord* *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 768, 463 N.W.2d 817, 821 (1990) ("A contract . . . can be shown by circumstantial evidence."); *Restatement (Second) of Contracts* § 4 (1981).

The term "implied contract" refers to that class of obligations that arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract. If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 856-57, 809 N.W.2d 725, 737 (2011) (footnote omitted). *Accord, e.g.*, *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 613, 901 N.W.2d 1, 17 (2017); *Donut Holdings, Inc. v. Risberg*, 294 Neb. 861, 866, 885 N.W.2d 670, 674 (2016) (involving a franchise that continued to operate after the franchise agreement expired); *Linscott v. Shasteen*, 288 Neb. 276, 281, 847 N.W.2d 283, 289 (2014); *Turner v. Fehrs Neb. Tractor & Equip. Co.*, 259 Neb. 313, 321, 609 N.W.2d 652, 659 (2000); *Kaiser v. Millard Lumber*, 255 Neb. 943, 951, 587 N.W.2d 875, 882 (1999) (second sentence of above quotation).

In *Woods v. Woods*, the court further explained:

A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality, or express utterance from the parties themselves as to all of the details of the proposed agreement. It may be established by

the parties assenting to the proposal drawn, or [by the parties assenting to an] utter[ance] by a third party . . . it may be implied from conduct and circumstances and may be shown by circumstantial evidence and the admissions of the parties sought to be charged.

Woods v. Woods, 177 Neb. 542, 544, 129 N.W.2d 519, 521 (1964). *Accord*, e.g., *Donut Holdings*, 294 Neb. at 867, 885 N.W.2d at 674; *Linscott*, 288 Neb. at 281, 847 N.W.2d at 289; *Tilt-Up Concrete*, 255 Neb. at 147, 582 N.W.2d at 610; *Hoeft v. Five Points Bank*, 248 Neb. 772, 779-80, 539 N.W.2d 637, 643-44 (1995) (party seeking to enforce contract has burden to show a definite offer and unconditional acceptance with nothing left open for future arrangement, and to show meeting of the minds; acceptance may be shown by words, conduct or acquiescence indicating agreement; meeting of the minds may be formally expressed or implied from conduct and surrounding circumstances) (quoting *Lindsay Ins. Agency*, below); *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993); (“Likewise, the acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement.”). *See also* *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 95, 465 N.W.2d 144, 148 (1991) (without evidence of mutual intent, there can be no implied contract); *Alward v. United Mineral Prods. Co.*, 197 Neb. 658, 661, 250 N.W.2d 623, 625 (1977) (without mutual intent, there can be no implied contract); *Citizens’ State Bank v. State Bank of Oelrichs*, 111 Neb. 571, 576-77, 197 N.W. 607, 608 (1924).

“The determination of the parties’ intent to make a contract is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances surrounding the transaction.” *Linscott*, 288 Neb. at 281-82, 847 N.W.2d at 289-90.

“Where an implied contract exists, its terms may be shown by the surrounding facts and circumstances giving rise to the contract, the conduct of the parties when performing under the contract, or a general reasonableness standard.” *Armstrong*, 297 Neb. at 614, 901 N.W.2d at 17 (2017).

“[P]aternal performance can remove uncertainty in the terms of a contract and establish that an enforceable contract has been formed. In fact. . . the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.” *Linscott*, 288 Neb. at 283, 847 N.W.2d at 289.

“If the parties’ conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.” *Linscott*, 288 Neb. at 282, 847 N.W.2d at 290.

On the other hand, “[i]t is the universal rule that there can be no

implied contract where there is an express agreement between the parties relative to the same subject matter.’ “ *Ryan v. Nelson*, 177 Neb. 130, 134, 128 N.W.2d 592, 595 (1964) (quoting *Acton v. Schoenauer*, 121 Neb. 62, 63, 236 N.W. 140, 141 (1931)). *Accord* *Associated Wrecking and Salvage Co. v. Wiekhorst Bros.*, 228 Neb. 764, 769, 424 N.W.2d 343, 348 (1988). “[T]here cannot be an express and an implied contract for the same thing existing at the same time.” *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 918, 531 N.W.2d 523, 530 (1995). “[On yet another hand,] an implied contract on a point not covered by an express contract is not superseded by the express contract, and if each arise out of the same transaction, they may be pleaded and tried together.” *Associated Wrecking and Salvage Co.*, 228 Neb. at 772, 424 N.W.2d at 350. Regarding implied contracts, see further NJI2d Civ. 15.02, Comment.

“The formation and terms of an implied contract are questions of fact, which an appellate court reviews for clear error.” *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 611, 614, 901 N.W.2d 1, 16, 17 (2017).

“[T]he court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in writing.” *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 260, 376 N.W.2d 312, 317 (1985).

The definition instruction found at NJI2d Civ. 15.02 instructs the jury on the possibility of an implied contract. When the implied contract part of that instruction is given, it may have to be tailored to the facts of the particular case.

Also, in a contract action, an action for contribution is, in effect, an action at law upon an implied contract. Regarding contribution in a contract action, see NJI2d Civ. 2.05, Comment & Authorities.

D. “QUASI CONTRACTS” AND THE DOCTRINE OF UNJUST ENRICHMENT

Implied contracts are not to be confused with quasi contracts.

A quasi-contract is not a contract. . . . Quasi-contract claims are restitution claims to prevent unjust enrichment. Quasi-contractual obligations do not arise from agreement. The law imposes them when justice and equity require the defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff’s expense. The defendant’s liability arises under the law of restitution, not contract.

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 857, 809 N.W.2d 725, 738 (2011) (footnotes omitted). *Accord* *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722, 729, 915 N.W.2d 786, 793 (2018). “Quasi contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. Quasi contracts are obligations created by law for reasons

of justice.” *Clark & Enersen, Hamersky, Schlaebitz, Burroughs & Thomsen, Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 813, 235 N.W.2d 870 872 (1975). “A quasi contract . . . usually has its origin in the principle that a person shall not be allowed to [be] enrich[ed] . . . unjustly at the expense of another.” *Bush v. Kramer*, 185 Neb. 1, 3, 173 N.W.2d 367, 369 (1969). *Accord Professional Recruiters, Inc. v. Oliver*, 235 Neb. 508, 515, 456 N.W.2d 103, 107 (1990). For example, “where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value.” *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 69, 416 N.W.2d 216, 219 (1987).

“[A] quasi-contract claim for restitution is an action at law.” *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 858, 809 N.W.2d at 738. *Accord DH-1, LLC v. City of Falls City*, 305 Neb. 23, 32, 938 N.W.2d 319, — (2020); *Bloedorn*, 300 Neb. at 726–27, 915 N.W.2d at 791–92; *Kalkowski v. Nebraska Nat’l Trails Museum Found., Inc.*, 290 Neb. 798, 803, 862 N.W.2d 294, 300 (2015) (tried to court, without a jury; not set aside unless clearly wrong; appellate court reviews the evidence in the light most favorable to the prevailing party; questions of law for appellate court, “independent of determinations reached by the lower court; *id.* at 803–04, 862 N.W.2d at 300”).

“A claim that a court should imply a promise or obligation to prevent unjust enrichment goes by a number of names—‘quasi contract,’ ‘implied-in-law contract,’ or ‘quantum meruit.’” Same quotation: *DH-1, LLC*, 305 Neb. at 30, 938 N.W.2d at —; *Bloedorn*, 300 Neb. at 728, 915 N.W.2d at 792.

“The doctrine of quasi-contracts has been supplanted in modern times by the doctrines of “unjust enrichment” and “restitution,” but, in essence, is the same.’ *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 833, 326 N.W.2d 182, 184 (1982).” *Professional Recruiters, Inc. v. Oliver*, 235 Neb. 508, 511, 456 N.W.2d 103, 105 (1990) (a litigant may alternatively plead both express contract and quasi-contract, *id.* at 514, 456 N.W.2d at 107, but a litigant who only pleads express contract, may not, over objection at trial or on appeal, rely on quasi-contract, *id.* at 512, 456 N.W.2d at 106).

“[U]njust enrichment [is] based not on the terms of a contract, but, instead, on circumstances that demand judicial action to remedy an injustice or inequality. *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 153, 953 N.W.2d 16, — (2021).

“[A]n express contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.” *DH-1, LLC*, 305 Neb. at 33, 938 N.W.2d at —. “Though contract claims supersede unjust

enrichment or quasi-contract claims, a plaintiff is permitted to allege both. We have said that when a plaintiff does so, a court should address the contract claim first.” *DH-1, LLC*, 305 Neb. at 33, 938 N.W.2d at ____.

The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties. The doctrine does not operate to rescue a party from the consequences of a bad bargain. In other words, the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract.

Washa v. Miller, 249 Neb. 941, 950, 546 N.W.2d 813, 818–19 (1996) (citations omitted). *Accord Bloedorn*, 300 Neb. at 729–30, 915 N.W.2d at 793.

Regarding unjust enrichment, *see also, e.g., Bloedorn*, 300 Neb. at 731, 915 N.W.2d at 794 (“[T]he existence of a construction lien does not preclude an unjust enrichment or a quasi-contract recovery for work or materials covered by the lien.”); *Kalkowski v. Nebraska Nat’l Trails Museum Found., Inc.*, 290 Neb. 798, 803–07, 862 N.W.2d 294, 301–02 (2015) (discussing when restitution is available under a theory of unjust enrichment); *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 866, 809 N.W.2d 725, 743 (2011) (“To recover under a theory of unjust enrichment, the plaintiff must allege facts that the law of restitution would recognize as unjust enrichment.”); *Kanne v. VISA U.S.A.*, 272 Neb. 489, 501–02, 723 N.W.2d 293, 302 (2006) (suit by credit card users alleging that VISA and MasterCard were unjustly enriched by inflated prices caused by their anticompetitive practices); *Home Pride Foods v. Johnson*, 262 Neb. 701, 710–11, 634 N.W.2d 774, 782–83 (2001) (we do not decide whether a plaintiff may recover damages for both lost profits and unjust enrichment; a majority of courts hold that plaintiff may only recover one or the other).

Dick v. Koski Professional Group addresses equitable clawback.

Our appellate courts have not otherwise addressed the concept of equitable clawback. Equitable clawback is a restitutionary remedy based on principles of unjust enrichment and the faithless servant doctrine. The doctrine establishes a mandate that an agent who engages in activities that breach the agent’s fiduciary duties to the principal is not entitled to a must forfeit any compensation for services rendered during the period of the breach.

Dick v. Koski Professional Group, P.C., 307 Neb. 599, 675, 950 N.W.2d 321, ____ (2020).

“[W]hen services are furnished to a party and knowingly accepted by that party, the law implies a promise to pay the reasonable value of the services rendered.” *Cty. of York v. Johnson*, 230 Neb. 403, 414, 432 N.W.2d 215, 221 (1988).

E. A SIGNATORY WHO HAS NOT READ THE DOCUMENT

"[O]ne who signs a written agreement is bound by its terms whether or not she has read the document." *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 827, 496 N.W.2d 916, 922 (1993). *Accord* *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 462, 571 N.W.2d 64, 68 (1997) (party is charged with knowledge of contents of writing upon signing it; party cannot avoid contract just because party failed to read all of it). On this point, see further *NJI2d Civ. 15.22*, Comment. "As a general rule, every person of mature age able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof." *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 706, 716 N.W.2d 749, 763 (2006), *partially overruled by* *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 927, 791 N.W.2d 317, 334 (2010) (overruling *Kramer* "only to the extent that [it] can be read as precluding a plaintiff from showing that a defendant fraudulently concealed a material fact with the intent that the plaintiff refrain from action in response").

F. AN AGREEMENT SIGNED BY ONE PARTY ONLY

When one party to one side of a contract signs and delivers the contract but other parties to that side of the contract do not, then the party who did sign and deliver is bound thereby. This is so unless there is a showing "of an *intention* not to be bound thereby until [the contract is] signed by others." *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 702, 538 N.W.2d 756, 759 (1995) (emphasis in original). "[T]he question as to whether or not appellee is bound by his signature must be determined by what the parties understood, intended, and agreed upon at the time the contract was executed." *Id.* at 703, 538 N.W.2d at 759.

G. CONTRACTUAL RIGHTS CREATED BY STATUTE

"Although a statute can be the source of a contractual right, a contract will be found to exist only if the statutory language 'evinces' a clear and unmistakable indication that the legislature intends to bind itself contractually.' The general rule is that rights conferred by statute are presumed not to be contractual." *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 595, 831 N.W.2d 23, 35-36 (2013) (footnotes citing *Salt Co. v. East Saginaw*, 80 U.S. 373 (1871) omitted).

H. RATIFICATION

Ratification—"the acceptance of a previously unauthorized contract," *Christiansen v. Cty. of Douglas*, 288 Neb. 564, 582-83, 849 N.W.2d 493, 582-83 (2014)—is discussed at *NJI2d Civ. 608*.

I. CROSS REFERENCES

Regarding terms imposed by law and statutes in existence at the time of the execution of the contract, see *NJI2d Civ. 15.40*, Comment.

Regarding contracts covered by the Uniform Commercial Code, see Neb. U.C.C. §§ 2-204(3), 2A-204(3) (Reissue 2001).

Regarding a contract for wills, see NJI2d Civ. 16.01, Comment.

Regarding unsolicited goods or merchandise received through the mail, see Neb. Rev. Stat. § 69-2201 (Reissue 2009), which is quoted in the Comment to NJI2d Civ. 15.05. Regarding home solicitation sales, see Neb. Rev. Stat. § 69-1601, *et seq.* (Reissue 2009). There is also federal regulation regarding these topics. For example, the Reporter's Note to Restatement (Second) of Contracts § 5 (1981) cites "16 C.F.R. § 429.1 (1974) (giving buyers in door-to-door transactions three days to rescind the contract)."

X. RULES OF CONSTRUCTION

A. NO PATTERN INSTRUCTION

No pattern instructions have been prepared on these rules of construction.

Instruction on interpretation of contract should not be given

[u]nless the question of interpretation is properly one for the jury, that is, there is an ambiguity as to what the parties may have meant and reasonable persons might reasonably differ as to how the ambiguity should be resolved. Also, the jury's sole function is to resolve the ambiguity as a question of fact. It is the court's function to determine what legal significance should be given the various possible reasonable meanings from which the jury might determine the correct one. Consequently, the court should inform the jury in other instructions what they are to do if they find that the parties meant one interpretation as opposed to another, and so forth

3 Corbin, Contracts §§ 534 and 554 (1960). Colo. Jury Inst. 2d § 30:11 Notes on Use (1980) (now appearing in somewhat different form at 2 Colo. Jury Inst. 4th, Civ., ch. 30 C Introductory Note (2009)). *See also id.* at § 30:13.

Nebraska's general rule that whether a contract is ambiguous is a question of law and the meaning of an ambiguous contract is a question of fact is discussed further in part VIII (B) and (C)(1) of this Comment, above. *See also*, part X(B) of this Comment, immediately below. Nebraska's specific rule that both whether there is an ambiguity in an insurance contract and the meaning of an ambiguous contract are questions of law is discussed above, in part VIII(C)(2) of this Comment, above.

B. THE CONSTRUCTION OF A CONTRACT IS A QUESTION OF LAW

The construction of a contract is a question of law. *E.g.*, *Kaiser v.*

Allstate Indemnity Company, 307 Neb. 562, 568, 949 N.W.2d 787, — (2020). Valley Boys, Inc. v. Am. Fam. Ins. Co., 306 Neb. 928, 937, 947 N.W.2d 856, — (2020); Acklie v. Greater Omaha Packing Co., 306 Neb. 108, 115, 944 N.W.2d 297, — (2020); Mays v. Midnite Dreams, 300 Neb. 485, 491, 915 N.W.2d 71, 80 (2018). Appellate review is de novo. *Id.* That is, “The meaning of a contract and whether a contract is ambiguous are questions of law.” Same quotation: Frohberg Elec. Co. v. Grossenburg Implement, Inc., 297 Neb. 356, 360, 900 N.W.2d 32, 37 (2017) (arbitration clause); David Fiala, Ltd. v. Harrison, 290 Neb. 418, 421, 860 N.W.2d 391, 426 (2015) (arbitration agreement). For more on this point, see part VIII(B) and part X(A) of this Comment, above.

C. APPLICATION OF RULES OF CONSTRUCTION

1. When Rules of Construction do not Apply

“When the terms of the contract are clear, a court may not resort to rules of construction.” *Deprez v. Continental W. Ins. Co.*, 255 Neb. 381, 385, 584 N.W.2d 805, 808 (1998). In that situation, the court must simply give the terms of the contract “their plain and ordinary meaning as the ordinary or reasonable person would understand them.” *Gage Cty. v. Employers Mut. Cas. Co.*, 304 Neb. 926, 940, 937 N.W.2d 863, 873 (2020); *Kasel v. Union Pac. RR. Co.*, 291 Neb. 226, 232, 865 N.W.2d 734, 738 (2015); *Deprez*, 255 Neb. at 385, 584 N.W.2d at 808. *Accord*, e.g., both quotations, *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 154–55, 953 N.W.2d 16, — (2021); *Lassalle v. State*, 307 Neb. 221, 232, 948 N.W.2d 725, — (2020); *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, — (2020); *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 955, 857 N.W.2d 808, 814 (2015); *Coffey v. Planet Group*, 287 Neb. 834, 841, 845 N.W.2d 255, 262 (2014); *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 170, 816 N.W.2d 728, 736 (2012); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 570, 805 N.W.2d 68, 82 (2011); *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 574, 789 N.W.2d 1, 9 (2010), *appeal after remand*, *D & S Realty v. Markel Ins. Co.*, 284 Neb. 1, 12, 816 N.W.2d 1 (2012); *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004); *Big River Constr. Co. v. L & H Props., Inc.*, 268 Neb. 207, 212, 681 N.W.2d 751, 756 (2004). (These two points are discussed further, and more cases are cited, below, in part X(D)(2) and (3) of this Comment.)

2. The Following Are Contracts

The following are contracts and the rules of construction of contracts apply to their construction.

■ Antenuptial Agreement: *See* Premarital Agreements, below

■ Arbitration: If arbitration arises from a contract involving interstate commerce, it is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1, et seq. If not, it is governed by the Uniform Arbitration Act

(UAA), Neb. Rev. Stat. §§ 25-2601 through 25-2622 (Reissue 2016). *See, e.g., Seldin v. Estate of Silverman*, 305 Neb. 185, 197–98, 939 N.W.2d 768, 781 (2020); *Garlock v. 3DS Properties, L.L.C.*, 303 Neb. 521, 529, 930 N.W.2d 503, 510 (2019); *Ronald J. Palagi, P.C., LLC*, 302 Neb. 769, 778, 925 N.W.2d 344, 351 (2019); *Cullinane v. Beverly Enters.—Neb.*, 300 Neb. 210, 222–32, 912 N.W.2d 774, 787–94 (2018); *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 423–26, 860 N.W.2d 391, 423 (2015). *See also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (involving the application of the FAA; citing and discussing cases).

“The U.S. Supreme Court has interpreted the term ‘involving commerce in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Garlock*. at 530, 930 N.W.2d at 510 (most internal quotation marks omitted; footnoting cases and 9 U.S.C § 2). For the FAA to apply, there need not be a showing that the particular transaction under litigation specifically affected interstate commerce. It is enough to show that the class of activities—the aggregation of all transactions of the kind under litigation—is “subject to federal control.” *Ronald J. Palagi*, 302 Neb. at 779, 925 N.W.2d at 352. In *Seldin* the court held that “[b]ecause this case arose from a commercial dispute involving properties and companies located in multiple states, the arbitration agreement clearly involves interstate commerce and thus is governed by the FAA.” *Seldin*, 305 Neb. at 198, 939 N.W.2d at 781–82.

When the facts of the contract put it under the FAA, then the FAA applies both in federal and state court. And it “preempts conflicting state laws and foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.” *Seldin*, 305 Neb. at 200, 939 N.W.2d at 783 (multiple internal quotation marks omitted; brackets added in *Seldin*).

While the FAA preempts conflicting state law, the McCarran-Ferguson Act [15 U.S.C. §§ 1011 to 1015 (2012)] reverse preempts the FAA to the extent that it gives the states supremacy to regulate insurance companies’ dealings with their policyholders. *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 555, 909 N.W.2d 614, 624 (2018); *Boyd v. Cook*, 298 Neb. 819, 831, 906 N.W.2d 31, 42 (2018); *Zweiback Family Ltd P’ship v. Lincoln Ben. Life Co.*, 299 Neb. 180, 184, 907 N.W.2d 700, 703, (2018) (“[W]hen issues of insurance and arbitration are presented, the applicability and scope of the McCarran-Ferguson Act should be considered.” (footnote omitted)).

No matter which statute applies, that is, under both the FAA and the UAA, “[a]rbitration is purely a matter of contract” *Zweiback Family*, 299 Neb. at 184, 907 N.W.2d at 703. Accord *Seldin*, 305 Neb. at 215, 939 N.W.2d at 791–92 (“[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.”); *Frohberg*, 297 Neb. 356, 360–61, 900 N.W.2d 900, 37–39 (2017) (The ap-

plication of the [FAA] “is triggered only if a contract involving interstate commerce actually contains an arbitration clause” *Id.* at 361, 900 N.W.2d at 37 (citing cases)).

“[I]n determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement.” *Frohberg*, 297 Neb. at 361, 900 N.W.2d at 37 n.6 (quoting *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004)).

As a matter of contract law, “[a] party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.” *Zweiback Family*, 299 Neb. at 184, 907 N.W.2d at 703. *Accord*, e.g., *Frohberg*, 297 Neb. at 360, 900 N.W.2d at 37–38; *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 318, 746 N.W.2d 672, 680 (2008), *abrogated on other grounds by Kremer v. Rural Cmty. Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

“[F]rom the premise that a contractual arbitration provision merely creates a contractual right, it necessarily follows that this right may be enforced only by a party to the contract.” *Boyd v. Cook*, 298 Neb. at 832, 906 N.W.2d at 42. For more on this, see part I(H) of this comment, above.

“The meaning of a contract and whether a contract is ambiguous are questions of law. Likewise, arbitrability presents a question of law.” *Frohberg*, 297 Neb. at 360, 900 N.W.2d at 37 (footnotes citing cases omitted). *Accord*, e.g., *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 29, 938 N.W.2d 319, — (2020); *Heineman v. Evangelical Luth. Good Sam. Soc’y*, 300 Neb. 187, 190, 912 N.W.2d 751, 755 (2018). For more on the interpretation of an ambiguity in contracts, see part VIII(B) and (C) of this Comment, above, and part X(C)(13), below.

“Arbitration provisions are not self-executing.” *Boyd*, 298 Neb. at 832, 906 N.W.2d at 42. “[A]n agreement to arbitrate can be waived by the parties.” *Boyd*, 298 Neb. at 832, 906 N.W.2d at 42 (2018). “Waiver of a contractual provision is a defense to enforcement of that provision, but a party must first seek to invoke the provision before it is necessary to consider the affirmative defense of waiver.” *Boyd*, at 832–33, 906 N.W.2d at 42. Regarding waiver of contracts generally, see part XI of this Comment, above.

When “all parties voluntarily submit[] their dispute to arbitration without objecting to arbitrability, [they] waive[] the right to seek a judicial determination that the dispute was not arbitrable.” *Garlock*, 303 Neb. at 535, 930 N.W.2d at 510 (answering a question of first impression; *id.* at 533, 930 N.W.2d at 512 (citing authorities)). “[T]he Garlocks voluntarily participated with the arbitration hearing and never raised an objection to arbitrability before the arbitrator. . . . [W]hile it

is possible for a party to participate in an arbitration and still preserve an objection to arbitrability, the Garlocks did not do so here.” *Id.* at 534–35, 930 N.W.2d at 513).

“In other words, a party may not voluntarily submit a dispute to arbitration and, after an unfavorable result, petition the courts to find the dispute was not arbitrable. If, however, a party clearly and explicitly makes known to the arbitrator, prior to a hearing on the merits, that he or she objects to the arbitrability of an issue, the party’s participation in the arbitration will not preclude a later judicial challenge to arbitrability.” *Garlock*, 303 Neb. at 533–34, 930 N.W.2d at 512. *See also Seldin*, 305 Neb. at 220, 939 N.W.2d at 794 (“Generally, under the acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant’s favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.”)

“When a party seeks to confirm an arbitration award pursuant to the UAA, a court must confirm that award unless a party has sought to vacate, modify, or correct the award and grounds for such vacation, modification, or correction exist.” *Garlock*, 303 Neb. at 537–38, 930 N.W.2d at 537–38. “The UAA does not allow for the exercise of discretion by the court when a request for confirmation is made and there is no pending application for vacation, modification, or correction.” *Cinatl v. Proski*, 307 Neb. 477, 492, 949 N.W.2d 505, 517 (2020) (citing Uniform Arbitration Act Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016 & Cum. Supp. 2018), at § 25-2612

The FAA sets out specific service requirements for a party seeking to vacate, modify, or confirm an arbitration award:

[N]otice of an application seeking judicial vacatur [must] “be served upon the adverse party or [the adverse party’s] attorney within three months after the award is filed or delivered.” [T]hese notice requirements are jurisdictional and that failure to strictly comply deprives the district court of authority under the FAA to vacate the arbitration award. And, where the district court lacks jurisdiction, this court lacks jurisdiction.

Seldin, 305 Neb. at 198, 939 N.W.2d at 782 (footnotes omitted). “[T]he FAA’s notice requirements are satisfied if the notice provided complies with Nebraska’s statutory notice requirements [found at] Neb. Rev. Stat. § 25-910 (Reissue 2016)” *Seldin*, 305 Neb. at 199, 939 N.W.2d at 782.

Whether an appeal can be taken from an arbitration order depends on whether they are appealable orders under the UAA or are final orders under Neb. Rev. Stat. § 25-1902 (Reissue 2016 & Cum. Supp. 2019).

The UAA specifies five orders and one judgment or decree from which an appeal can be taken.

“(1) An order denying an application to compel arbitration made under section 25-2603;

“(2) An order granting an application to stay arbitration made under subsection (b) of section 25-2603;

“(3) An order confirming or denying confirmation of an award;

“(4) An order modifying or correcting an award;

“(5) An order vacating an award without directing a rehearing; or

“(6) A judgment or decree entered pursuant to the provisions of the [UAA].”

Cinatl v. Prosoki, 307 Neb. at 486, 949 N.W.2d at 516, *quoting* § 25-2620(a)(3) (brackets added in *Cinatl*)).

When the list of appealable orders in “§ 25-260 is silent regarding the appealability of an arbitration-related order, we look to the general final order statute [§ 25-1902] to determine whether the order is final and appealable.” *Cinatl*, 307 Neb. at 487, 949 N.W.2d at 514. *Cinatl* lists and discusses the four factors necessary in order for an order to be final and appealable. *Id.* at 487–89, 949 N.W.2d at 514–16.

“In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court’s ruling as to questions of law. However, the trial court’s factual findings will not be set aside on appeal unless clearly wrong.” *Garlock*, 303 Neb. at 529, 930 N.W.2d at 510 (footnotes omitted). Accord *Cinatl*, 307 Neb. at 485, 949 N.W.2d at 513; *Seldin*, 305 Neb. at 197, 939 N.W.2d at —; *Ronald J. Palagi*, 302 Neb. at 778, 925 N.W.2d at 351.

“When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, a court’s role is limited by the act [(FAA or UAA)] governing the agreement.” *Ronald J. Palagi*, 302 Neb. at 780, 925 N.W.2d at 352 (“As the U.S. Supreme Court has explained, 9 U.S.C. §§ 10 and 11 provide the exclusive regimes of judicial review for agreements governed by the FAA.” *Id.* at 780–81, 925 N.W.2d at 352. Applying § 9 of the Federal Arbitration Act, the motion to vacate herein was not timely filed.). And, in this situation “an extraordinary level of deference is given to the underling award itself.” *Cinatl*, 307 Neb. at 490, 949 N.W.2d at 515.

When a party seeks vacation, modification or confirmation of an

arbitration that has already occurred, “an extraordinary level of deference [is given] to the underlying award itself.” *Seldin*, 305 Neb. at 200, 939 N.W.2d at 781 (multiple quotation marks omitted; brackets in *Seldin*) (“The FAA favors arbitration agreements and applies in both federal and state court.” *Id.*).

The FAA states four grounds for vacating an arbitration award and unless one is present, then the court must confirm the award. *Seldin*, 305 Neb. at 201, 939 N.W.2d at 783 (citing *Hall St. Assoc., L.L.C v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396 (2008) as holding “that under the FAA, courts lack authority to vacate or modify arbitration awards on any grounds other than those specified in §§ 10 and 11 of the FAA.” *Id.* at 206, 939 N.W.2d at 786 (citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)). The four grounds are these:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrator, or either of them;
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Seldin, 305 Neb. at 201, 939 N.W.2d at 783 (quoting 9 U.S.C. § 10(a) (2018)).

“The FAA provides that a court must confirm an arbitration award unless grounds exist for vacating or modifying the award” *Seldin*, 305 Neb. at 220, 939 N.W.2d at 786. Furthermore, “under the FAA, a court is not authorized to vacate an arbitration award based on public policy grounds because public policy is not one of the exclusive statutory grounds set forth in § 10 of the FAA.” *Seldin*, 305 Neb. at 207, 939 N.W.2d at 786.

Under the FAA (9 U.S.C. § 10(a)(3), quoted above) an arbitrator’s award may be vacated for “misconduct.” As used there, “misconduct” refers to the conduct of the arbitrator—“evident partiality” on the part of the arbitrator. *Seldin*, 305 Neb. at 203, 939 N.W.2d at 784. An appearance of bias is not enough to establish “evident partiality.” *Seldin*, 305 Neb. at 203, 939 N.W.2d at 785. The evidence must “objectively demonstrate[] such a degree of partiality that a reasonable person could

assume that the arbitrator had improper motives.” *Seldin*, 305 Neb. at 203, 939 N.W.2d at 785 (multiple quotation marks omitted).

Section 10(a)(4) of the FAA, quoted above, authorizes courts “to set aside an arbitration award where the arbitrator exceeded his or her powers. However, [i]t is not enough . . . to show that the [arbitrator] committed an error—or even a serious error. The analysis is ‘whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong’” *Seldin*, 305 Neb. at 208, 939 N.W.2d at 787 (brackets and ellipses in the original; internal quotation marks omitted; footnotes citing the U. S. Supreme Court omitted).

“[A] court order staying an action pending arbitration is a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2016), because it affects a substantial right and is made in a special proceeding.” *Citizens of Humanity v. Applied Underwriters*, 299 Neb. 545, 555, 909 N.W.2d 614, 624 (2018).

Regarding arbitration of electric rate disputes under Neb. Rev. Stat. §§ 70-1301, et seq., see *In re Application of Northeast Neb. Pub. Power Dist.*, 300 Neb. 237, 912 N.W.2d 884 (2018).

See also *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 200 L. Ed. 2d 889 (2018) (regarding the FAA, the Court asked these either/or questions: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?” It answered ‘Yes’ to the first question and, therefore, ‘No’ to the second.)

■ Assignment: “An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to the rules of contract construction.” Same quotation: *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 937, 947 N.W 2d 856, __ (2020); *Western Ethanol Co., LLC v. Midwest Renewable Energy*, 305 Neb. 1, 11, 938 N.W.2d 329, __ (2020).

We have long recognized that parties should generally be free to assign rights and delegate duties as they see fit, subject to certain limitations. At common law, “[c]ontract duties are generally delegable, unless prohibited by statute, public policy or the terms of the contract. Contractual duties are also not delegable if they involve the personal qualities or skills of the obligor, in the absence of consent by the obligee.”

Delegation to a third party of the duty to perform under a contract requires an agreement between the obligor under the first contract and a delegate. That is, the delegate must agree to be delegated the obligor’s duty.

Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates

II Homeowners Association, 308 Neb. 128, 149, 953 N.W.2d 16, — (2021) (footnotes omitted) (“A delegation of duties is not itself sufficient to bind its delegate to perform the duties delegated Similar to other areas of contract law, it is foundational that an agreement to delegate duties is not formed until it is accepted by the delegate. *Id.* at 150–51, 953 N.W.2d at —.)

“Even if a delegate does not promise in so many words to perform the duty of the delegating party, a court may infer such a promise from the delegate’s conduct. *Equestrian Ridge*, 308 Neb. at 138, 953 N.W.2d at —.

■ **Bailment:** Regarding bailment contracts, *see particularly* Peterson v. Homesite Indemnity Co., 287 Neb. 48, 58-65, 840 N.W.2d 885, 893-897 (2013).

■ **Broker’s Listing Agreement:** For a lengthy discussion of the obligations of a real estate broker and the broker’s client, *see* George Clift Enters. v. Oshkosh Feedyard Corp., 306 Neb. 775, 804–09, 814, 947 N.W.2d 510, 532–35, 537–38 — (2020); McCully, Inc. v. Baccaro Ranch, 284 Neb. 160, 170–78, 816 N.W.2d 728, 736–41 (2012).

■ **Contract of Employment of a Teacher:** “Except insofar as controlled by statute, the validity of a contract of employment of a teacher in the public schools is governed by rules relating to contracts generally.” Drain v. Bd. of Educ. of Frontier Cty. Sch. Dist. No. 46, 244 Neb. 551, 558, 508 N.W.2d 255, 260 (1993).

■ **Deeds of Trust:** “Deeds of trust are subject to the principles of interpretation and construction that govern contracts generally.” Gilroy v. Ryberg, 266 Neb. 617, 623, 667 N.W.2d 544, 552 (2003).

■ **Gambling:** Houghton v. Big Red Keno, 254 Neb. 81, 574 N.W.2d 494 (1998) (action to collect keno winnings; court notes that plaintiff brought action as contract action, that court had not previously addressed question of what law governs suits over alleged lottery or keno winnings, and that many other jurisdictions apply principles of contract law; court affirms summary judgment against gambler because of insufficient “meeting of the minds” to create a contract; court applies contract law but does not specifically answer question of whether contract law always governs or the court was just taking this case as pled).

■ **Guaranty:** *E.g.*, Cattle National Bank & Trust Co. v. Watson, 293 Neb. 943, 880 N.W.2d 906 (2016) (“A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults. A guaranty is interpreted using the same general rules as are used for other contracts.” (footnotes omitted)); Cattle Nat. Bank & Trust Co. v. Watson, 293 Neb. 943, 880 N.W.2d 906 (2016); Mutual of Omaha Bank v. Murante, 285 Neb. 747, 752-56, 829 N.W.2d 676, 681-84 (2013); First Nat’l Bank of Unadilla v. Betts, 275 Neb. 665, 671, 748 N.W.2d 76, 84–94 (2008); Builders Supply Co. v. Czerwinski, 275 Neb. 622,

631-41, 748 N.W.2d 645, 674-84 (2008); NEBCO, Inc. v. Adams, 270 Neb. 484, 489, 704 N.W.2d 777, 781 (2005); Production Credit Ass'n of the Midlands v. Schmer, 233 Neb. 749, 755, 448 N.W.2d 123, 127 (1989) ("Nebraska adheres to the rule of strict construction of guaranty contracts."); Nogg Brothers Paper Co. v. Bickels, 233 Neb. 561, 563, 446 N.W.2d 729, 730 (1989). *See also* State ex rel. Wagner v. Amwest Surety Ins. Co., 274 Neb. 110, 116-118, 738 N.W.2d 805, 811-13 (2007) (involving a surety agreement with bonds issued as security for performance under lease agreements).

■ **Implied Contracts:** Regarding implied contracts, *see* the heading "implied Contracts," above in this Comment.

■ **Indemnity Agreement:** Jacobs Engr. Group v. ConAgra Foods, 301 Neb. 38, 66, 917 N.W.2d 435, 458 (2018) ("An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts."); Federated Serv. Ins. Co. v. Alliance Constr., 282 Neb. 638, 649-51, 805 N.W.2d 468, 477-78 (2011) (discussing scope of coverage under the indemnity provision of an endorsement to an insurance policy); Kuhn v. Wells Fargo Bank of Neb., 278 Neb. 428, 440, 771 N.W.2d 103, 115 (2009); Oddo v. Speedway Scaffold Co., 233 Neb. 1, 9, 443 N.W.2d 596, 602 (1989).

■ **Insurance Policy:**

"An insurance policy is a contract, and an appellate court construes it like any other contract, according to the meaning of the terms the parties have used." Kaiser v. Allstate Indemnity Company, 307 Neb. 562, 570, 949 N.W.2d 787, — (2020). *Accord* State Farm Fire & Casualty Company v. TFG Enterprises, LLC, 308 Neb. 460, 465, 954 N.W.2d 899, — (2021):

In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof. In a coverage dispute between an insured and the insurer, the burden of proving *prima facie* coverage under a policy is upon the insured. If the insured meets [that] burden . . . the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense.

Gage Cty. v. Employers Mut. Cas. Co., 304 Neb. 926, 940, 937 N.W.2d 863, 873 (2020) (footnotes and paragraph break omitted). *Accord, e.g.,* Merrick v. Fischer, 305 Neb. 230, 245, 939 N.W.2d 795, — (2020); Van Kleek v. Farmers Ins. Exch., 289 Neb. 730, 735, 857 N.W.2d 297, 301 (2014); Shada v. Farmers Ins. Exch., 286 Neb. 444, 840 N.W.2d 856 (2013) (discussing uninsured motorist coverage).

An insurance policy requires offer and acceptance to be effective; an application for insurance is simply an offer. Callahan v. Washington Nat'l Ins. Co., 259 Neb. 145, 152, 608 N.W.2d 592, 598 (2000).

Though the general rule of contract interpretation is that the trier of fact shall resolve the interpretation of ambiguities or contradictory provisions in a contract, the court has consistently stated a different rule for the construction of insurance contracts. "The construction of an insurance contract is purely a question of law." *Union Ins. Co. v. Land & Sky, Inc.*, 247 Neb. 696, 699, 529 N.W.2d 773, 775 (1995). "Interpretation of an insurance policy is a question of law." *Kaiser*, 307 Neb. at 568, 949 N.W.2d at _____. Appellate courts decide questions of law, including this one, independently of the decision of the trial court. *See, e.g., State Farm Fire & Casualty Company v. TFG Enterprises, LLC*, 308 Neb. 460, 464, 954 N.W.2d 899, ____ (2021); *Kaiser*, 307 Neb. at 568, 949 N.W.2d at ____; *Merrick*, 305 Neb. at 237, 939 N.W.2d at _____. For more on these points, including an explanation for the difference between this rule and the general rule, *see* parts VIII(C) (1) and (2) of this Comment, below.

In line with the general rule that ambiguities in a contract are interpreted against the drafter of the contract, ambiguities in an insurance policy are interpreted against the insurer. This is discussed above at part VIII(C)(2) below at part X(D)(11), 'Ambiguous Contracts are Construed Against the Drafter.'

The following general rule regarding ambiguity in contracts applies here: "[T]he language of an insurance policy should be read to avoid ambiguities, if possible" *Hillabrand v. Am. Family Mut. Ins. Co.*, 271 Neb. 585, 593, 713 N.W.2d 494, 501 (2006).

"When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. An insurance agent has no duty to anticipate what coverage an insured should have. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued." *Merrick*, 305 Neb. at 238, 939 N.W.2d at ____ (footnotes omitted). *Accord, e.g., Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 803, 515 N.W.2d 767, 770 (1994). Damages for breach of contract to obtain insurance is the subject of *NJI2d Civ. 4.55* and *4.56*.

The distinction between an insurance broker and an insurance agent and the respective duties each owes to the client is discussed at length at *Merrick*, 305 Neb. at 239, 939 N.W.2d at ____.

Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy. The insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a covered occurrence. An insurers duty to defend is broader than the duty to indemnify.

A court must initially measure an insurer's duty to defend

an action against the insured by the allegations in the complaint against the insured, but in determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources. An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. Thus, an insurer has a duty to defend its insured whenever it ascertains facts that give rise to potential liability under the policy. Conversely, an insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability. Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Merrick, 305 Neb. at 245–46, 939 N.W.2d at — (footnotes omitted, mostly citing *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011)). *Accord*, e.g., *Peterson v. Ohio Cas. Group*, 272 Neb. 700, 708, 724 N.W.2d 765, 773 (2006) (stating that an insurance policy is generally understood to consist of duty to defend and duty to pay; duty to defend discussed).

In assessing which party in an insurance dispute bears the burden of proving or disproving coverage, a court must first determine whether the insurance policy presumptively extends coverage to all, or only to specific, perils. A specific perils policy covers limited risks and, by implication, excludes all other risks. In contrast, an all perils policy impliedly covers all risks except those expressly addressed in the policy's exclusion paragraphs.

Under a specific perils policy, the insured carries the initial burden of proving that a provision in the insurance policy requires the insurer to provide coverage for a specific type of loss. But that initial burden is presumed met in an all perils policy, provided that the covered property was damaged. Once the initial burden of proving coverage is met, the insurer bears the burden of proving the application of an exclusion under the policy as an affirmative defense.

Kaiser v. Allstate Indem. Co., 307 Neb. at 568–69, 949 N.W.2d at — (footnotes omitted). *See also*, *id.* at 573, 949 N.W.2d at —. *See also*, e.g., *State Farm Fire & Casualty Company v. TFG Enterprises, LLC*, 308 Neb. 460, 465, 954 N.W.2d 899, — (2021) (“An exclusion in an insurance policy is a limitation or liability, or a carving out of certain types of loss, to which the insurance coverage never applied.”).

Under certain circumstances the insured can recover attorney's fees against the insurer. This is discussed in parts 9(e) and (f) of the Introduction to Chapter 4, above

In addition, *see, e.g.*, the following cases. *Greenwood v. J.J. Holligan's, LLC*, 297 Neb. 435, 440–43, 899 N.W.2d 905, 909–11 (2017) (discussing “the requirements for a notice of cancellation of worker’s compensation insurance policies,” *id.* at 440, 899 N.W.2d at 909); *Barnes v. Am. Stand. Ins. Co. of Wisc.*, 297 Neb. 331, 336–46, 900 N.W.2d 22, 26–27 (2017) (discussing cancellation of an automobile insurance policy); *SFI Ltd. P’ship 8 v. Carroll*, 288 Neb. 698, 704, 851 N.W.2d 82, 705 (2014) (“[A]bsent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord’s fire insurance policy”); *Shada v. Farmers Insurance Exchange*, 286 Neb. 444, 840 N.W.2d 856 (2013) (discussing uninsured motorist coverage, including the accrual of the cause of action and running of the statute of limitations, and the fact that such coverage is a contract and an action on the coverage is one in contract, not tort); *Beveridge v. Savage*, 285 Neb. 991, 995, 830 N.W.2d 482, 486 (2013) (stating that if the lease clearly “require[es] the tenants to obtain insurance coverage for the realty, tenants will be on notice that they must obtain fire insurance for the realty if they wish to protect themselves from personal liability in the event they negligently start a fire.”); *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 300–01, 770 N.W.2d 619, 628–29 (2009) (discussing “antistacking provisions” as applied to uninsured or underinsured motorist coverage); *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009) (discussing the Uninsured and Underinsured Motorist Insurance Coverage Act, its purpose, affect, and interpretation; among other things, an insurance policy may provide more favorable underinsured coverage than the law requires, but may not provide less favorable coverage); *Steffen v. Progressive N. Ins. Co.*, 276 Neb. 378, 386, 754 N.W.2d 730, 738 (2008) (discussing the Uninsured and Underinsured Motorist Insurance Coverage Act and, among other things, stating that “[w]here a statutory omnibus provision is in conflict with the provisions of the insurance policy, the statute and not the policy is controlling.”); *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008) (containing many statements of black-letter law regarding interpretation of liability insurance policies and a discussion of the insured’s duty to give timely notice of the claim to the insurer); *Molina v. Am. Alternative Ins. Corp.*, 270 Neb. 218, 222, 699 N.W.2d 415, 418 (2005) (stating that direct actions by the injured party against the insurance carrier based on the negligence of the insured are not permitted; there is no privity between the injured party and the tortfeasor’s liability insurance company); *Miller v. Steichen*, 268 Neb. 328, 336, 682 N.W.2d 702, 709 (2004) (“[W]hen the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.”); *Norwest Corp. v. State*, 253 Neb. 574, 583–90, 571 N.W.2d 628, 634–37 (1997) (discussing the difference between a warranty and an insurance policy); *Dahlke v. John Zimmer Ins. Agency*, 245 Neb. 800, 803–08, 515 N.W.2d 767, 770–72 (1994) (discussing the insured’s duty to read the policy and the agent’s duty to explain policy terms); *Lindsay Ins. Agency v. Mead*, 244 Neb.

645, 653–55, 508 N.W.2d 820, 825–27 (1993) (involving a temporary contract of insurance).

■ **Lease:** “A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present.” *AVG Partners I v. Genesis Health Clubs*, 307 Neb. 47, 55, 948 N.W.2d 212, 225 (2020).

“Generally the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties in the premises. One in exclusive possession of the real estate of another with the latter’s knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner’s permission.”

AVG Partners, 307 Neb. at 56, 307 N.W.2d at 225 (footnote omitted).

See also *TNT Cattle Co., Inc.*, 304 Neb. 890, 937 N.W.2d 811 (2020) (involving breach of a lease agreement, anticipatory breach, privity, rescission, and damages); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (oil and gas leases); *Johnson Lakes Dev., Inc. v. Central Neb. Pub. Power*, 254 Neb. 418, 429, 576 N.W.2d 806, 814 (1998); *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 229 Neb. 382, 386, 427 N.W.2d 50, 53 (1988), appeal after remand, 2 Neb.App. 555, 512 N.W.2d 410 (1994); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 506, 412 N.W.2d 453, 457 (1987). *See also* *Brick Dev. V. CNBT II*, 301 Neb. 279, 289–90, 918 N.W.2d 824, 832–33 (2019) (discussing privity of contract and privity of estate regarding a lease of real property).

■ **Lottery Tickets:** *See* *Gambling*, above.

■ **Medical Services:** *Midwest Neurosurgery v. State Farm Ins. Co.*, 268 Neb. 642, 648, 686 N.W.2d 572, 578 (2004) (managed care agreement is a contract; “Even in the absence of an express contract, the rendering of medical services creates an implied contract between the provider and the person being given the medical care.”).

■ **Mortgage:** *Cty. of Keith v. Fuller*, 234 Neb. 518, 526, 452 N.W.2d 25, 31 (1990).

■ **Option to Purchase Real Estate:** *Arnold v. Walz*, 306 Neb. 179, 944 N.W.2d 747 (2020) (discussing such options, including that they “should be strictly construed and not extended beyond their express provisions,” *id.* at 188, 944 N.W.2d at ___; holding that a quiet title action when the holder of the option does not exercise the option is an action in equity, *id.* at 186, 944 N.W.2d at ___).

■ **Premarital Agreements:** “Premarital agreements are contracts made in contemplation of marriage.” *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

“As a contract, an antenuptial agreement is governed by the same principles that are applicable to other contracts, but is subject to the particular statutory requirement that an antenuptial agreement must be based on fair disclosure.” In re Estate of Stephenson, 243 Neb. 890, 896, 503 N.W.2d 540, 545 (1993) (referring to Neb. Rev. Stat. § 30-2316 (Reissue [2016]) and citing cases), *partially overruled on other grounds* by Knights of Columbus Council 3152 v. KFS BD, Inc., 280 Neb. 904, 927, 791 N.W.2d 317, 334 (2010). *Accord* In re Estate of Jakopovic, 261 Neb. 248, 253, 622 N.W.2d 651, 655 (2001).

“Parties to a premarital agreement may contract with respect to several matters, including any matter ‘not in violation of public policy or a statute imposing a criminal penalty.’ Neb. Rev. Stat. § 42-1004 (Reissue 2016).” In re Estate of McConnell, 28 Neb. App. 303, 321, 943 N.W.2d 722 (2020). And such agreements are to be interpreted according to basic contract principles. *Id.*

■ Release: Cano v. Walker, 297 Neb. 580, 587-91, 901 N.W.2d 257-61 (2017); Watmore v. Ford, 229 Neb. 121, 125, 425 N.W.2d 612, 615 (1988), *overruled in part, on other grounds*, by Landon v. Pettijohn, 231 Neb. 837, 438 N.W.2d 757 (1989).

■ Restrictive Covenants: “The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members and the association.” Regency Homes Ass’n v. Schrier, 277 Neb. 5, 11, 759 N.W.2d 484, 489 (2009).

■ Retirement Plan: Fraternal Order of Police, Lodge No. 2 v. Cty. of Douglas, 259 Neb. 822, 826, 612 N.W.2d 483, 486 (2000) (Douglas County Employee’s Retirement Plan is a contract between the County and its employees).

■ Settlement Agreement: Thrower v. Anson, 276 Neb. 102, 752 N.W.2d 555 (2008); Strategic Staff Mgt. v. Roseland, 260 Neb. 682, 686, 619 N.W.2d 230, 234 (2000) (“To have a settlement agreement, there must be a definite offer and an unconditional acceptance.”) *Id.* at 687, 619 N.W.2d at 234; Woodmen of the World Life Ins. Soc. v. Kight, 246 Neb. 619, 623, 522 N.W.2d 155, 157 (1994); Heese Produce Co. v. Lueders, 233 Neb. 12, 18, 443 N.W.2d 278, 282 (1989); Fleming Co. of Neb. v. Michals, 230 Neb. 753, 755, 433 N.W.2d 505, 507 (1988).

■ Subordination: Wintroub v. Nationstar Mortg. LLC, 303 Neb. 15, 22, 927 N.W.2d 19, 24 (2019) (“Nebraska courts . . . apply[] basic contract principles to determine the enforceability, validity, and meaning of a subordination agreement.”).

■ Suretyship: “Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal.” State ex rel. Wagner v. Gilbane Bldg. Co., 276 Neb. 686, 693, 757 N.W.2d 194, 201 (2008).

D. SOME RULES OF CONSTRUCTION

Rules of construction include the following:

1. CONTRACTS ARE CONSTRUED TO GIVE EFFECT TO THE INTENTION OF THE PARTIES

A contract is to be construed “to give effect to the parties’ intentions at the time the contract was made.” Same quotation, *e.g.*: *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017) (insurance policy); *Peterson v. Ohio Cas. Group*, 272 Neb. 700, 707–08, 724 N.W.2d 765, 772–73 (2006). *Accord, e.g.*, *Kaiser v. Allstate Indemnity Company*, 307 Neb. 562, 570, 949 N.W.2d 787, — (2020); *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 747, 733 N.W.2d 192, 195 (2007); *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004) (insurance policy); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 153, 663 N.W.2d 131, 135 (2003); *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 394, 618 N.W.2d 145, 153 (2000). *See also* *R.W. v. Schrein*, 264 Neb. 818, 830–31, 652 N.W.2d 574, 580–81 (2002) (“[I]n determining the scope of a liability insurance policy, the issue ‘is not whether the conduct in question is negligence, but whether a particular contract was intended to cover this conduct.’”).

“A court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties’ intent.” Same quotation: *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 155, 953 N.W.2d 16, — (2021); *Lassalle v. State*, 307 Neb. 221, 232, 948 N.W.2d 725, — (2020);

“If a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties’ intent.” *Timberlake v. Douglas Cty.* 291 Neb. 387, 394, 865 N.W.2d 788, 795 (2015).

2. WHEN A CONTRACT IS UNAMBIGUOUS, INTENTION MUST BE DETERMINED FROM ITS TERMS

Regarding ambiguity in a contract, see also part VIII of this Comment, above, and part X(C)(13), below.

“[W]hen a written contract is expressed in unambiguous language, the intention of the parties must be determined from the content of the contract document.” *Kraus v. Am. Charter Fed. Sav. and Loan Ass’n*, 240 Neb. 607, 608–09, 483 N.W.2d 144, 145–46 (1992). Additional authority for this point is at part VIII of this Comment, above, and part X(D)(3) of this Comment, below. *See also* part X(C)(7) of this Comment, below.

“A contract written in clear and unambiguous language is not

subject to interpretation or construction and must be enforced according to its terms.” Same quotation: *E.g., Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 941, 947 N.W.2d 856, — (2020); *Nathan v. McDermott*, 306 Neb. 216, 229, 945 N.W.2d 92, 104 (2020); *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, — (2020); *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 30, 938 N.W.2d 319, — (2020); *Wintroub v. Nationstar Mortg. LLC*, 303 Neb. 15, 22, 927 N.W.2d 19, 24 (2019); *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 515, 925 N.W.2d 39, 44 (2019); *Ray Anderson, Inc. v. Buck’s, Inc.*, 300 Neb. 434, 441, 900 N.W.2d 32, 42 (2018). Further discussion and additional authority for this point is found at part VIII of this Comment, above. *See also* parts X(D)(3) and X(D)(3) of this Comment.

Courts may not resort to rules of construction when the terms of a contract are clear. Supporting cases are cited in the next part of this Comment, part X(C)(3)(a).

“Parties are bound by the terms of the contract even though their intent may be different from that expressed by the agreement.” *Rumbaugh v. Rumbaugh*, 229 Neb. 652, 654, 428 N.W.2d 500, 502 (1988). *Accord* *Murphy v. City of Lincoln*, 245 Neb. 707, 711–12, 515 N.W.2d 413, 415 (1994); *Hughes v. Cornhusker Cas. Co.*, 235 Neb. 656, 660, 456 N.W.2d 765, 767 (1990) (“The expressed intentions of the parties which they manifest by their words and acts, and not their secret intention, is controlling in determining the legal effect of an offer or an acceptance.”); *Int’l Harvester Credit Corp. v. Lech*, 231 Neb. 798, 802, 438 N.W.2d 474, 477 (1989); *Bedrosky v. Hiner*, 230 Neb. 200, 205, 430 N.W.2d 535, 539 (1988).

“A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.” Same quotation: *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 155, 953 N.W.2d 16, — (2021); *Lassalle v. State*, 307 Neb. 221, 232, 948 N.W.2d 725, — (2020). *Accord* *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 30–31, 938 N.W.2d 319, — (2020); *Ray Anderson, Inc. v. Buck’s, Inc.*, 300 Neb. 434, 441, 900 N.W.2d 32, 42 (2018); *Meyer Natural Foods*, 302 Neb. at 515, 925 N.W.2d at 44; *Gary’s Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 298, 702 N.W.2d 355, 366 (2005); *Gast v. Peters*, 267 Neb. 18, 24, 671 N.W.2d 758, 763 (2003); *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 536, 483 N.W.2d 114, 121 (1992) (“[W]here the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court’s view of a fair bargain.”).

“The parol evidence rule states that if negotiations between the parties result in an integrated agreement which is reduced to writing, then, in the absence of fraud, mistake, or ambiguity, the written agreement is the only competent evidence of the contract between them.” Same quotation: *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706,

714-16, 798 N.W.2d 121, 128-30 (2011); *Farms Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 685, 789 N.W.2d 260, 266 (2010). “The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.” *Par 3, Inc. v. Livingston*, 268 Neb. 636, 641, 686 N.W.2d 369, 373-74 (2004). *Accord Thrower v. Anson*, 276 Neb. 102, 109, 752 N.W.2d 555, 561 (2008).

“The general rule is that *unless a contract is ambiguous*, parol evidence cannot be used to vary its terms.” *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 955, 857 N.W.2d 808, 816 (2015) (emphasis added). “Where the terms of a written lease appear to be ambiguous and uncertain as to the intended length of the tenancy or the beginning or end of the term, then, *as in other cases of ambiguity*, parol evidence may properly be resorted to for the purpose of resolving the uncertainty and explaining the parties’ true intentions in the respect. *TNT Cattle Co., Inc.*, 304 Neb. 890, 911, 937 N.W.2d 811, 834 (2020) (emphasis added).

Regarding ambiguities in a will, see *NJI2d Civ. 16.01 Comment & Authorities*, under the heading “Construction of a Will.”

“Where neither the terms of a contract nor [the] facts and circumstances demonstrating the intent of the parties are disputed, construction of [the] contract is a question of law.” *Boisen v. Petersen Flying Serv., Inc.*, 222 Neb. 239, 241, 383 N.W.2d 29, 31 (1986) (on appeal of such questions, Supreme Court obliged to reach its conclusion independent from conclusion reached by trial court). For more on this point, see part VIII of this Comment, above.

3. THE WORDS OF A CONTRACT ARE TO BE GIVEN THEIR PLAIN AND ORDINARY MEANING

a. The General Rule

“When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.” Same quotation, *e.g.*: *Lassalle v. State*, 307 Neb. 221, 232, 948 N.W.2d 725, — (2020); *Bierman v. Benjamin*, 305 Neb. 865, 943 N.W.2d 269, — (2020); *Gage Cty. v. Employers Mut. Cas. Co.*, 304 Neb. 926, 940, 937 N.W.2d 863, 873 (2020); *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017); *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 170, 816 N.W.2d 728, 736 (2012); *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 450, 763 N.W.2d 86, 90 (2009); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 823, 716 N.W.2d 87, 98 (2006) (Since an insurance policy is to be construed in favor of the insured, “[t]he language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean.”); *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004) (insurance policy). *Accord, e.g.*, *Kaiser v. Allstate Indemnity Company*, 307

Neb. 562, 570, 949 N.W.2d 787, — (2020); *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 941, 947 N.W.2d 856, — (2020); *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 515, 925 N.W.2d 39, 45 (2019) (“The parties to a contract must be held to the plain language of the agreement they entered into.”); *Ray Anderson, Inc. v. Buck’s, Inc.*, 300 Neb. 434, 441, 900 N.W.2d 32, 42 (2018); *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017) (regarding an insurance policy, the question is not what the insurer intended the words in the contract to mean but “what a reasonable person in the position of the insured would have understood them to mean”); *Kasel v. Union Pac. RR. Co.*, 291 Neb. 226, 232, 865 N.W.2d 734, 738 (2015); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 570, 805 N.W.2d 68, 82 (2011); *Kreikemeier v. McIntosh*, 223 Neb. 551, 555, 391 N.W.2d 563, 566 (1986). *See also* parts X(C)(2) and X(D)(2) of this Comment.

b. The Exceptions: Words Given Special Meanings

The words used in a contract are given their plain and ordinary meaning at least in the absence of an explanation or a qualification in the contract. *Smith v. Game, Forestation and Parks Comm’n*, 170 Neb. 593, 598, 103 N.W.2d 829, 832 (1960); *Long v. Magnolia Petrol. Co.*, 166 Neb. 410, 422, 89 N.W.2d 245, 253 (1958).

If a clause of a contract would have one application by grammatical construction and if it is apparent from the whole tenor of the contract that the parties intended the clause to have a different, more extended application, the intention of the parties controls. *Baylor v. Hall*, 106 Neb. 786, 791, 184 N.W. 886, 888 (1921).

If one party attaches a certain meaning to language used in a contract, and makes that meaning known to the other party, who does not object, then the language will be construed according to that meaning. *Platte Valley Bank v. Lemke*, 141 Neb. 218, 224, 3 N.W.2d 396, 399 (1942) (citing predecessor to Neb. Rev. Stat. § 25-1217 (Reissue 2016)). Neb. Rev. Stat. § 25-1217 (Reissue 2016) states: “When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.” That same statutory section, though its 1913 publication, was also cited in *Richey v. Omaha & Lincoln Ry. & Light Co.*, 100 Neb. 847, 850, 161 N.W. 575, 575-76 (1917), for the proposition that technical terms should be given nontechnical meaning where one party has reason to suppose that the other party so understood them. *See also* *State v. Commercial Cas. Ins. Co.*, 125 Neb. 43, 49, 248 N.W. 807, 810 (1933) (conflicting evidence relating to meaning of technical term in contract is for jury to resolve).

4. SPECIFIC TERMS CONTROL OVER GENERAL TERMS

Specific terms control over general terms. *Hans v. Lucas*, 270 Neb. 421, 424, 703 N.W.2d 880, 883 (2005); *Panwitz v. Miller Farm-Home Oil Serv.*, 228 Neb. 220, 223-24, 422 N.W.2d 63, 66 (1988); *Corso v.*

Creighton Univ., 731 F.2d 529, 533 (8th Cir.1984); *State v. Commercial Cas. Ins. Co.*, 125 Neb. 43, 49, 248 N.W. 807, 810 (1933).

5. IS A LIST IN A CONTRACT EXCLUSIVE OR NONEXCLUSIVE?

"The doctrine of *expressio unius est exclusio alterius* means that the expression in an instrument of one or more things of a class implies the exclusion of all not expressed." *Hafeman v. Gem Oil Co.*, 163 Neb. 438, 439, 80 N.W.2d 139, 143 (1956) (syllabus by the court). *Accord Jacobson v. Shresta*, 288 Neb. 615, 623, 849 N.W.2d 515, 521 (2014) (defining "[t]he legal principle" as "the expression of the one thing is the exclusion of the others"); *Chapin v. Neuhoﬀ Broad.-Grand Island, Inc.*, 268 Neb. 520, 527, 684 N.W.2d 588, 593 (2004).

On the other hand, when a contract contains a list preceded by the word "include" or some variation thereof, the list is nonexclusive of other like things. The use of such words is expansive, not restrictive. *Timberlake v. Douglas Cty.* 291 Neb. 387, 396–99, 865 N.W.2d 788, 795 (2015) (in this context, at least, "include" means the same thing as "include, but are not limited to"; *id.* at 399, 865 N.W.2d at 796–98).

Furthermore,

under the *ejusdem generis* canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. In other words, specific terms modify and restrict the interpretation of general terms when they are used in a sequence.

Kuhn v. Wells Fargo Bank of Neb., 278 Neb. 428, 445-46, 771 N.W.2d 103, 118–19 (2009) (footnoting cases; footnotes omitted).

6. A CONTRACT IS TO BE READ AS A WHOLE

" '[A] contract must be viewed as a whole.' *Bass v. Dalton*, 213 Neb. 360, 362–63, 329 N.W.2d 115, 117 (1983)." *Rees v. Huffman*, 222 Neb. 493, 496, 384 N.W.2d 631, 634 (1986). *Accord Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 155, 953 N.W.2d 16, — (2021); *Gage Cty. v. Employers Mut. Cas. Co.*, 304 Neb. 926, 940, 937 N.W.2d 863, 873 (2020); *Gen. Drivers & Helpers Union, Local No. 554 v. Cty. of Douglas*, 291 Neb. 173, 179, 864 N.W.2d 661, 666 (2015) (using the reasonable interpretation of the contract as a whole to construe an otherwise ambiguous work in the contract); *Kercher v. Bd. of Regents*, 290 Neb. 428, 436, 860 N.W.2d 398, 405 (2015); *Tierney v. Four H Land Company Limited Partnership*, 288 Neb. 586, 596, 852 N.W.2d 292, 300 (2014) ("Whatever the construction of a particular clause . . . standing alone, . . . it must be read in connection with other clauses."); *Davenport Ltd. P'ship v. 75th & Dodge, L.L.P.*, 279 Neb. 615, 621, 780 N.W.2d 416, 419 (2010); *Lexington Ins. Co. v. Entrex Commc'n Servs., Inc.*, 275 Neb. 702, 713,

749 N.W.2d 124, 132 (2008); *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 4 (2006); *Keller v. Bones*, 260 Neb. 202, 209, 615 N.W.2d 883, 888 (2000); *Ruble v. Reich*, 259 Neb. 658, 664, 611 N.W.2d 844, 850 (2000).

In other words, a party may not “be permitted to pick and choose among the clauses of a contract, accepting only those which advantage it.” *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 467, 428 N.W.2d 141, 150 (1988).

Said yet a third way, in construing a contract, consider the whole contract and, if possible, give effect to every part thereof. *E.g.*, *Equestrian Ridge Homeowners Association v. Equestrian Ridge Estates II Homeowners Association*, 308 Neb. 128, 138, 953 N.W.2d 16, — (2021); *Lassalle v. State*, 307 Neb. 221, 232, 948 N.W.2d 725, — (2020); *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 117, 944 N.W.2d 297, — (2020); *Gage Cty.*, 304 Neb. at 935, 937 N.W.2d at 873; *Am. Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 260, 842 N.W.2d 100, 107 (2014); *Hearst-Argyle Prop. v. Entrex Commc’n. Servs.*, 279 Neb. 468, 473, 778 N.W.2d 465, 470 (2010); *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 556, 772 N.W.2d 88, 95 (2009); *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 440, 771 N.W.2d 103, 115 (2009); *Lexington Ins. Co. v. Entrex Commc’n. Servs.*, 275 Neb. 702, 713, 749 N.W.2d 124, 135 (2008); *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 319, 746 N.W.2d 672, 681 (2008); *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 4 (2006); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 153, 663 N.W.2d 131, 135 (2003); *Daehnke v. Nebraska Dep’t of Soc. Serv.*, 251 Neb. 298, 303–04, 557 N.W.2d 17, 20 (1996); *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 619, 96 N.W.2d 721, 725 (1959) (defining “occur”); *Long v. Magnolia Petrol. Co.*, 166 Neb. 410, 421, 89 N.W.2d 245, 253 (1958).

A construction that gives effect to all parts of a contract is preferred over one that renders part of the contract redundant and useless. *McGavock v. Omaha Nat’l Bank*, 64 Neb. 440, 440, 90 N.W. 230, 230 (1902) (syllabus by the court).

7. WORDS GROUPED TOGETHER IN A LIST ARE GIVEN A RELATED MEANING

“Words are known by the company they keep, so a court gives written words grouped together in a list a related meaning.” *Timberlake v. Douglas Cty.* 291 Neb. 387, 399, 865 N.W.2d 788, 798 (2015).

8. CONTRACTS MADE IN REFERENCE TO AND AS PART OF THE SAME TRANSACTION

Absent an indication of a contrary intention, “instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are legally one instrument and will be construed together as if they were as much one in form as they are in

substance.” Same quotation: *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 467, 428 N.W.2d 141, 150 (1988); *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 471, 418 N.W.2d 236, 240 (1988). *Accord* *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb 928, 941-42, 947 N.W 2d 856, — (2020) (“[I]nstruments made in reference to and as part of the same transaction are to be considered and construed together.”); *TNT Cattle Co. v. Fife*, 304 Neb. 890, 919, 937 N.W.2d 811, 834 (2020) (same quotation as *Valley Boys*, above; *Davenport Ltd. P’ship v. 75th & Dodge, L.L.P.*, 279 Neb. 615, 629, 780 N.W.2d 416, 427 (2010); *Gary’s Implement Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 302, 702 N.W.2d 355, 368 (2005); *In re Estate of West*, 252 Neb. 166, 169-70, 560 N.W.2d 810, 812-13 (1997) (trust instruments); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 834, 540 N.W.2d 101, 104 (1995); *Baker’s Supermarkets v. Feldman*, 243 Neb. 684, 691, 502 N.W.2d 428, 433 (1993); *Kearney Centre Invs., Ltd. v. Thomas*, 229 Neb. 21, 25, 424 N.W.2d 620, 623 (1988). *Accord* *Ray Anderson, Inc. v. Buck’s, Inc.*, 300 Neb. 434, 442, 900 N.W.2d 32, 43 (2018); *Mutual of Omaha Bank v. Watson*, 297 Neb. 479, 486, 900 N.W.2d 545, 550 (2017) (slightly different version of the same quotation).

Furthermore, “instruments made in reference to and as part of the same transaction are to be considered and construed together, and the fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction.” *Norwest v. State*, 253 Neb. 574, 584, 571 N.W.2d 628, 634 (1997). *Accord* *Solar Motors*, 249 Neb. at 768, 545 N.W.2d at 721; *Lee Sapp Leasing*, 248 Neb. at 834, 540 N.W.2d at 104.

9. STATUTES IN EXISTENCE WHEN A CONTRACT IS EXECUTED ARE PART THEREOF

“[S]tatutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.” *In re Estate of Peterson*, 221 Neb. 792, 800, 381 N.W.2d 109, 116 (1986). Additionally, “a contract for an illegal purpose is void and unenforceable.” *Central States Health & Life Co. v. Miracle Hills Ltd. P’ship*, 235 Neb. 592, 596, 456 N.W.2d 474, 477 (1990). “A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.” *Rath v. City of Sutton*, 267 Neb. 265, 287, 673 N.W.2d 869, 889 (2004). *See also* *NJI2d Civ. 15.40, Comment.*

10. A CONSTRUCTION THAT MAKES A CONTRACT LAWFUL IS PREFERRED OVER ONE THAT MAKES IT UNLAWFUL

A construction that makes a contract lawful is preferred over one that makes it unlawful. *Horton v. Rohlff*, 69 Neb. 95, 99, 95 N.W. 36, 38 (1903).

11. AMBIGUOUS CONTRACTS ARE CONSTRUED AGAINST THE DRAFTER

“Ambiguous contracts are construed against the drafter.” *Beveridge*

v. Savage, 285 Neb. 991, 995, 830 N.W.2d 482, 486 (2013). *Accord, e.g.*, DH-1, LLC v. City of Falls City, 305 Neb. 23, 30, 938 N.W.2d 319, — (2020); Henn v. Am. Family Mut. Ins. Co., 295 Neb. 859, 865, 894 N.W.2d 179, 184 (2017) (ambiguity in insurance policy construed “in favor of the insured”); Van Kleek v. Farmers Ins. Exch., 289 Neb. 730, 735, 857 N.W.2d 297, 301 (2014); Brockley v. Lozier Corp., 241 Neb. 449, 464, 488 N.W.2d 556, 565 (1992). When there is a question as to the meaning of a contract, it “will be construed most strongly against the party preparing it.” Schmidt v. J.C. Robinson Seed Co., 220 Neb. 344, 352, 370 N.W.2d 103, 108 (1985) (multiple quotation marks omitted). *Accord, e.g.*, Lexington Ins. Co. v. Entrex Comm. Servs., 275 Neb. 702, 713, 749 N.W.2d 124, 135 (2008); Cornhusker Cas. Co. v. Farmers Mut. Ins. Co., 268 Neb. 168, 175, 680 N.W.2d 595, 600 (2004) (insurance contract); Anderson v. Nashua Corp., 251 Neb. 833, 840, 560 N.W.2d 446, 450 (1997); D & R Realty v. Bender, 230 Neb. 301, 305, 431 N.W.2d 920, 923 (1988); Malerbi v. Central Reserve Life, 225 Neb. 543, 551, 407 N.W.2d 157, 162 (1987); Long v. Magnolia Petrol. Co., 166 Neb. 410, 421, 89 N.W.2d 245, 252 (1958).

Enforcement of this general rule is even more resolute when the contract is embodied in one party’s preprinted form. Am. Family Ins. Group v. Hemenway, 254 Neb. 134, 141, 575 N.W.2d 143, 148 (1998); Union Ins. Co. v. Land and Sky, Inc., 247 Neb. 696, 701, 702, 529 N.W.2d 773, 776, 777 (1995); Am. Security Servs., Inc. v. Vodra, 222 Neb. 480, 486, 385 N.W.2d 73, 77 (1986); DaLee Realty, Inc. v. Kuhl, 209 Neb. 6, 9, 305 N.W.2d 891, 893 (1981). *See also* Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir.1984) (printed-form contract prepared by one party and adhered to by another who has little or no bargaining power, ambiguity construed against drafting party). The application of this rule of construction may change the question of the interpretation of an ambiguous contract from a question of fact to a question of law. This is discussed above, in part VII(C)(2) of this Comment, which discusses the resolution of an ambiguity in an insurance contract.

“In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.” Mahoney v. Union Pac. R.R. Employees’ Hosp. Ass’n, 238 Neb. 531, 535, 471 N.W.2d 438, 441 (1991) (multiple quotation marks and citation omitted). Said a bit differently, “an insurance policy will be construed against the insurer because the insurer drafted the contract” *Cornhusker Cas. Co.*, 268 Neb. at 175, 680 N.W.2d at 600; *Accord, e.g.*, State Farm Fire & Casualty Company v. TFG Enterprises, LLC, 308 Neb. 460, 467, 954 N.W.2d 899, — (2021) (“[W]hen an insurance contract is ambiguous, we will construe the policy in favor of the insured.”); Am. Fam. Mut. Ins. Co. v. Wheeler, 287 Neb. 250, 255, 842 N.W.2d 100, 104 (2014); Boutilier v. Lincoln Benefit Life Ins. Co., 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004); Guerrier v. Mid-Century Ins. Co., 266 Neb. 150, 154, 663 N.W.2d 131, 135 (2003); Farm Bureau Ins. Co. v. Martinsen, 265 Neb. 770, 774, 659 N.W.2d 823, 827 (2003); City of Scottsbluff v. Employers Mut. Ins. Co., 265 Neb. 707, 711, 658 N.W.2d 704, 708 (2003); Neff Towing Serv. v. United States Fire Ins. Co., 264 Neb. 846, 852, 652 N.W.2d 604, 609

(2002); *R.W. v. Schrein*, 264 Neb. 818, 823, 652 N.W.2d 574, 579 (2002). *See also* part VII(C)(2) of this Comment, above.

“The insurer, as the drafter of the policy, is responsible for language creating the ambiguity. The resolution of an ambiguity in an insurance policy turns not on what the insurer intended the language to mean, but on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.” *Mendenhall v. Grantzinger*, 249 Neb. 847, 853, 546 N.W.2d 775, 779 (1996). *Accord*, *i.e.*, *Kaiser v. Allstate Indemnity Company*, 307 Neb. 562, 570, 949 N.W.2d 787, 794–95 (2020). The handling of an ambiguity in an insurance policy is the subject of part VIII(C)(2) of this Comment. Please turn there for more.

“Where contract language is plain and unambiguous, the court will not read an ambiguity into it in order to construe it against the one who prepared the contract.” *Nat’l Farmers Union Serv. v. Edwards*, 220 Neb. 231, 233, 369 N.W.2d 76, 79 (1985). *Accord, e.g.*, *Ray Anderson, Inc. v. Buck’s, Inc.*, 300 Neb. 434, 441, 900 N.W.2d 32, 42 (2018) (“Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous”); *Henn*, 295 Neb. at 865, 894 N.W.2d at 184; *Kliver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 4 (2006); *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004); *Cornhusker Cas. Co.*, 268 Neb. at 176, 680 N.W.2d at 600; *Poulton v. State Farm Fire and Cas. Cos.*, 267 Neb. 569, 575–76, 675 N.W.2d 665, 671 (2004); *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 774, 659 N.W.2d 823, 827 (2003); *City of Scottsbluff*, 265 Neb. at 711, 658 N.W.2d at 708; *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003) (extrinsic evidence cannot be used to create ambiguity where a contract’s terms are clear and unambiguous); *R.W. v. Schrein*, 264 Neb. 818, 822–23, 652 N.W.2d 574, 579 (2002). *See also* Restatement (Second) of Contracts § 206 (1981) and part VIII(C)(2) of this Comment, above.

“This court will not rewrite the contract to provide terms contrary to those which are expressed. Nor is it the province of a court to rewrite a contract to reflect the court’s view of a fair bargain.” *DH-1, LLC*, 305 Neb. at 30–31, 938 N.W.2d at —. This point is discussed in greater detail at part X(6)(2) of this Comment, above, and part X(C)(13), below.

12. DIVISIBLE CONTRACTS

[W]hether a contract is divisible or indivisible is a question of intentions apparent in the instrument. In an unambiguous contract, it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in light of the surrounding circumstances. “A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable.”

Fuelberth v. Heartland Heating & Air Conditioning, Inc., 307 Neb.

1002, 1008–09, 951 N.W.2d 758, 763 (2020) (citations omitted) (“[T]he question of whether a contract was divisible . . . [is] one of fact.” *Id.* at 108, 951 N.W.2d at 1008. “If a contract is divisible, ‘breaches of its severable parts give rise to separate causes of action, [and] the statute of limitations will generally begin to run at the time of each breach.’” *Id.* (brackets in *Fuelberth*).

13. CONTRACTS PARTLY WRITTEN AND PARTLY PRINTED

“When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent.” Neb. Rev. Stat. § 25-1216 (Reissue 2016). *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 477, 507 N.W.2d 465, 474 (1993); *Niedbalski v. Bd. of Educ. of Sch. Dist. No. 24 of Platte Ctr.*, 227 Neb. 516, 522, 418 N.W.2d 565, 569 (1988); *Spencer-O’Neill House, Inc. v. Denbeck*, 196 Neb. 456, 459, 243 N.W.2d 767, 769 (1976). “‘Typewriting is writing within the contemplation of th[is] statute.’” *Niedbalski, supra* (quoting *Spencer-O’Neill House, Inc., supra*). Where the contract is typed, subsequent writing thereon, in longhand, controls over the typed portion. *Niedbalski* and *Spencer-O’Neill House, Inc.*, both *supra*.

It is true that to the extent a conflict exists between type-written and printed provisions, the typewritten matter in a contract must be given effect over the printed matter. But “[b]oth a printed provision that is clearly a part of the body of a contract and a handwritten or typewritten provision that has been inserted into a contract are subject to the same rules of interpretation as are other provisions of a contract.”

Coral Prod. Corp. v. Central Res., Inc., 273 Neb. 379, 393, 730 N.W.2d 357, 370 (2007) (footnotes omitted) (quoting 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.24, at 262 (1998)).

14. EXTRINSIC EVIDENCE

“Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.” Same quotation: *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003); *McDonald’s Corp. v. Goler*, 251 Neb. 934, 940, 560 N.W.2d 458, 462 (1997). *Accord Lassalle v. State*, 307 Neb. 221, 235, 948 N.W.2d 725, — (2020); *Benjamin v. Bierman*, 305 Neb. 879, 884, 943 N.W.2d 283, — (2020); *Facilities Cost Mgt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 656, 868 N.W.2d 67, 77 (2015); *Gibbons Ranches, L.L.C. v. Bailey*, 289 Neb. 949, 955, 857 N.W.2d 808, 816 (2015) (“[U]nless a contract is ambiguous, parol evidence may not be used to vary its terms.”); *Wood v. Wood*, 266 Neb. 580, 584, 667 N.W.2d 235, 240 (2003) (“When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.”); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003) (extrinsic evidence cannot be used to create ambiguity where a contract’s terms are clear and unambiguous). *See also* part VIII(B) of this Comment, above.

Extrinsic evidence may be considered to determine the meaning of an ambiguous contract. *Davenport Ltd. P'ship v. 75th & Dodge, L.L.P.*, 279 Neb. 615, 622, 780 N.W.2d 416, 420 (2010); *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 237, 681 N.W.2d 746, 750 (2004); *Plambeck v. Union Pac. R.R. Co.*, 244 Neb. 780, 783–84, 509 N.W.2d 17, 20–21 (1993); *Dammann v. Litty*, 234 Neb. 664, 671, 452 N.W.2d 522, 527 (1990); *Lueder Constr.Co. v. Lincoln Elec. Sys.*, 228 Neb. 707, 710, 424 N.W.2d 126, 128 (1988); *Hensman v. Parsons*, 235 Neb. 872, 880, 458 N.W.2d 199, 205 (1990) (when a document is ambiguous, it is for the trier of fact to determine the intent of parties from all the facts and circumstances).

Regarding extrinsic evidence, *see also* part VII of this Comment, above. Regarding extrinsic evidence under a different name, *i.e.*, parol evidence, *see* part X(D)(2), Some Rules of Construction, in this comment, above.

Regarding extrinsic evidence and consideration *see* NJI2d 15.06, Comment & Authorities.

15. INDICATIONS OF THE PARTIES' INTENTIONS (WHEN EXTRINSIC EVIDENCE IS ADMISSIBLE)

One of the best indications of what the parties to a contract intended by the contract is the interpretation they give to the contract while engaged in its performance. How they perform under the contract should be given great, if not controlling influence. *Keller v. Bones*, 260 Neb. 202, 210, 615 N.W.2d 883, 889 (2000); *Fraternal Order of Police, Lodge No. 2 v. Cty. of Douglas*, 259 Neb. 822, 828, 612 N.W.2d 483, 488 (2000); *Stephens v. Radium Petrol. Co.*, 250 Neb. 560, 562, 550 N.W.2d 39, 41 (1996); *Solar Motors v. First Nat'l Bank of Chadron*, 249 Neb. 758, 768, 545 N.W.2d 714, 721 (1996); *Professional Serv. Indus., Inc. v. J.P. Constr., Inc.*, 241 Neb. 862, 867, 491 N.W.2d 351, 354 (1992); *Brockley v. Lozier Corp.*, 241 Neb. 449, 464, 488 N.W.2d 556, 565 (1992); *Wurst v. Blue River Bank*, 235 Neb. 197, 204–05, 454 N.W.2d 665, 669–70 (1990); *Int'l Harvester Credit Corp. v. Lech*, 231 Neb. 798, 803, 438 N.W.2d 474, 477 (1989); *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 6, 434 N.W.2d 532, 535 (1989); *Municipal Energy Agency of Neb. v. City of Cambridge*, 230 Neb. 61, 65, 430 N.W.2d 44, 47 (1988); *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 471, 418 N.W.2d 236, 241–42 (1988).

As just noted, the course of performance of the parties is an aid to ascertaining their intent regarding the contract. On the other hand, “[t]he practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself.” Same quotation: *Bedrosky v. Hiner*, 230 Neb. 200, 206, 430 N.W.2d 535, 539 (1988); *Ames v. George Victor Corp.*, 228 Neb. 675, 683, 424 N.W.2d 106, 112 (1988).

“[E]vidence of prior or contemporaneous negotiations or under-

standings' " can be an indication of the meaning of an ambiguous contract. *Stastny*, 243 Neb. at 50, 497 N.W.2d at 668 (such evidence is admissible to discover meaning each party had reason to know other party would give words of contract) (quoting *Quinn v. Godfather's Invs.*, 213 Neb. 665, 668–69, 330 N.W.2d 921, 924 (1983)).

The custom and practice of an industry can be an indication of the meaning of an ambiguous contract. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 53, 497 N.W.2d 657, 670 (1993) ("Expert testimony as to the custom and practice of an industry is admissible to elucidate the meaning of ambiguous language"; regarding this use of experts, see part VII(C)(1) of this Comment, above, and see *NJI2d Civ. 1.42*, Comment and Authorities).

"Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract." *Professional Bus. Servs. Co. v. Rosno*, 268 Neb. 99, 115, 680 N.W.2d 176, 188 (2004).

Evidence of preliminary negotiations: "In the interpretation of a writing . . . intended to state the entire agreement, preliminary negotiations between the parties may be considered . . . to determine their intention, but not to vary or contradict the plain terms of the [contract]." *Smith v. Game, Forestation and Parks Comm'n*, 170 Neb. 593, 598, 103 N.W.2d 829, 832–33 (1960).

16. OMITTED TERM SUPPLIED BY THE COURT

The Restatement (Second) of Contracts provides a default rule for the omission of terms necessary to determining the parties' obligations under an enforceable contract: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. [T]his rule does not apply when the parties' manifestations or conduct show that they do not intend to be bound unless they agree upon a term and they fail to agree. [W]e agree with this rule, and adopt it, for circumstances showing that the parties to a binding contract have failed to negotiate a term to cover a future contingency.

The first step in an omitted-term case is to determine whether interpretative principles show what the term should be. That is, a court should first consider whether there exists a "tacit agreement or a common tacit assumption" or whether it

can supply a term “by logical deduction from agreed terms and the circumstances.” But a court should not engage in a hypothetical bargaining analysis if applying interpretative principles shows that the parties did not agree on a contract term necessary to determining their rights and duties. In that circumstance, it must supply a term that “comports with community standards of fairness and policy.”

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 876, 809 N.W.2d 725, 749 (2011) (footnotes omitted).

17. CONSTRUCTION OF THE PARTIES' REMEDIAL RIGHTS UNDER THE CONTRACT

“A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed.” *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 24, 645 N.W.2d 519, 526 (2002).

18. RELEVANCE OF TERMS OR CONDITIONS OF AN EXPIRED EMPLOYMENT CONTRACT

“Generally, when terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision, even when that provision is contained in an expired contract.” *Employees United Labor Assn. v. Douglas Cty.*, 284 Neb. 121, 128, 816 N.W.2d 721, 727 (2012).

19. THE TERMS OF A CONTRACT AND A COURSE OF DEALING OR USAGE OF TRADE

“The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other.” *Production Credit Ass'n. v. Eldin Haussermann Farms*, 247 Neb. 538, 544, 529 N.W.2d 26, 31 (1995) (citing *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991)). *See also Weitz Company, LLC v. Hands, Inc.*, 294 Neb. 215, 277, 882 N.W.2d 659, 668 (2016) (“Usages of trade are strong evidence of the foreseeability of reliance.”).

20. CROSS REFERENCES

Regarding mistake on the part of one or more parties to a contract, *see above and see* NJI2d Civ. 15.22, Comment.

Regarding implied contracts, quasi contracts (a.k.a., unjust enrichment and restitution), and agreements to make future contracts, *see above and see* NJI2d Civ. 15.01, Comment, and 15.02, Comment.

A number of general rules regarding the interpretation of contracts are discussed at Restatement (Second) of Contracts §§ 200–208 (1981).

E. CROSS-REFERENCE TO TERMS IMPOSED BY LAW

On the related question of terms imposed on a contract by law, see NJI2d Civ. 15.40.

XI. PROMISSORY ESTOPPEL

Promissory estoppel may be asserted as the basis for a cause of action for detrimental reliance in connection with an offer of at-will employment. *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 28, 588 N.W.2d 798, 804 (1999). "Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Blinn v. Beatrice Cmty. Hosp. and Health Ctr., Inc.*, 270 Neb. 809, 821, 708 N.W.2d 235, 246 (2006). The kind of promise necessary is discussed at length in *Blinn*.

In Nebraska, a claim of promissory estoppel requires a plaintiff to show: (1) a promise that the promisor should have reasonably expected to induce that plaintiff's action or forbearance, (2) the promise did in fact induce the plaintiff's action or forbearance, and (3) injustice can only be avoided by enforcing the promise. The promise need not be definite enough to support a unilateral contract, but it must be definite enough to show that the plaintiff's reliance on it was reasonable and foreseeable.

Weitz Company, LLC v. Hands, Inc., 294 Neb. 215, 226, 882 N.W.2d 659, 668 (2016) (footnotes omitted). *Accord* *In re Estate of Ryan*, 302 Neb. 821, 830, 925 N.W.2d 336, 343 (2019) ("Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise. Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

"Under Nebraska law, the doctrine of promissory estoppel does not require that the promise giving rise the cause of action must meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Under this theory, the main focus is on reasonable reliance." *In re Estate of Ryan*, 302 Neb. at 831, 925 N.W.2d at 343.

"No single measure of damages applies in every promissory estoppel case." *Weitz Co.*, 294 Neb. at 233, 882 N.W.2d at 672. When the cause of action is based upon promissory estoppel, damages are awarded as justice requires and not by attempting to provide the plaintiff damages based upon the benefit of the bargain. *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 29-30, 588 N.W.2d 798, 805 (1999). *See also Weitz Co.*, 294 Neb. at 233-34, 882 N.W.2d at 672-73.

Regarding estoppel generally, see the references in the Index, under

Equitable Estoppel. Different aspects of estoppel are discussed at different places herein: *See* NJI2d Civ. 1.45, (judicial estoppel: False Testimony (Falsus in Uno, Falsus in Omnibus)); NJI2d Civ. 6.26-6.28 ("Partner by Estoppel"); NJI2d Civ. 8.72, Comment & Authorities (State Tort Claims Act and Political Subdivision Tort Claims Act); NJI2d Civ. 9.01, Comment & Authorities (fraudulent misrepresentation; citing equitable estoppel cases); NJI2d Civ. 12.04 Comment & Authorities (statute of limitations) and NJI2d Civ. 15.01 (promissory estoppel as a basis for a cause of action for breach of contract).

XII. WAIVER OF CONTRACT

"A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive." Same quotation: *George Clift Enters. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 810, 947 N.W.2d 510, — (2020); *Weber v. North Loup River Pub. Power and Irrig. Dist.*, 288 Neb. 959, 968, 854 N.W.2d 263, 272 (2014); *Davenport Ltd. P'ship v. 75th & Dodge, L.L.P.*, 279 Neb. 615, 625, 780 N.W.2d 416, 423 (2010). *Accord* *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 391, 872 N.W.2d 765, 773 (2015).

The determination of whether a contractual provision has been waived is a factual determination. *U.S. Pipeline v. Northern Nat. Gas Co.*, 303 Neb. 444, 474, 930 N.W.2d 460, — (2019).

"A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct." "[T]o establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part." A waiver requires that the waiving party have "full knowledge of all the material facts."

State ex rel. Wagner v. Amwest Surety Ins. Co., 280 Neb. 729, 736-37, 790 N.W.2d 866, 872 (2010) (footnotes omitted). *Accord* *U.S. Pipeline*, 303 Neb. at 474, 930 N.W.2d at —; *Omaha Police Union Local 101*, *supra*; *Weber*, 288 Neb. at 966, 854 N.W.2d at 272; *Lexington Ins. Co. v. Entrex Comm'c Serv., Inc.*, 275 Neb. 702, 711, 749 N.W.2d 124, 131 (2008) (stating that public policy favors contractual waiver of subrogation); *Davenport Ltd. P'ship*, 279 Neb. at 621, 780 N.W.2d at 423.

"Even a provision in a written contract that specifies that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct. *U.S. Pipeline*, 303 Neb. at 474, 930 N.W.2d at —.

"Waiver of a contractual provision is a defense to enforcement of that provision, but a party must first seek to invoke the provision before

it is necessary to consider the affirmative defense of waiver.” *Boyd*, 298 Neb. 819, 832, 906 N.W.2d 31, 42 (2018). *Lexington Ins. Co. v. Entrex Comm’c Serv., Inc.*, 275 Neb. 702, 711, 749 N.W.2d 124, 131 (2008).

XIII. DEFENSES

Regarding part II of the instruction, Defendant’s Defenses, see both part C of this chapter (NJI2d Civ. 15.20 *et seq.*) and the Comment to NJI2d Civ. 2.02D.

“Matters seeking avoidance of a valid contract are affirmative defenses.” *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 640, 950 N.W.2d 321, — (2020).

“To constitute a defense to an action based on contract, the matters must generally be germane to the cause of action pleaded, in addition to presenting a legal reason why the plaintiff will not recover.” A claim of defense arising out of tort concepts is not generally available where the claim of plaintiff is premised upon contract.” *Dick*, 307 Neb. at 647, 950 N.W.2d, at — (footnotes omitted).

XIV. DAMAGES

The damage instructions for use in a contracts case are in Chapter 4. *See generally*, NJI2d Civ. 4.40, *et seq.* *See particularly*, NJI2d Civ. 4.40, Comment. For a general discussion of damages, including liquidated damages for a breach of contract, see the Introduction to Chapter 4. Mitigation of damages, including its application in contract actions and actions under the Uniform Commercial Code, is discussed at NJI2d Civ. 4.70, Comment.

AUTHORITIES

For an extensive discussion of this general subject of statement-of-the-case instruction, *see* NJI2d Civ. 2.01, Comment and Authorities.

If the essence of a dispute sounds in contract, the action is at law. *Union Ins. Co. v. Bailey*, 234 Neb. 257, 260, 450 N.W.2d 661, 664 (1990) (citing cases). *See also, e.g., City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 857, 809 N.W.2d 725, 737 (2011) (“A claim that the parties created an enforceable contract generally presents an action at law.”); *Struve Enters. v. Travelers Ins. Co.*, 243 Neb. 516, 519, 500 N.W.2d 580, 583 (1993).

A suit brought to recover damages for breach of contract is an action at law. *TNT Cattle Co., Inc.*, 304 Neb. 890, 911, 937 N.W.2d 811, 829 (2020) (involving breach of a lease agreement); *Goes v. Vogler*, 304 Neb. 848, 853, 937 N.W.2d 190, 195 (2020); *Weyh v. Gottsch*, 303 Neb. 280, 294, 929 N.W.2d 40, 294 (2019) (involving a declaratory judgment); *Fredericks Peebles & Morgan v. Assam*, 300 Neb. 670, 685, 915 N.W.2d

770, 781 (2018); *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 23, 810 N.W.2d 677, 682 (2012); *Par 3, Inc. v. Livingston*, 268 Neb. 636, 638, 640, 686 N.W.2d 369, 372, 373 (2004); *Phipps v. Skyview Farms*, 259 Neb. 492, 498, 610 N.W.2d 723, 730 (2000); *Records v. Christensen*, 246 Neb. 912, 915, 524 N.W.2d 757, 760 (1994). *See also* *Winberg v. Cimfel*, 248 Neb. 71, 75, 532 N.W.2d 35, 39 (1995) (action for specific performance sounds in equity); *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 468, 507 N.W.2d 465, 469 (1993) (whereas action to foreclose construction lien is action in equity); *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 459, 428 N.W.2d 141, 145 (1988) (whereas action for specific performance is action in equity; case discusses what happens when same case contains both legal and equitable issues); *South Sioux City Star v. Edwards*, 218 Neb. 487, 488, 357 N.W.2d 178, 179 (1984) (suit to recover monetary damages for services rendered is action at law for breach of contract). Regarding specific performance generally, see part 4 of the Introduction to chapter 4, above.

This subject, and the difference between the contract action and the tort action is discussed in detail in part III of the Comment, above.

"A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract." Same quotation: *Valley Boys, Inc. v. Am. Fam. Ins. Co.*, 306 Neb. 928, 942, 947 N.W.2d 856, — (2020); *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 116, 944 N.W.2d 297, — (2020); *Houghton v. Big Red Keno*, 254 Neb. 81, 86, 574 N.W.2d 494, 498 (1998); *Hoelt v. Five Points Bank*, 248 Neb. 772, 779, 539 N.W.2d 637, 644 (1995).

"A breach [of contract] is a nonperformance of a duty." *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 23, 645 N.W.2d 519, 526 (2002). *Accord, e.g., Weber v. North Loup River Pub. Power and Irrig. Dist.*, 288 Neb. 959, 966, 854 N.W.2d 263, 271 (2014).

"In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty." Same quotation: *Henriksen v. Gleason*, 263 Neb. 840, 847, 643 N.W.2d 652, 658 (2002); *Phipps v. Skyview Farms*, 259 Neb. 492, 498, 610 N.W.2d 723, 730 (2000); *Production Credit Ass'n v. Eldin Haussermann Farms*, 247 Neb. 538, 545, 529 N.W.2d 26, 32 (1995). *Accord* *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 516, 576 N.W.2d 817, 825 (1998); *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 373, 518 N.W.2d 910, 922 (1994); *Steineke v. Share Health Plan of Neb., Inc.*, 246 Neb. 374, 378, 518 N.W.2d 904, 907 (1994) (plaintiff must prove breach was proximate cause of alleged damages); *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 828–29, 496 N.W.2d 916, 922–23 (1993); *Rapp v. Wilson & Co., Inc.*, 200 Neb. 383, 386, 263 N.W.2d 832, 834 (1978) (plaintiff must also show that he or she is a person entitled to enforce the contract); *Pinkerton v. Leonhardt*, 184 Neb. 430, 431, 168 N.W.2d 272, 273 (1969). *See also* *Harmon Cable Commc'ns v. Scope Cable Television, Inc.*, 237 Neb. 871, 881–84, 468 N.W.2d 350, 358–59 (1991) (discusses difference between promise and condition precedent).

“In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.” *Henriksen v. Gleason*, 263 Neb. 840, 847, 643 N.W.2d 652, 658 (2002).

In any damage action for breach of contract, the claimant must prove that the breach of contract was the proximate cause of the damages. This requires a causal relationship between the damages asserted and the breach relied upon Uncertainty as to the fact of whether damages were sustained at all is fatal to recover, but uncertainty to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.

Union Ins. Co. v. Land and Sky, Inc., 253 Neb. 184, 188, 568 N.W.2d 908, 911 (1997) (citations omitted). *Accord Sack Brothers v. Great Plains Co-op.*, 260 Neb. 292, 310–11, 616 N.W.2d 796, 809 (2000).

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled: A general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

See the Comment, *supra*, and see generally 17A Am. Jur. 2d *Contracts* §§ 699, *et seq.* (2004 & Supp. 2009).

B. DEFINITIONS

NJI2d Civ. 15.02

CONTRACT—AGREEMENT AND CONSIDERATION

For there to be a contract, the parties must agree to do or not to do something and the agreement must be supported by consideration. [The agreement may consist of an offer by one party and an acceptance by the other.]

[The agreement may be written, oral, inferred from conduct, or found in some combination of those ways.]

COMMENT

A. GENERAL

This instruction presents the first in a series of definitions. Applicable definitional instructions can be given as single instructions or

combined into one definitional instruction. They are presented separately in this work to increase their usefulness by both enhancing their accessibility and keeping the Comments and Authorities to a more manageable size.

Just what the parties agreed to do or not to do is covered in other instructions. Case law stating that in order for there to be a contract the parties must agree as to each essential term of the contract is presented at NJI2d Civ. 15.01, Comment. If this is a problem, the problem will be taken care of in NJI2d Civ. 15.01, the statement of the case instruction.

About offer, acceptance, and meeting of the minds, *see generally* NJI2d Civ. 15.01, Comment, part VIII. *See also* NJI2d Civ. 15.03, *et seq.*

“An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. . . . An agreement to agree, rather than a complete contract that could simply be memorialized at a later time, is not enforceable in Nebraska.” *Cimino v. FirstTier Bank*, 247 Neb. 797, 809, 530 N.W.2d 606, 614 (1995).

Sometimes consideration enters a case as an affirmative defense, and the defendant has the burden of proving failure of consideration. This is discussed at NJI2d Civ. 15.27.

Regarding consideration generally, *see also* NJI2d Civ. 15.06 and its Comment and NJI2d Civ. 15.27 and its Authorities.

In a Uniform Commercial Code case, *see* J. White and R. Summers, *Uniform Commercial Code*, Ch. 1 (6th ed. 2010).

B. THIS INSTRUCTION NOT OFTEN GIVEN

It is the opinion of the Committee that this instruction, NJI2d Civ. 15.02, will not often be given. Its inclusion in these materials is not meant to suggest that it should be given routinely. More often than not, the Burden of Proof part of NJI2d Civ. 15.01 will be all that is needed and giving this instruction in addition would be redundant. And, even when this instruction is used, the offer and acceptance language will not often be used. (This is so even though it is true “that to create a contract there must be both an offer and an acceptance.” *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 768, 463 N.W.2d 817, 821 (1990).)

C. IMPLIED AND “QUASI” CONTRACTS

The statement that “[t]he agreement may be written, oral, inferred from conduct, or found in some combination of those ways,” applies to a case involving an implied contract. It is in brackets to alert the reader

that care must be taken when using this part of the instruction. "An action in contract inevitably rests upon a promise or set of promises. A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct." *Clark & Enersen, Hamersky, Schlaebitz, Burroughs & Thomsen, Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 813, 235 N.W.2d 870, 872 (1975). More succinctly, "[a] contract may be written or oral and can be shown by circumstantial evidence." *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 768, 463 N.W.2d 817, 821 (1990). *Accord* Restatement (Second) of Contracts § 4 (1981).

When the implied contract part of this instruction is given, it may have to be tailored to the facts of the particular case.

Regarding implied contracts generally, *see* NJI2d Civ. 15.01, Comment, part VII(C).

Regarding "quasi contracts," which are not contracts at all, but are claims for restitution to prevent unjust enrichment, *see* NJI2d Civ. 15.01, Comment, part VII(D).

AUTHORITIES

See generally, the Comment, *supra*; NJI 15.01, Comment; Restatement (Second) of Contracts, particularly §§ 3, 4, 17 (1981 & Supp. 1996).

E.g., *Logan Ranch, Karg P'ship v. Farm Credit Bank*, 238 Neb. 814, 821–22, 472 N.W.2d 704, 708–09 (1991); *Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991); *Wurst v. Blue River Bank*, 235 Neb. 197, 207, 454 N.W.2d 665, 671 (1990); *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967); *Fairchild v. Fairchild*, 176 Neb. 95, 125 N.W.2d 191 (1963); *Wilkie v. Banse*, 166 Neb. 138, 88 N.W.2d 181 (1958); *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957); *Krum v. Chamberlain*, 57 Neb. 220, 77 N.W. 665 (1898); *Melick v. Kelley*, 53 Neb. 509, 73 N.W. 945 (1898). *Neff v. World Publ'g Co.*, 349 F.2d 235 (8th Cir.1965).

NJI2d Civ. 15.03

DEFINITION OF OFFER

An "offer" is an expression of willingness to enter into an agreement with another, made in such a way that the other party is justified in believing that (his, her, its) acceptance is invited and will result in a contract.

COMMENT

Use only when appropriate under the pleadings and the evidence. In the opinion of the Committee, this will not be often because whether there was an offer will not often be a jury question.

"[T]he offeror is master of the offer." *Keller v. Bones*, 260 Neb. 202, 207, 615 N.W.2d 883, 887 (2000). *Accord Hughes v. Cornhusker Cas. Co.*, 235 Neb. 656, 661, 456 N.W.2d 765, 768 (1990).

Depending on the facts, this expression of willingness may be written, oral, or inferred from conduct. This part of the law regarding the form of an offer is taken care of in NJI2d Civ. 15.02, and discussed in the Comment to that instruction, *supra*. As explained in that Comment, however, there may be cases when the instruction given in the second paragraphs of NJI2d Civ. 15.02 should be given in NJI2d Civ. 15.03 instead. When that is done, add one of the following as a second paragraph to NJI2d Civ. 15.03:

"An offer may be written or oral."

"An offer may be written, oral, inferred from conduct, or found in some combination of those ways."

It is the expressed intention of the parties, as shown by their words and acts, and not their secret intention, which is controlling in determining whether a contract has been entered. *Hughes*, 235 Neb. at 660, 456 N.W.2d at 767; *Fairchild v. Fairchild*, 176 Neb. 95, 99, 125 N.W.2d 191, 194 (1963). *See* NJI2d Civ. 15.01, Comment, part X.

A mere expression of opinion or prophecy is not an offer. A communication intended only as preliminary negotiation or an expression of willingness to negotiate is not an offer. *See* Restatement (Second) of Contracts § 26 (1981).

Regarding the time during which an offer remains open, see NJI2d Civ. 15.41.

In a Uniform Commercial Code case, see Neb. U.C.C. §§ 2-205, 2-206 (Reissue 2001); and *J. White and R. Summers*, Uniform Commercial Code § 1-4 (6th ed. 2010).

AUTHORITIES

Restatement (Second) of Contracts §§ 24, *et seq.* (1981) (particularly §§ 24 and 26). *E.g.*, *Fairchild v. Fairchild*, 176 Neb. 95, 99, 125 N.W.2d 191, 194 (1963); *Farmers Union Fid. Ins. Co. v. Farmers Union Co-op. Ins. Co.*, 147 Neb. 1093, 1096, 26 N.W.2d 122, 124 (1947); *Melick v. Kelley*, 53 Neb. 509, 510, 73 N.W. 945, 945 (1898).

"'An offer must be so definite in its terms, or require such definite terms in its acceptance, that the promises and performances to be rendered by each party are reasonably certain.'" *Kennedy v. Central Power Co.*, 129 Neb. 637, 639, 262 N.W. 504, 507 (1935) (quoting § 32 of the Restatement of Contracts).

NJ12d Civ. 15.04

DEFINITION OF ACCEPTANCE

“Acceptance” of an offer is an expression of agreement to the terms of the offer, made while the offer is still open.

[For an acceptance to be valid, there must not be any substantial variation between the offer and the claimed acceptance.]

[If the offer requires a certain time, place, or manner of acceptance, then, for the acceptance to be valid, it must meet those requirements.]

COMMENT

Use only when appropriate under the pleadings and the evidence. In the opinion of the Committee, this will not often be appropriate because whether there was an acceptance will not often be a jury question.

Regarding the time during which an offer remains open, see NJ12d Civ. 15.41.

“[T]he acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement.” *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993) (multiple quotation marks and citation omitted). *Accord* *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 769, 463 N.W.2d 817, 821 (1990); *Overman v. Brown*, 220 Neb. 788, 791, 372 N.W.2d 102, 105 (1985) (“‘need not be express or formal’”). The part of the law regarding the form of acceptance is discussed in NJ12d Civ. 15.02 and 15.05 and discussed further in the Comments to those pattern instructions. Regarding the possibility of adapting this instruction to cover the forms of acceptance, see NJ12d Civ. 15.03, Comment. Regarding acceptance through silence or inaction, see particularly NJ12d Civ. 15.05.

“The act constituting the alleged acceptance of an offer must be judged by whether [it] . . . would lead a reasonable person to conclude that the offer has been accepted.” *Overman v. Brown*, 220 Neb. 788, 791, 372 N.W.2d 102, 105 (1985). *Accord* *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 769, 463 N.W.2d 817, 821 (1990).

“An offeror is the master of the offer and may limit the means of acceptance to the actual performance of the bargained-for act, but unless such limitation is clear, the offeree may accept by promising to perform the act.” *Hughes v. Cornhusker Cas. Co.*, 235 Neb. 656, 661, 456 N.W.2d 765, 768 (1990).

As a general rule, acceptance must be communicated to the offeror.

Keller v. Bones, 260 Neb. 202, 207, 615 N.W.2d 883, 887 (2000). *Keller* recognizes that general rule and then states that on the facts of that case the court need not answer the question "of whether an offer may dispense with a notice of acceptance." *Id.*

Under the deposit-acceptance rule, if acceptance may be transmitted by mail, then acceptance so transmitted "is operative and completes the contract as soon as put out of the offeree's possession . . . unless the offer otherwise provides." *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 289-90, 512 N.W.2d 633, 639-40 (1994) (multiple quotation marks omitted) (in this context, out of offeree's possession presumably means into the U.S. mail or a stream reasonably believed to lead to the U.S. mail).

"When the issue is whether an acceptance of an offer was sufficient to create a contract, the issue is one of fact and summary judgment is not proper." *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 768, 463 N.W.2d 817, 821 (1990).

The burden is on the offeree to show that he or she revoked acceptance of an offer prior to the communication of the acceptance to the offeror. *Stremmel v. Kinney*, 226 Neb. 555, 557, 412 N.W.2d 834, 836 (1987).

In a Uniform Commercial Code case, see Neb. U.C.C. §§ 2-206, 2-207 (Reissue 2001); and J. White and R. Summers, Uniform Commercial Code §§ 1-3 and 1-5 (6th ed. 2010). See also *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 772, 463 N.W.2d 817, 822-23 (1990) (acceptance as used in Neb. U.C.C. § 2-201(3)(c)).

AUTHORITIES

Restatement (Second) of Contracts §§ 50, *et seq.* (1981). *E.g.*, *Pluhacek v. Nebraska Lutheran Outdoor Ministries*, 227 Neb. 778, 781, 420 N.W.2d 286, 288-89 (1988); *Overman v. Brown*, 220 Neb. 788, 372 N.W.2d 102 (1985); *Pribil v. Ruther*, 200 Neb. 161, 262 N.W.2d 460 (1978); *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 432, 109 N.W.2d 733, 735 (1961) (acceptances must be made within time specified in offer); *Wilkie v. Banse*, 166 Neb. 138, 144, 88 N.W.2d 181, 185 (1958); *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957); *Kline v. Metcalfe Constr. Co.*, 148 Neb. 357, 362, 27 N.W.2d 383, 386-87 (1947); *Standard Oil Co. v. O'Hare*, 126 Neb. 11, 252 N.W. 398 (1934); *Melick v. Kelley*, 53 Neb. 509, 510, 73 N.W. 945, 945 (1898).

"In instances where the contract specifies the required manner of acceptance, the optionee must conform." *In re Estate of Michels*, 223 Neb. 286, 290, 389 N.W.2d 285, 289 (1986). " 'If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.' Restatement (Second) of Contracts § 60

(1981).” Overman v. Brown, 220 Neb. 788, 791, 372 N.W.2d 102, 105 (1985).

The acceptance of the offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but it is a counterproposition.

Rybin Inv. Co., Inc. v. Wade, 210 Neb. 707, 710, 316 N.W.2d 744, 746 (1982). *Accord* Logan Ranch, Karg P’ship v. Farm Credit Bank, 238 Neb. 814, 822–23, 472 N.W.2d 704, 709–10 (1991) (also: a counter offer of different terms and conditions is a rejection of the original offer); *Pluhacek v. Nebraska Lutheran Outdoor Ministries*, *supra*; Frankel v. Pitlor, 166 Neb. 219, 88 N.W.2d 770 (1958); *Griggs v. Oak*, *supra*; Farmers Union Fid. Ins. Co. v. Farmers Union Co-op. Ins. Co., 147 Neb. 1093, 26 N.W.2d 122 (1947). *See also* Restatement (Second) of Contracts § 59 (1981).

NJI2d Civ. 15.05

SILENCE OR INACTION AS ACCEPTANCE

The silence or inaction of (here insert name of offeree) constitutes acceptance only if:

1. (Name of offeree) accepted the benefit of the offered services, understanding that compensation was expected, and having had a reasonable opportunity to reject the services; or
2. (Name of offeror) gave (name of offeree) reason to understand that silence or inaction would constitute acceptance and (name of offeree) intended that (his, her, its) silence or inaction would constitute acceptance; or
3. Because of previous dealings between the parties, or other facts, it is reasonable that (name of offeree) should have notified (name of offeror) if (he, she, it) did not intend to accept the offer.

COMMENT

This instruction should not be given routinely, but only when required by the pleadings and the evidence in the case. When given, this instruction should be given along with NJI2d Civ. 15.04, the general instruction on acceptance.

Silence alone does not generally constitute acceptance of an offer. Authorities, below.

The following statute describes a situation where the concurrence of the three elements of this instruction does not constitute acceptance:

Unless otherwise agreed, where unsolicited goods or merchandise are sent through the mail to a person, he has a right to refuse to accept delivery of the goods or merchandise and is not bound to return such goods or merchandise to the sender. If such unsolicited goods or merchandise are either addressed to or intended for the recipient, they shall be deemed a gift to the recipient who may use them or dispose of them in any manner without any obligations to the sender.

Neb. Rev. Stat. § 69-2201 (Reissue 2009). There may also be federal regulation on the subject of unsolicited goods or merchandise. (On the related of topic home solicitation sales, including federal regulation of door-to-door sales, see NJI2d Civ. 15.01, Comment, part IX(H).

AUTHORITIES

Silence constitutes acceptance only in the three situations set out in this pattern instruction. *David City Hosp. v. Gilmore*, 184 Neb. 342, 345, 167 N.W.2d 397, 399 (1969). Restatement (Second) of Contracts § 69 (1981).

“‘As a general rule, mere silence does not constitute an acceptance of an offer.’” *Atokad Agric. and Racing Ass’n v. Governors of the Knights of Ak-Sar-Ben*, 237 Neb. 317, 323, 466 N.W.2d 73, 78 (1991) (quoting 17 C.J.S. *Contracts* § 41e. at 670–71 (1963); now found at C.J.S. *Contracts* § 49 at 488–89 (1999 and Supp. 2009)), *overruled on other grounds*, *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

This general rule does not apply if there is a duty to speak and the silence conveys but one reasonable meaning. *Atokad Agric. and Racing Ass’n v. Governors of the Knights of Ak-Sar-Ben*, 237 Neb. 317, 323, 466 N.W.2d 73, 78 (1991), *overruled on other grounds*, *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

NJI2d Civ. 15.06

CONSIDERATION

[If you find (here insert the claimed consideration), then there was consideration.]

[[If the above sentence will not work, then draft a definitional instruction based on one or more of the possible definitions discussed in the Comment, below. Take care to correctly state the burden of proof, as also discussed in the Comment, below.]]

COMMENT & AUTHORITIES

Consideration is usually a question for the court and, therefore, the

court will not often give this instruction. The judge decides whether “X” is consideration; the jury decides whether “X” exists. This instruction is intended for the case where there is a dispute as to whether “X” exists.

If the pleadings and the evidence are such that the first of the above paragraphs will work, then it is preferable. Regarding the parenthetical in the first paragraph, the following is an example of an insert: “that the plaintiff offered to paint the defendant’s home for \$1,000 and the defendant accepted this offer.”

See generally Restatement (Second) of Contracts §§ 71–94 (1981).

“ ‘[C]onsideration is an essential element to the validity of a contract.’ ” *Irwin v. West Gate Bank*, 288 Neb. 353, 360, 848 N.W.2d 605, 610 (2014) (quoting *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 59, 382 N.W.2d 303, 307 (1986)).

We have long observed: “ ‘That the contract was lacking in consideration from its inception may be shown by extrinsic evidence, providing the proof thereof does not contradict or vary the contractual consideration named in the written contract. . . .’ ” *Barth v. Reber*, 135 Neb. 25, 28, 280 N.W. 219, 220 (1938). A statement that consideration for a promise was received is a statement of fact, not a term of the contract. As a statement of fact, it may be explained or contradicted by extrinsic evidence. The Restatement (Second) of Contracts § 71, comment b. at 173 (1981), states that ‘a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration. . . .’

Irwin, 288 Neb. at 360, 848 N.W.2d at 610 (“[E]xtrinsic evidence could be used to show that [the stated] consideration was meaningless and that hence, there was not consideration”; *id.* at 361, 848 N.W.2d at 611).

Regarding extrinsic evidence generally, see *NJI2d* 15.01, Comment, parts X(C)(13-14).

Where no consideration is apparent on the face of an agreement, the party relying on it must prove consideration. . . . Some courts have held that the party contesting the adequacy of consideration has the burden . . . of persuasion. However, other courts have stated that . . . if the defendant pleads specially the matters showing the want of consideration, he or she thereby assumes that burden of proof on the issue.

17B C.J.S., Contracts § 702 (1999 & Supp. 2009). The more awkwardly worded but substantively equal predecessor to § 702 C.J.S. is cited in *Cornhusker Dev. & Inv. Group, Inc. v. Knecht*, 180 Neb. 873, 146 N.W.2d 567 (1966), which states: “[A] defendant [who] pleads a failure of consideration, . . . has the burden of proving it.” *Accord* *Blaha*

GMC-Jeep Inc. v. Frerichs, 211 Neb. 103, 317 N.W.2d 894 (1982). *See also* Spittler v. Nicola, 239 Neb. 972, 977-78, 479 N.W.2d 803, 807 (1992) (consideration for a contract of guaranty); Erftmier v. Eickhoff, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled in part, on other grounds*, by Nielsen v. Adams, 223 Neb. 262, 388 N.W.2d 840 (1986).

"[C]ontracts for testamentary or similar disposition of property must, like other contracts, be supported by a sufficient valid consideration." *Blanchard v. White*, 217 Neb. 877, 880, 351 N.W.2d 707, 710 (1984).

Consideration requires "some benefit to the promisor, or some loss or detriment to the promisee. In other words, a contract must be supported by consideration in order to be valid and legally enforceable, and generally consideration must flow from both parties. . . ." 17 C.J.S., *Contracts* § 84 (1999 & Supp. 2009).

"Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor." *Melcher v. Bank of Madison*, 248 Neb. 793, 801-02, 539 N.W.2d 837, 844 (1995). *Accord* Aon Consulting v. Midlands Fin. Benefits, 275, Neb. 642, 654, 748 N.W.2d 626, 638 (2008); *Schuelke v. Wilson*, 255 Neb. 726, 735, 587 Neb. 369, 376 (1998); *Myers v. Nebraska Equal Opportunity Comm'n.*, 255 Neb. 156, 163, 582 N.W.2d 362, 367 (1998).

In order for there to be consideration for an agreement there must be either a benefit or a detriment to one of the parties. *Schuelke*, 255 Neb. at 734, 587 N.W.2d at 375; *Bock v. Bank of Bellevue*, 230 Neb. 908, 913, 434 N.W.2d 310, 314 (1989); *Kearney Centre Invs., Ltd. v. Thomas*, 229 Neb. 21, 26, 424 N.W.2d 620, 623 (1988); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984); *Blaha GMC-Jeep Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982); *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled in part, on other grounds*, by Nielsen v. Adams, 223 Neb. 262, 388 N.W.2d 840 (1986); *Omaha Nat'l Bank v. Goddard Realty*, 210 Neb. 604, 316 N.W.2d 306 (1982); *Scottsbluff Nat'l Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 54 N.W.2d 392 (1952); *Henry v. Dussell*, 71 Neb. 691, 99 N.W. 484 (1904).

A benefit need not necessarily accrue to the promisor if detriment to the promisee is present. *Blanchard*, 217 Neb. at 881, 351 N.W.2d at 710; *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984); *Hyde v. Shapiro*, 216 Neb. 785, 346 N.W.2d 241 (1984); *Omaha Nat'l Bank v. Goddard Realty*, 210 Neb. 604, 316 N.W.2d 306 (1982); *Musser v. Zurcher*, 180 Neb. 882, 146 N.W.2d 559 (1966); *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948); *United States Fid. & Guar. Co. v. Curry*, 126 Neb. 705, 254 N.W. 430 (1934); *Faulkner v. Gilbert*, 57 Neb. 544, 77 N.W. 1072 (1899).

The benefit need not accrue to a party directly; rather, it may ac-

crue to someone else, at the request of a party. *Bock v. Bank of Bellevue*, 230 Neb. 908, 914, 434 N.W.2d 310, 314 (1989); *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled in part, on other grounds*, by *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986); *Grady v. Denbeck*, 197 Neb. 795, 251 N.W.2d 164 (1977); *Adair v. Adair*, 192 Neb. 571, 222 N.W.2d 908 (1974).

Consideration exists if, in return for a promise, the promisee does anything legal which he or she is not bound to do, or refrains from doing anything he or she has a right to do, even though there is neither actual loss or detriment to the promisee nor actual benefit to the promisor. *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984); *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984); *Hyde v. Shapiro*, 216 Neb. 785, 346 N.W.2d 241 (1984); *Omaha Nat'l Bank v. Goddard Realty*, 210 Neb. 604, 316 N.W.2d 306 (1982); *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948); *In re Lehnhoff's Estate*, 77 Neb. 307, 112 N.W. 563 (1907).

Personal services are sufficient consideration to support an agreement. *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981).

Consideration does not necessarily have to be translatable into dollars and cents. A performance or promise that the promisor considers valuable is sufficient. *Schuelke v. Wilson*, 255 Neb. 726, 735, 587 N.W.2d 369, 375 (1998); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Hyde v. Shapiro*, 216 Neb. 785, 346 N.W.2d 241 (1984); *Asmus v. Longenecker*, 131 Neb. 608, 269 N.W. 117 (1936); *Helfrich v. Baxter*, 128 Neb. 281, 258 N.W. 532 (1935); *In re Griswold's Estate*, 113 Neb. 256, 202 N.W. 609 (1925). Compensation and consideration are not synonymous. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985).

"Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract." *Melcher v. Bank of Madison*, 248 Neb. 793, 802, 539 N.W.2d 837, 844 (1995). *Accord Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *In re Lehnhoff's Estate*, 77 Neb. 307, 112 N.W. 563 (1907).

Speaking generally, mutuality of obligation is an essential element of every enforceable agreement. However, "Mutuality of contract consists in the obligation of each party to do, or to permit something to be done, in consideration for the act or promise of the other. * * * Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

De Los Santos v. Great W. Sugar Co., 217 Neb. 282, 285, 348 N.W.2d 842, 845 (1984) (quoting *Garsick v. Dehner*, 145 Neb. 73, 79, 15 N.W.2d

235, 238 (1944). *Accord* Valley Boys, Inc. v. Am. Fam. Ins. Co., 306 Neb 928, 942, 947 N.W.2d 856, — (2020); *Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991).

■ **Mutual promises:** Mutual promises may constitute consideration if they are given in exchange for each other and are equally obligatory on the parties so that each may have an action thereon. *De Los Santos v. Great W. Sugar Co.*, 217 Neb. 282, 285, 348 N.W.2d 842, 845 (1984); *Chalupnik v. Brant*, 134 Neb. 465, 279 N.W. 159 (1938); *Grimes v. Baker*, 133 Neb. 517, 275 N.W. 860 (1937); *In re Lehnhoff's Estate*, 77 Neb. 307, 112 N.W. 563 (1907); *State v. Holcomb*, 46 Neb. 612, 65 N.W. 873 (1896). *See* 17A Am. Jur. 2d, *Contracts* §§ 128–34 (2004 & Supp. 2009).

■ **Forbearance:** There is consideration for a promise if the promisee refrains from doing anything he or she has a right to do, whether or not there is any actual loss or detriment to the promisee or actual benefit to the promisor. *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984); *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984); *Darling v. Darling*, 122 Neb. 153, 239 N.W. 727 (1931).

Forbearance to sue where no cause of action exists and the claim is groundless is not consideration. *Wehnes v. Marsh*, 103 Neb. 120, 170 N.W. 606 (1919).

■ **Performance of a legal obligation:** A promise to do what one is already under a legal obligation to do is not a sufficient consideration for another contract. *In re Nelson's Estate*, 127 Neb. 563, 256 N.W. 27 (1934); *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N.W. 344 (1924); *Allen v. Plasmeyere*, 3 Neb. (Unof.) 187, 90 N.W. 1125 (1902). *See* 17A Am. Jur. 2d *Contracts* §§ 135–141 (2004).

■ **Moral obligations:** A moral obligation does not constitute valid consideration for a promise. *Fender v. McCain*, 144 Neb. 58, 12 N.W.2d 541 (1943); *Chalupnik v. Brant*, 134 Neb. 465, 279 N.W. 159 (1938). *See* 17A Am. Jur. 2d *Contracts* §§ 157–167 (2004).

■ **Past consideration:** Something given or received before the time a promise is made is past consideration that is not sufficient to support a contract. *Stuht v. Sweesy*, 48 Neb. 767, 67 N.W. 748 (1896). *See* 17A Am. Jur. 2d *Contracts* §§ 152–156 (2004).

Sometimes consideration enters a case as an affirmative defense, and the defendant has the burden of proving failure of consideration. This is discussed above and again at NJI2d Civ. 15.27.

Regarding consideration generally, see also NJI2d Civ. 15.02 and its Comment and NJI2d Civ. 15.27 and its Authorities.

NJI2d Civ. 15.07

SUBSTANTIAL PERFORMANCE

Plaintiff's performance is substantial if (he, she) made (a good faith, an honest) effort to live up to (his, her) part of the contract and any deviations from the (terms, requirements, et cetera) of the contract are relatively minor and unimportant.

COMMENT

This definitional instruction relates back to part B, 3 of NJI2d Civ. 15.01. *See also* NJI2d Civ. 15.01, Comment, part VII(A).

AUTHORITIES

I. IN GENERAL

Lange Bldg. and Farm Supply, Inc. v. Open Circle R Inc. 216 Neb. 1, 6-9, 342 N.W.2d 360, 363-64 (1983). This instruction is a combination of the following:

- The instruction given at the trial of *Lange*, 216 Neb. at 6, 342 N.W.2d at 363;
- The rule stated in *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961) and *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981), as discussed in *Lange*, 216 Neb. at 7, 342 N.W.2d at 363-64; and
- The rule from *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 194 Neb. 473, 233 N.W.2d 299 (1975), as added to in *Rickertsen v. Carskadon*, 172 Neb. 46, 108 N.W.2d 392 (1961), both as discussed in *Lange*, 216 Neb. at 7-8, 342 N.W.2d at 364.

Regarding the instruction given at the trial of *Lange*, the Supreme Court said:

The trial court in its instruction defined substantial performance as follows: "Each party to a contract has a duty to perform his obligations under the contract. Performance may be substantial even though [not] every detail is . . . in strict compliance with the terms of the contract; something less than perfection is required. Some measure of nonperformance will be tolerated if the defendant has received, with relatively minor and unimportant deviation, what he bargained for. But if the defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance."

Lange, 216 Neb. at 6, 342 N.W.2d at 363 (opinion actually says, “even though every detail is not in . . . compliance,” but clearly means “even though not every detail is in . . . compliance”). In addition, the trial court correctly instructed on the measure of damages (contract price less damages occasioned by the omission or defect). The Supreme Court approved those instructions. *Lange*, 216 Neb. at 9, 342 N.W.2d at 364. (The substantial performance instruction actually given in *Lange* is erroneous standing by itself, but when it is considered together with the other instructions, they are not erroneous. *Lange*, 216 Neb. at 8, 342 N.W.2d at 364.)

Comparing the above pattern with the instruction given at the trial of the *Lange* case the above instruction’s requirement of a “good faith” or an “honest” effort takes care of *Lange*’s “duty to perform [one’s] obligations under the contract.” The above instruction’s language regarding the requirement that any deviations be relatively minor and unimportant takes care of the rest of the *Lange* instruction.

Regarding substantial performance as an element of the plaintiff’s case in a breach of contract action, see the discussion at NJI2d Civ. 15.01, Comment, at VII(A).

II. PERFORMANCE MUST BE SUBSTANTIAL

In *Lange Bldg. and Farm Supply, Inc. v. Open Circle R Inc.*, 216 Neb. 1, 6–9, 342 N.W.2d 360, 363–64 (1983), the court interpreted *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961) and *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981), as follows: “[S]ubstantial performance is shown in a building contract when all of the essential elements necessary to the full accomplishment of the purposes for which the thing contracted for has [sic] been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract.” *Lange*, 216 Neb. at 7, 342 N.W.2d at 363–64. *Accord* *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 342, 886 N.W.2d 240, 254 (2016) (“[A]ny deviation from the contract must be relatively minor and unimportant’ ”); *Phipps v. Skyview Farms*, 259 Neb. 492, 499, 610 N.W.2d 723, 731 (2000); *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 849–50, 530 N.W.2d 619, 622–23 (1995); *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 474, 507 N.W.2d 465, 473 (1993).

Comparing the pattern with the rule from *Jones* and *Tibbs*: the pattern says that “any deviations from the (terms, requirements, et cetera) of the contract [must be] relatively minor and unimportant”; *Jones* and *Tibbs* say that performance is substantial if “the owner obtains substantially what is called for by the contract.” *Jones*, 172 Neb. at 96, 108 N.W.2d at 742; *Tibbs*, 208 Neb. at 303, 303 N.W.2d 293.

Lange Building and Farm Supply states four elements of substantial performance:

(1) The party made an honest endeavor in good faith to perform its part of the contract; (2) The results of the endeavor are beneficial to the other party; and (3) Such benefits are retained by the other party [And (4) The plaintiff] substantially performed the terms of the contract [Plaintiff may recover] if there were some slight omissions or defects which were not so essential as to defeat the object of the parties, but could be readily remedied.

Lange, 216 Neb. at 7, 342 N.W.2d at 364 (finding that the first three elements were present, but that the first three are not enough; the fourth is needed as well). *Accord Rickertsen v. Carskadon*, 172 Neb. 46, 108 N.W.2d 392 (1961).

In *ADC-I, Ltd. v. Pan Am. Fuels, Ltd.*, 247 Neb. 71, 75, 525 N.W.2d 190, 192 (1994), the court stated that a contract is substantially performed if the claimant proves just the first three elements, as numbered above. For this proposition, it cites *Lange Building and Farm Supply*. *Lange* says that the first three elements alone are not enough. *Lange's* approach is approach of cases and authorities other than *ADC-I, Ltd.*, and it is the intuitively correct approach—*substantial* performance cannot exist unless performance is substantial.

Rickertsen addresses the fourth element this way: "We know of no rule of law which holds that a party has substantially performed merely because he in good faith endeavors to perform his contract. The other party should receive at least approximately what he bargains for." *Rickertsen*, 172 Neb. at 49, 108 N.W.2d at 395.

More recently, in *City of Sidney v. Municipal Energy Agency of Neb.*, 301 Neb. 147, 177, 917 N.W.2d 826, 845–46 (2018), the court states the first three elements and, additionally, states that "any deviations from the contract must be relatively minor and unimportant." *Accord VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 849–50, 530 N.W.2d 619, 623 (1995). This is another way of stating the fourth element and it seems that this element should be in the jury instruction, however it is phrased.

On this same subject, *Lange* states that the first three elements standing alone do not completely define substantial performance, but they do so when the proper measure-of-damages instruction is added.

"If there is substantial performance, a contract action may be maintained, but without prejudice to any showing of damage on the part of the defendant for failure to receive full and complete performance." *RM Campbell Industrial, Inc. v. Midwest Renewable Energy, LLC*, 294 Neb. 326, 337, 886 N.W.2d 240, 254 (2016).

Where there is a lack of substantial performance, but there has been a part performance and it has been of substantial

benefit to the other party and [that other party] has accepted the benefits thereof, [then that other party] should not be permitted entirely to avoid the duties [he or she has] assumed . . . under [the] contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he or she has suffered from the failure of the part-performing party to perform fully or substantially [under the] contract.

RM Campbell Indus., 294 Neb. at 337, 886 N.W.2d at 254.

III. BENEFIT RECEIVED AND RETAINED

The pattern instruction's requirement of a "good faith" or "honest" effort takes care of the court's language—from *Lange Bldg. and Farm Supply, Inc. v. Open Circle R Inc.*, 216 Neb. 1, 342 N.W.2d 360 (1983), discussed in detail just above—regarding each party's "honest endeavor in good faith to perform its part of the contract." In most cases, the pattern's requirement that any deviations be relatively minor and unimportant, takes care of the requirements that the results of the endeavor be beneficial to the other party and that such benefits be retained: If the deviations are only slight, then there will be a benefit to defendant, which will be retained by him (unless defendant made a bad bargain, one without benefit to him at all—and that is a different problem than the one we are dealing with here).

As previously noted, there is Nebraska authority for the proposition that one of the elements of substantial performance is that the defendant must have received some benefit, which will be retained. And yet the pattern instruction has no such language. Here is why:

First, the cases in which the court has stated this requirement of retained benefit have all been cases in which some benefit was received and retained. That is how the language ended up in the instructions in those cases, and, from there, it ended up in the Supreme Court's statements of the law.

Second, it is the opinion of the Committee that in most cases this idea of benefit retained is not really part of the law of substantial performance. If there is no more than a slight deviation from the terms of the contract and yet there is no benefit retained, that is a problem of either consideration or estoppel.

Third, even if this is part of the law of substantial performance, in most cases it will not be in controversy and, therefore, it will not be necessary to state that part of the law in the instruction.

If there is a case in which is necessary to add language on benefits received and retained, the Committee suggests adding the following clause to the end of the pattern:

“and the defendant received and retained some benefit.”

Later word on this matter—whether benefits must be retained—comes in *ADC-I, Ltd. v. Pan Am. Fuels, Ltd.*, 247 Neb. 71, 525 N.W.2d 190 (1994), in which the court cites *Lange* and the first three elements of substantial performance quoted above, and then states, “If the claimant fails to establish any one of these elements, then the contract has not been substantially performed, and the claimant cannot maintain an action on the contract.” *ADC-I, Ltd.*, 247 Neb. at 75, 525 N.W.2d at 192. As noted, the pattern only contains two of those elements, plus it contains something more: it seems to the Committee that the third element may not be necessary in most cases; however, if it is necessary, add to the instruction the language suggested above.

IV. MEASURE OF DAMAGES

More than once in *Lange*, the court stated the importance of coupling this instruction with the proper damage instruction. Regarding the proper measure of damages, see *NJI2d Civ. 4.44*.

NJI2d Civ. 15.08

DEFINITION OF FRAUDULENT REPRESENTATION

A representation is made fraudulently if it is made either:

1. With knowledge that it is false; or
2. Both as a positive assertion and recklessly, without knowledge of its truth.

COMMENT & AUTHORITIES

“To constitute fraud, a misrepresentation must be an assertion of fact, not merely an expression of opinion.” *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 720, 502 N.W.2d 444, 453 (1993) (citing cases) (trier of fact reasonably found that statement that property was in “first-class condition” was puffery rather than an assertion of fact; “sales talk” or “puffing” is expression of opinion). In the right case, it may be necessary to draft new language to add that distinction to this instruction.

See also *NJI2d Civ. 9.01* (fraudulent misrepresentation), 15.01 (statement of the case—breach of contract), 15.21 (fraud in the inducement or fraudulent representation), and 15.22 (material misrepresentation).

NJI2d Civ. 15.09

DEFINITION OF MATERIAL FACT

A material fact is one that is either:

1. Likely to change a reasonable person's mind regarding entering into a contract; or,
2. For some reason known to the defendant, likely to change the plaintiff's mind regarding entering into a contract.

COMMENT & AUTHORITIES

See NJI2d Civ. 15.22, Comment. (*See also* NJI2d Civ. 9.03.)

"A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 808, 824 N.W.2d 12, 20 (2012) (quoting Restatement (Second) of Contracts § 162(2) at 439 (1981). *See also*, §§ 164, and 167, which are quoted in the Authorities to NJI2d Civ. 15.21.

In an action on a contract of insurance and regarding a misrepresentation by the putative insured, the court has stated: "A misrepresentation is material if the insurer would not have issued the policy had it been aware of the true facts." *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 175, 421 N.W.2d 775, 778 (1988).

NJI2d Civ. 15.10

DEFINITION OF UNDUE INFLUENCE—CONTRACT

"Undue influence" is influence that overpowers a person's mind and destroys that person's free choice in regard to the act of making a contract; it causes (him, her) to express the will of another rather than (his, her) own. The controlling factor is the effect of the influence on the mind of the person making the contract [rather than the means employed, or the extent or degree of the influence exerted, or the identity of the person exerting the influence].

[The fact that a person has a motive and an opportunity to exert influence upon a person making a contract is not enough by itself to establish undue influence.]

COMMENT & AUTHORITIES

This instruction accompanies NJI2d Civ. 15.25. It is based on NJI2d Civ. 16.07. *See* NJI2d Civ. 15.25, Comment and Authorities; NJI2d Civ. 16.07, Comment and Authorities.

C. AFFIRMATIVE DEFENSES**NJI2d Civ. 15.20****EXTREME DIFFICULTY OR IMPOSSIBILITY OF PERFORMANCE****A. ISSUES**

In defense to the plaintiff's claim [that the defendant breached the contract], the defendant claims (here insert a statement of the claimed defense).

The plaintiff admits (here state what the plaintiff admits, by pleading or otherwise, if anything).

The plaintiff denies (here state what the plaintiff denies).

B. BURDEN OF PROOF

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

1. That the breach was in no way caused through the fault of the defendant;

2. That, as a result of (here describe the event on which the defendant relies), the defendant's performance of the contract was rendered [not just more difficult or more costly, but] impossible; and

3. That, at the time the contract was made, the defendant could not have reasonably foreseen (here insert an appropriate reference back to the event described in the preceding paragraph).

C. EFFECT OF FINDINGS

If the defendant *has* met this burden of proof, then your verdict [on (here identify appropriate claim)] must be for the defendant.

If the defendant has *not* met this burden of proof, then you must disregard this particular defense in reaching your decision in this case.

SPECIAL NOTE**I. ARMSTRONG V. CLARKSON COLLEGE**

Armstrong v. Clarkson College, states the three elements of this af-

firmative defense differently from the way they are stated in this pattern instruction.

“There are three general requirements for the application of the doctrine of impracticability of performance: (1) the occurrence (or nonoccurrence) of the event causing the impracticability was unexpected; (2) performance of the duty by the promisor would be extremely difficult and burdensome, if not impossible; and (3) the promisor did not assume the risk of the event’s occurrence (or nonoccurrence).

Armstrong v. Clarkson College, 297 Neb. 595, 621, 901 N.W.2d 1, 21 (2017).

As noted below in this Special Note this requires a change in essential element (2) in this pattern instruction.

Do not use this instruction without first reading this Special Note.

A. ARMSTRONG’S ELEMENT (1)

Armstrong states its element (1) of this defense as follows: “(1) the occurrence (or nonoccurrence) of the event causing the impracticability was unexpected.” *Id.* at 621, 901 N.W.2d at 21 (2017). The pattern instruction states its element 3 as follows: “3 That, at the time the contract was made, the defendant could not have reasonably foreseen” the event (the occurrence or nonoccurrence) that caused the nonperformance. These two statements are substantively the same and should not require any change in the pattern instruction.

The difference between *Armstrong* and this pattern instruction is that the former states that the relevant event “was not expected” and the latter states that the event “could not have been reasonably foreseen.” The “reasonably foreseen” language comes from A. Corbin, *Corbin on Contracts* § 1320 (1952); L. Simpson, *Handbook on the Law of Contracts* § 174 (2d ed. 1965); Restatement (Second) of Contracts § 266 (1981). In addition, the concept of reasonable foreseeability appears elsewhere in *Armstrong* itself; *Armstrong*, 297 Neb. at 613, 901 N.W.2d at 21 (quoting the Colorado Supreme Court’s characterization of the “unanticipated circumstance” as one that “has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties). The language in the pattern seems to be the better option for a pattern instruction. It is, of course, possible that on the facts of a particular case a different wording of the pattern’s element 3 would be preferable.

Element (1) as stated in *Armstrong* seems to be subsumed under the pattern instruction’s element (3).

B. ARMSTRONG’S ELEMENT (2)

The second of *Armstrong*’s three numbered paragraphs of the

burden of proof states that the defense must prove that, "(2) performance of the duty by the promisor would be extremely difficult and burdensome, if not impossible." *Armstrong*, 297 Neb. at 621, 901 N.W.2d at 21. (*Armstrong* also states it this way: "[where] performance has been rendered severely impracticable or impossible by unforeseen circumstances." *Id.* at 620, 901 N.W.2d at 21 (citing The Restatement (Second) on Contracts, § 261)); *Young v. Tate*, 232 Neb. 915, 918, 442 N.W.2d 865, 868 (1989); *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 262, 376 N.W.2d 312, 319 (1985)).

This changes the pattern instruction's element 2, which states that "performance of the contract was rendered [*not just more difficult or more costly, but*] impossible." (Emphasis added.) (The brackets indicate that the language therein is optional.) Element 2 of this pattern instruction needs to be changed to state that the defendant must show that this defense applies if "performance . . . would be *extremely difficult and burdensome, if not impossible.*"

C. ARMSTRONG'S ELEMENT (3)

Armstrong's states its third element as follows: "(3) the promisor did not assume the risk of the event's occurrence (or nonoccurrence)." Elements 1 and 3 of the burden of proof part of this pattern state, respectively, "the breach was in no way caused through the fault of the defendant" and "at the time the contract was made, the defendant could not have reasonably foreseen (here insert an appropriate reference back to the event described in the preceding paragraph)." *Armstrong's* element (3) is subsumed under the pattern's elements 1 and 3.

If the defendant assumed the risk (*Armstrong's* (3)), then the breach was, as stated in the pattern's statement of its first element, "in [some] way caused through the fault of the defendant" (pattern's 1). And it means, as stated in the pattern's statement of the third element, that "the defendant could . . . have reasonably foreseen" the risk (the pattern's 1 and 3). Assuming the risk is just one way in which the defendant can be at fault. Assuming the risk is subsumed under the defendant being in some way at fault for the extreme impracticability or impossibility of performing the contract.

Furthermore, to the extent that assumption of the risk has its own special meaning in the law, the committee prefers the "reasonably foreseen" language. As noted above, the "reasonably foreseen" language comes from Corbin on Contracts; Simpson's, Handbook on the Law of Contracts; the Restatement (Second) of Contracts § 266 (1981); and the is found in *Armstrong* itself, 297 Neb. at 613, 901 N.W.2d at 21.

D. OTHER STATEMENTS IN ARMSTRONG

On a related matter, outside of its statement of the three elements, *Armstrong* states that "the party invoking the impracticability defense

must show that he or she used reasonable efforts to surmount the obstacles which prevented performance." *Armstrong*, 297 Neb. at 622, 901 N.W.2d at 22 (citations to an opinion of the 9th Circuit Court of Appeals and a treatise omitted). This defense burden is not expressly stated in this pattern instruction. And, later, *Armstrong*, states that "[t]he doctrine of impracticability also does not apply because [the defendant] failed to use reasonable efforts to overcome the difficulty it faced in performing its duty" *Armstrong*, 297 Neb. at 623, 901 N.W.2d at 23. "[T]he party invoking the impracticability defense . . . must show that it used reasonable efforts to overcome the obstacles which prevented its performance" *Id.* at 623-24, 901 N.W.2d at 23. It seems that the "surmounting the obstacles" language is used because, in the context of that case, this is the way the defendant was alleged to have been at fault, *i.e.* to have been a cause of the extreme impracticability or impossibility.

This particular burden on a defendant invoking the defense of "extreme difficulty or impossibility of performance" is not expressly stated in this pattern instruction. The first numbered paragraph of the pattern states that the defense must prove "[t]hat the breach was in no way caused through the fault of the defendant." It seems that *Armstrong's* "reasonable efforts to surmount the obstacles" language is simply a subset of ways in which the breach could have been "caused through the fault of the defendant," as stated in element 1 of the pattern. If that is so, then the subset does not belong in the pattern; rather, the pattern instruction is the place for a statement that encompasses the entire set; and a subset is a matter for argument as to how the breach was not caused by the defendant. Separating out this one way the breach could be defendant's fault, and instructing the jury on that one way, would give it emphasis against all other possible ways it could be defendant's fault; this is neither appropriate in the pattern instruction nor required in the instruction as adapted for the case at hand. This *Armstrong* language points to a matter for argument under the first element of the pattern and not for a separate instruction.

In this regard, note that while "use[ing] reasonable efforts to surmount the obstacles which prevented performance" is not found in *Armstrong's* statement of the three elements, *Armstrong* does state elsewhere in the opinion that the defense did not apply because the defendant therein failed to use reasonable efforts to overcome the difficulty it faced in performing its duty" *Armstrong*, 297 Neb. at 623, 901 N.W.2d at 23.

E. ARMSTRONG'S DESCRIPTIVE DESIGNATION THIS DOCTRINE

Armstrong refers to this as the "doctrine of impracticability of performance." *Armstrong*, 297 Neb. at 621, 901 N.W.2d at 21 (stating

later, "The doctrine . . . [is] often now called impracticability of performance" *Id.*, at 620, 901 N.W.2d at 17.). And *Cleasby v. Leo A. Daly Co.* tells us, "Business necessity is sometimes called impossibility of performance, extreme impracticability, frustration of contract, or implied condition of the promise." *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 262, 376 N.W.2d 312, 318 (1985).

The title of this instruction is not "Impracticability or Impossibility of Performance" because, as discussed above, the "impracticability" must be "extreme" and because impracticability is something of a difficult word. The title is instead "Extreme Difficulty or Impossibility of Performance." That title can be changed to something like "Severely Burdensome or Impossible" or "Performance that is Extremely Difficult and Burdensome or Impossible" ("extremely difficult and burdensome" comes from *Armstrong*; *id.*, at 621, 901 N.W.2d at 22) or some other title that better relates to the facts of the case and the words used during the trial.

F. CONCLUSION

If there is a case where the three numbered burden-of-proof subparagraphs of this pattern instruction do not adequately cover this defense, then, depending on the inadequacy, the instruction will have to be changed or there will have to be further instruction. And it seems that in most cases the instruction's title and its statement of element number 2 of the burden of proof 2 will have to be rewritten to include not just "impossible," but also "extremely difficult."

COMMENT & AUTHORITIES

I.

See the Special Note, above,

II. AFFIRMATIVE DEFENSES

Regarding affirmative defenses generally, see *NJI2d Civ. 2.02D*.

"Matters which seek to avoid a valid contract are affirmative defenses." *Schuelke v. Wilson*, 255 Neb. 726, 732, 587 N.W.2d 369, 374 (1998). *Accord, e.g., Drake-Williams Steel, Inc. v. Continental Casualty Company*, 294 Neb. 386, 392-93, 883 N.W.2d 60, 65 (2016); *Lease Nw. v. Davis*, 224 Neb. 617, 623, 400 N.W.2d 220, 224 (1987). As such, they "must be specifically pled to be considered." *Lease*, 224 Neb. at 623, 400 N.W.2d at 224. "[I]n a contract action, . . . a general denial is not sufficient to raise any affirmative defense." *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 310, 338 N.W.2d 601, 607 (1983). It is not necessary, however, to state the defense in any particular form; it is enough if sufficient facts are pled to raise the defense. *Blaha GMC-Jeep*

Inc. v. Frerichs, 211 Neb. 103, 110–11, 317 N.W.2d 894, 899 (1982). “[T]he burden of proving an affirmative defense rests upon the party alleging the defense.” *Schuelke*, 255 Neb. at 732, 587 N.W.2d at 374. *Accord*, e.g., *Armstrong v. Clarkson College*, 297 Neb. 595, 622, 901 N.W.2d 1, 22 (2017) (“[I]he party invoking the impracticability defense must show that he or she used reasonable efforts to surmount the obstacles which prevented performance.” (citations to an opinion of the 9th Circuit Court of Appeals and a treatise omitted)).

NJI2d Civ. 15.20 through NJI2d Civ. 15.28 are affirmative defense instructions for contract actions. Other affirmative defenses in contract actions, for which no pattern instruction has been drafted, include:

■ **Breach of Contract:** *See, e.g., Kotrous v. Zerbe*, 287 Neb. 1033, 1037, 846 N.W.2d 122, 126 (2014); *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 976, 492 N.W.2d 855, 858 (1992). *See also* NJI2d Civ. 2.02D, Comment.

■ **Election of Remedies:** *Weitz Company, LLC v. Hands, Inc.*, 294 Neb. 215, 235–36, 882 N.W.2d 659, 673 (2016); *Porter v. Smith*, 240 Neb. 928, 937, 486 N.W.2d 846, 852 (1992). “The election of remedies doctrine generally applies in two instances: when a party seeks inconsistent remedies against another party or persons in privity with the other party or when a party asserts several claims against several parties for redress of the same injury.” *deNourie & Yost Homes, LLC v. Frost*, 295 Neb. 912, 927, 893 N.W.2d 669, 681 (2017). Regarding election of remedies, *see also* NJI2d Civ. 2.02D, Comment, 9.02, 15.20, 15.21.

■ **Payment of a Debt:** *Vistar Bank v. Thompson*, 247 Neb. 856, 858, 530 N.W.2d 910, 911 (1995). *See also* NJI2d Civ. 2.02D, Comment.

For cases governed by the Uniform Commercial Code, *see* Neb. U.C.C. §§ 2-613 through 2-616 (Reissue 2001).

III. OTHER RELEVANT CASES

“Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified.” *Faught v. Platte Valley Pub. Power & Irrig. Dist.*, 155 Neb. 141, 150, 51 N.W.2d 253, 259 (1952) (quoting 17 C.J.S., *Contracts* § 464 (1936); now found at 17B C.J.S. *Contracts* § 516 (1999 & Supp. 2009)).

“If the specific performance promised by a contractor becomes impossible, either by the destruction of the specific subject matter, the death of a necessary person, or the non-existence of the specifically

contemplated means of performance, his duty is discharged—unless the parties expressed a contrary intention.” A. Corbin, Corbin on Contracts § 1321 (1952 & Supp. 2001) (revised edition found at 14 James P. Nehf, Corbin on Contracts § 74.1 (rev. ed. 2001)). “‘[W]here the existence of a particular person is necessary for the performance of a contractual duty, the death of that person, or his or her loss of capacity to perform the duty, discharges the obligor’s duty to perform.’” *Wilson v. Fieldgrove*, 280 Neb. 548, 552, 787 N.W.2d 707, 711-12 (2010) (citation to the Kansas Supreme Court and the Restatement (Second) of Contracts omitted). *See also* L. Simpson, Handbook of the Law of Contracts §§ 176, 177 (2d ed. 1965). For more on specific performance, see NJ12d Civ. ch. 4, Introduction, part 4.

Where a change in the law makes performance of the contract illegal, and where there is no showing of either a contrary intention or contributing fault on the part of the person subject to the duty, the change in the law discharges the duty. *Kuhl v. Sch. Dist. No. 76*, 155 Neb. 357, 366-67, 51 N.W.2d 746, 751 (1952) (quoting Restatement of Contracts § 458 (1932)); L. Simpson, Handbook of the Law of Contracts § 178 (2d ed. 1965); 14 James P. Nehf, Corbin on Contracts § 74.1 (rev. ed. 2001).

“A simple promise to pay money is not made impossible of performance by death or illness of either the debtor or the creditor.” *Hasemann v. Hasemann*, 189 Neb. 431, 433, 203 N.W.2d 100, 102 (1972). “The mere personal inability of a promisor to perform is no excuse. This is subjective impossibility. It is only where because of the supervening event the performance cannot be rendered by anyone that the duty is discharged.” L. Simpson, Handbook on the Law of Contracts § 175 (2d ed. 1965).

All of that being said,

“‘[T]he true distinction is not between difficulty and impossibility. A man may contract to do what is impossible The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.’
...”

Armstrong, 297 Neb. at 621, 901 N.W.2d at 22 (2017) (quoting *Littleton v. Emp. Fire Ins. Co.*, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969)).

In *Mohrlang v. Draper*, the court stated:

“Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to

do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. . . . A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. It has been said that difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission."

Mohrlang v. Draper, 219 Neb. 630, 634, 365 N.W.2d 443, 447 (1985) (action in equity) (quoting *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 177, 43 N.W.2d 657, 666-67 (1950)).

"Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears."

. . . .

The doctrine of . . . impossibility does not apply to a situation so as to excuse performance "where performance is not practically cut off, but only rendered more difficult or costly."

Megan v. Updike Grain Corp., 94 F.2d 551, 553-54 (C.C.A. 8th Cir. 1938) (quoting the Restatement of the Law of Contracts, § 288 (1932) and then *Texas Co. v. Hogarth Shipping Corporation*, 256 U.S. 619, 630, 41 S. Ct. 612, 615, 65 L. Ed. 1123 (1921)).

While *Armstrong v. Clarkson College*, discussed at length in the Special Note, above, does not contradict either *Mohrlang* or *Megan*, it does note that the burden must be extreme or severe to stand as an affirmative defense. See the Special Note, above. Somewhere there is a line separating "more difficult or costly" and "extremely difficult and burdensome."

IV. ORIGINAL IMPOSSIBILITY VERSUS SUPERVENING IMPOSSIBILITY

A contract may be impossible to perform from the beginning, or the impossibility may be supervening. There are Nebraska cases that support the notion that, of the two, only original impossibility is a defense to a contract action, and that supervening impossibility is not a defense. In *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), the court stated: "No facts existed when the contract in the instant case was made . . . which made it impossible of

performance. . . . '[S]upervening impossibility is not an excuse for nonperformance. . . . A contract which is possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible.' " *Wilson & Co.*, 153 Neb. at 176-77, 43 N.W.2d at 666-67. *Accord Mohrlang v. Draper*, 219 Neb. 630, 634, 365 N.W.2d 443, 447 (1985).

Neither *Mohrlang* nor *Wilson & Co.* turned on the difference between original and supervening impossibility. Furthermore, in *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985), the court quoted with approval the following sections of the Restatement (Second) of Contracts:

§ 261. Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 265. Discharge by Supervening Frustration

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 at 313, § 265 at 334-35 (1981), as found in *Cleasby*, 221 Neb. at 263, 376 N.W.2d at 319. *Cleasby* involved an employment contract. The impossibility asserted in the affirmative defense was based on the supervening, unforeseen illness of the employee-party to the contract.

Additionally, the treatises in the area support a defense based on supervening impossibility. "A study of the cases indicates that there has been an increasing liberality in determining what constitutes a justifying 'impossibility' or frustration of purpose. A portion, at least, of the risk of disappointment by supervening events is being put upon the promisee." A. Corbin, *Corbin on Contracts* § 1320 (1952) (revised edition found at 8 Catherine M.A. McCauliff, *Corbin on Contracts* § 32.6 (rev. ed. 1999)). "Impossibility of performance excuses the promisor's duty where that which was promised has become objectively impossible of fulfillment without fault of the promisor *after the time of contracting*, provided the promisor has not assumed the risk of its now-happening." L. Simpson, *Handbook on the Law of Contracts* § 174 (2d ed. 1965) (emphasis added). Professor Simpson continues: "Originally, the law did not recognize impossibility as an excuse for the promisor's nonperfor-

mance of his duty. The reasoning was that by failing to condition his promise against supervening impossibility the promisor has assumed the risk that the event might happen The fallacy here lay in the failure to recognize that only where the event causing impossibility was so probable as to be foreseen at the time of contracting does the failure to provide against it indicate an implied assumption of the risk." *Id.*

This pattern instruction takes the position that the law of Nebraska is that neither the extremely difficult or burdensome nor the impossibility need have existed at the time the parties entered into the contract. If the Committee's position on this point is not correct, this instruction will have to be adapted accordingly.

NJI2d Civ. 15.21

FRAUD IN THE INDUCEMENT OR FRAUDULENT REPRESENTATION

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff made the claimed representation;
2. That the representation was false;
3. That the representation was made fraudulently;
4. That, when (he, she, it) made the representation, (he, she, it) intended that the defendant would rely upon it;
5. That this representation substantially contributed to the defendant's decision to (agree to, enter into, et cetera) the contract; [and]
6. That the defendant's reliance on this representation was reasonable; and
7. That the defendant was (harmed, damaged, et cetera) as a result of this reliance.

COMMENT

I. IN GENERAL

This is the Burden of Proof part of the instruction on the affirmative defense of fraud in the inducement or fraudulent misrepresentation. Use only those subparagraphs of the instruction as are put in issue by the pleadings and the evidence. For the Issues and the Effect of Find-

ings parts of the instruction, see NJI2d Civ. 15.20. The claimed false representation will be set out in the issues part of NJI2d Civ. 15.20.

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

The “false representation” instructed on here is what the Restatement (Second) of Contracts labels “fraudulent misrepresentation.” Restatement (Second) of Contracts §§ 162, 164 (1981).

There is a second kind of false representation that may be a defense to an action on a contract. It is described in the Restatement (Second) of Contracts as follows:

If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

Restatement (Second) of Contracts § 164(2) (1981). See *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 808-09, 824 N.W.2d 12, 20 (2012) (quoting Restatement (Second) of Contracts, above, at § 164(1) at 445). The Committee has not drafted a pattern instruction on this aspect of the defense of false representation.

[T]he general rule is that one is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. While no action will lie where ordinary prudence would have prevented the deception, this rule is generally applied when the means of discovering the truth was in the hands of the party defrauded.

Gibb v. Citicorp Mortg., Inc., 246 Neb. 355, 369, 518 N.W.2d 910, 920 (1994) (citation omitted). *Accord Fitl v. Strek*, 269 Neb. 51, 54, 690 N.W.2d 605, 608-09 (2005).

II. FRAUD IN THE INDUCEMENT VERSUS FRAUD IN THE EXECUTION

“Fraud in the execution goes to the very existence of the contract, such as where a [contract] is misread to the [party] or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument he or she did not mean to execute. . . . Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be

voidable if the party's consent was obtained by false representation. . . .

Heritage Bank v. Bruha, 283 Neb. 263, 272, 812 N.W.2d 260, 269 (2012) (ellipses and brackets in *Heritage Bank*) (quoting *Gonzalez v. Union Pac. RR.*, *infra*). *Accord Cullinane v. Beverly Enters.*—Neb., 300 Neb. 210, 230, 912 N.W.2d 774, 792 (2018).

“In such cases, . . . there was no meeting of the minds.” *Cullinane*, 300 Neb. at 230, 912 N.W.2d at 792 (ellipsis in *Cullinane*).

When a settlement or release is merely voidable, due to fraud in the inducement, the consideration should be tendered or returned as a condition precedent to maintaining an action on the original claim. But in a case of fraud in the execution, because there never was a contract or release, tender of return of the consideration is not required.

Gonzalez v. Union Pac. RR., 282 Neb. 47, 66, 803 N.W.2d 424, 442 (2011) (discussion of return of consideration and the exceptions to the above stated general rule).

III. FRAUDULENT REPRESENTATION VERSUS MATERIAL MISREPRESENTATION

And regarding the affirmative defense of material misrepresentation, see NJI2d Civ. 15.22, below, discussing, among other things, the difference between false representation and material misrepresentation. NJI2d Civ. 15.08 defines fraudulent representation. NJI2d Civ. 15.09 defines material representation. NJI2d Civ. 15.23 states the forms of false representation.

On related matters, regarding the tort action for fraudulent misrepresentation, discussed in the Authorities below, see NJI2d Civ. 9.01. And, regarding an action for fraudulent concealment in the vendor/purchaser setting, see NJI2d Civ. 9.02.

IV. AFFIRMATIVE DEFENSE TO CONTRACT VERSUS CAUSE OF ACTION IN TORT

This affirmative defense instruction is a first cousin to NJI2d Civ. 9.01, the instruction for use in a tort action for fraudulent misrepresentation. See NJI2d Civ. 9.01, Comment & Authorities for more on fraudulent representation as a defense to a contract versus a cause of action in tort.

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled: a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the

party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

Fraudulent misrepresentation is an affirmative defense and the burden of proof is on the party alleging same. *Nathan v. McDermott*, 306 Neb. 216, 235, 945 N.W.2d 92, 108 (2020) (concerning recoupment as a result of fraudulent misrepresentation); *Erftmier v. Eickhoff*, 210 Neb. 726, 731-32, 316 N.W.2d 754, 757 (1982), *overruled in part, on other grounds*, by *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986); *Muller Enters., Inc. v. Gerber*, 178 Neb. 463, 473, 133 N.W.2d 913, 919 (1965), appeal after remand 180 Neb. 318, 142 N.W.2d 593 (1966), appeal after remand 182 Neb. 261, 153 N.W.2d 920 (1967).

The false representation “must not only be consciously false but must also be intended to mislead another.” Restatement (Second) of Contracts § 162 comment a (1981).

A misrepresentation may be a defense to an action on a contract. It “may also be the basis for an affirmative claim for liability for misrepresentation under the law of torts. Such liability for misrepresentation is dealt with in the Restatement (Second) Torts. *See* Restatement (Second) Torts chs. 22, 23. The rules stated there conform generally to those stated here.” Restatement (Second) of Contracts, Introductory Note, at 425 (1981). “One who enters into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to the position which existed before entering into the contract.” *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 154-55, 396 N.W.2d 273, 281 (1986). “A party who has been induced to enter a contract by fraud has, upon its discovery, an election of remedies, and he may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated.” *Gitschel v. Sauer*, 212 Neb. 454, 456, 323 N.W.2d 93, 95 (1982). *Accord deNourie & Yost Homes, LLC v. Frost*, 295 Neb. 912, 927-28, 893 N.W.2d 669, 681-82 (2017). (Regarding the tort action, see NJI2d Civ. 9.01. *See also* NJI2d Civ. 15.01, Comment, part III.)

A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or was made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely; and [5] the plaintiff suffered damages as a result.

Nathan, 306 Neb. at 236, 945 N.W.2d at 108-09 (*Nathan* involves the affirmative defense of fraudulent misrepresentation; the elements of the tort and the affirmative defense are the same; though this case involved the affirmative defense, the parties raised the issue in their counterclaim and they are “the ‘plaintiffs’ on their counterclaims.” *Id.* at 235, 945

N.W.2d at 108. “Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the . . . mental state [of the party against whom it is asserted].” *Id.* at 236, 945 N.W.2d at 109.). *Accord* Production Credit Ass’n v. Eldin Haussermann Farms, 247 Neb. 538, 544, 529 N.W.2d 26, 32 (1995) (in the heading, Court labels this “fraudulent representation”; in the clause preceding the quotation, Court writes of “false representation”); *Commerce Sav. Scottsbluff, Inc. v. F.H. Schafer Elevator, Inc.*, 231 Neb. 288, 302–03, 436 N.W.2d 151, 163 (1989); *Pawnee Cty. Bank v. Droge*, 226 Neb. 314, 323, 411 N.W.2d 324, 330 (1987) (the court refers to “misrepresentation,” but describes what these instructions call “fraud in the inducement” or “fraudulent representation”).

The elements of plaintiff’s cause of action in a tort action for fraudulent misrepresentation are the same. *See* Cullinane v. Beverly Enters.—Neb., 300 Neb. 210, 231, 912 N.W.2d 774, 793 (2018). That being so, *see also* the cases cited at NJI2d Civ. 9.01, the instruction on the tort of fraudulent misrepresentation. The elements are the same, it is just that one is a cause of action and the other is an affirmative defense.

The third stated element of the above quotation—“that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion”—is the third element of the pattern instruction when this pattern instruction is read along with NJI2d Civ. 15.08.

Regarding reliance, *see also* the Restatement (Second) of Contracts § 164 comment c (1981), which states: “No legal effect flows from a [material] . . . or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it. Whether a misrepresentation is an inducement is a question of fact governed by the rule stated in § 167.” Section 167 states: “A misrepresentation induces a party’s manifestation of assent if it substantially contributes to his decision to manifest his assent.” Restatement (Second) of Contracts § 167 (1981). If this is not an element of the defense in Nebraska, then the fifth element of the pattern instruction will have to be omitted.

[T]he general rule is that one is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. While no action will lie where ordinary prudence would have prevented the deception, this rule is generally applied when the means of discovering the truth was in the hands of the party defrauded.

Gibb v. Citicorp Mortg., Inc., 246 Neb. 355, 369, 518 N.W.2d 910, 920 (1994) (citation omitted). *Accord* Fitl v. Strek, 269 Neb. 51, 54, 690 N.W.2d 605, 608–09 (2005).

In both negligent and fraudulent misrepresentation cases,

whether the [party defrauded] exercised ordinary prudence is relevant to whether the [that party] justifiably relied on the misrepresentation when the means of discovering the truth was in the [that party's] hands. A plaintiff is justified in relying upon a positive statement of fact if an investigation would be required to discover the truth. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.

Nathan, 306 Neb. at 236, 945 N.W.2d at 109.

Regarding subparagraph number 7 of this instruction, the quotation just above from the Restatement (Second) of Contracts § 164 comment *c* (1981) continues as follows: "In general, the recipient of a misrepresentation need not show that he has actually been harmed by relying on it in order to avoid the contract. *But see* § 165." Section 165 notes that: "If a contract is voidable because of a misrepresentation and, before notice of an intention to avoid the contract, the facts come into accord with the assertion, the contract is no longer voidable unless the recipient has been harmed by relying on the misrepresentation." Restatement (Second) of Contracts § 165 (1981). The general rule from the *Restatement (Second)* is that harm or damage is not an element of this affirmative defense. Subparagraph number 7 of this pattern instruction is not a correct statement of the *Restatement (Second)*'s general rule. That subparagraph is included in the instruction because, in *Dworak v. Michals*, the court stated that: "The buyer could have defended . . . on the ground of misrepresentation. The facts support the essential elements, . . . [including the fact that the misrepresentation was] acted upon with resulting detriment." *Dworak v. Michals*, 211 Neb. 716, 722, 320 N.W.2d 485, 489 (1982). That statement is dictum. If it is determined that this is not an element of this affirmative defense, then subparagraph number 7 of the pattern instruction should not be given.

"Where consideration is grossly and shockingly inadequate, inadequacy is generally regarded as fraud." *Abraham v. Abraham*, 203 Neb. 384, 391, 279 N.W.2d 85, 88 (1979).

In the absence of fraud or inability to read, those who sign instruments without reading them cannot avoid the effect of their signature merely because they were not informed of the contents of the document. Absent fraud or inability to read, those who sign a contract without reading it cannot later be relieved of its burdens. *Cullinane v. Beverly Enters.*—Neb., 300 Neb. 210, 229–30, 912 N.W.2d 774, 792 (2018); *Gonzalez v. Union Pac. RR. Co.*, 282 Neb. 47, 54–62, 803 N.W.2d 424, 434–44 (2011) (discussing at length instruments, and particularly releases, signed by persons illiterate or illiterate in English: "[T]he key qualifiers [to the rule that one who signs an instrument without reading it cannot

be relieved of its burdens] are the ability to read and the absence of fraud." Appellant's allegation that she could not read was sufficient to state a claim for rescission: "sufficient to support legal or equitable relief from a release, on grounds of fraud, overreaching, or . . . absence of a meeting of the minds."); *Eicher v. Mid Am. Fin. Inv. Corp.*, 275 Neb. 462, 475, 748 N.W.2d 1, 14 (2008); *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 379, 702 N.W.2d 792, 804 (2005) ("The general rule that one who fails to read a contract cannot avoid the effect of signing it applies only in the absence of fraud."); *In re Estate of Peterson*, 221 Neb. 792, 798, 381 N.W.2d 109, 113 (1986); *Mangan v. Landen*, 219 Neb. 643, 646, 365 N.W.2d 453, 455 (1985); *Smith v. Ganz*, 219 Neb. 432, 437, 363 N.W.2d 526, 530 (1985); *Day v. Kolar*, 216 Neb. 47, 49, 341 N.W.2d 598, 599 (1983); *Erftmier v. Eickhoff*, *supra*. See also NJI2d 15.22, Comment.

For more on rescission, see the instructions cited in the Index, at Contract, Rescission. See particularly NJI2d Civ. 15.24, Comment.

And, of course, "[t]he fact that matters did not develop as one or all of the parties might have expected or hoped does not prove that [anyone] misrepresented anything." *Production Credit Ass'n. v. Eldin Haussermann Farms*, 247 Neb. 538, 545, 529 N.W.2d 26, 32 (1995) (quoting *O'Neill Prod. Credit Ass'n. v. Mellor*, 220 Neb. 555, 559, 371 N.W.2d 265, 267 (1985)).

See generally Restatement (Second) of Contracts ch. 7, §§ 159–73, particularly §§ 162, 164 (1981); 17 C.J.S., *Contracts* §§ 158–174 (1999 & Supp. 2009).

For cases governed by the Uniform Commercial Code, see Neb. U.C.C. § 2-721 (Reissue 2001).

NJI2d Civ. 15.22

MATERIAL MISREPRESENTATION

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff made the claimed representation;
2. That the representation was false;
3. That the representation was material;
4. That this representation substantially contributed to the defendant's decision to agree to the contract; [and]
5. That the defendant's reliance on this representation was reasonable; and

6. That the defendant was (harmed, damaged, et cetera) as a result of this reasonable reliance.

It is not necessary that the plaintiff knew that the representation was false. It may be that (he, she, it) was honestly mistaken.

COMMENT

I. IN GENERAL

This is the Burden of Proof part of the instruction on the affirmative defense of material misrepresentation. Use only those subparagraphs of the instruction as are put in issue by the pleadings and the evidence. For the Issues and the Effect of Findings parts of the instruction, see NJI2d Civ. 15.20.

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment. Regarding affirmative defenses in contract actions generally, see NJI2d Civ. 15.20, Comment.

NJI2d Civ. 15.09 defines "material representation." Regarding the affirmative defense of fraud in the inducement, also known as fraudulent misrepresentation, see NJI2d Civ. 15.21. Regarding the forms of false representation, see NJI2d Civ. 15.23. Regarding tort actions for fraudulent misrepresentation and fraudulent concealment, see NJI2d Civ. 9.01 and NJI2d Civ. 9.02; *see also* NJI2d Civ. 15.01, Comment, part III.

II. NJI2d Civ. 15.21 AND 15.22 DISTINGUISHED

The difference between NJI2d Civ. 15.21 and NJI2d Civ. 15.22 is the focus of each. NJI2d Civ. 15.21 focuses on the person who makes the representation. It requires a representation that is intentionally or recklessly false. NJI2d Civ. 15.22 focuses on the fact misrepresented. It requires a false representation concerning a fact likely to induce either a reasonable person or, for some special reason known to the plaintiff, this particular defendant to agree to the contract. The representation may have been intentionally or recklessly false, or it may have been an honest mistake.

Either the representation dealt with in NJI2d Civ. 15.21 or that dealt with in NJI2d Civ. 15.22 can be an affirmative defense to an action on a contract. The kind of representation defined in NJI2d Civ. 15.21 need not be material to entitle the defendant to relief. The kind of representation defined in NJI2d Civ. 15.22 must be material to entitle the defendant to relief.

As noted, one distinction between NJI2d Civ. 15.21 and NJI2d Civ. 15.22 is that under the former a representation must concern a fact likely to induce either a reasonable person or, for reasons known to plaintiff, this particular defendant to agree to the contract. This is not a

requirement of NJI2d Civ. 15.22. The latter, however, does require that the false representation be made with the intention that the defendant rely on it, that it substantially contribute to the defendant's decision to agree to the contract, and that the defendant's reliance on the false representation be reasonable. That seems to diminish the distance between NJI2d Civ. 15.21 and NJI2d Civ. 15.22.

As also noted, another distinction is that under NJI2d Civ. 15.21 the plaintiff must have either known the representation was false or made the representation with reckless disregard of its truth. Under NJI2d Civ. 15.22, on the other hand, the false representation could be the result of honest, non-reckless mistake. Although a false representation that is neither material nor known to be false or made with reckless disregard of its truth does not constitute an affirmative defense to an action on a contract, the person to whom the false representation was made "may have a claim to relief under other rules, such as those relating to breach of warranty." Restatement (Second) of Contracts § 162, comment c (1981).

III. RELATED MATTERS

A. SIGNING A CONTRACT WITHOUT READING IT

Absent fraud, "a person who signs a contract without reading it cannot later relieve himself of its burdens." In re Estate of Peterson, 221 Neb. 792, 798, 381 N.W.2d 109, 113 (1986); Krzycki v. Genoa Nat'l Bank, 242 Neb. 819, 827, 496 N.W.2d 916, 922 (1993). *Accord* Eicher v. Mid Am. Fin. Inv. Corp., 275 Neb. 462, 475, 748 N.W.2d 1, 14 (2008); Eicher v. Mid Am. Fin. Inv. Corp., 270 Neb. 370, 379, 702 N.W.2d 792, 804 (2005) ("The general rule is that one who fails to read a contract cannot avoid the effect of signing it applies only in the absence of fraud."); In re Claims Against Atlanta Elevator, Inc., 268 Neb. 598, 617, 685 N.W.2d 477, 493 (2004); Walker v. Walker Enters., Inc., 248 Neb. 120, 127, 532 N.W.2d 324, 329 (1995); Mangan v. Landen, 219 Neb. 643, 646, 365 N.W.2d 453, 455 (1985); Smith v. Ganz, 219 Neb. 432, 437, 363 N.W.2d 526, 530 (1985) ("[I]n the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.") (quoting *Interholzinger v. Estate of Dent*, 214 Neb. 264, 271, 333 N.W.2d 895, 899 (1983)); *Day v. Kolar*, 216 Neb. 47, 49, 341 N.W.2d 598, 599 (1983). See also NJI2d Civ. 15.21 and 15.22 and, for related material on "Formation of a Contract" and "Rules of Construction," NJI2d Civ. 15.01, Comment.

B. CARELESS OR NEGLIGENT SIGNING

"[T]he rule that carelessness or negligence of a person in signing an instrument estops [that person] from asserting that it does not truly express the agreement of the parties does not apply where relief is sought on the ground the instrument was obtained by fraud, or entered

into by mutual mistake of the parties.” *Lippire v. Eckel*, 178 Neb. 643, 649, 134 N.W.2d 802, 806 (1965).

C. REFORMATION OF AN AGREEMENT ON THE GROUNDS OF MISTAKE

“An action to reform a contract sounds in equity. [A]n appellate court tries factual questions de novo on the record.” *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 710-11, 714, 798 N.W.2d 121, 126, 128 (2011) (same quotation at both places in the opinion; footnotes omitted).

The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed. To overcome the presumption that the agreement correctly expresses the parties’ intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.

R & B Farms v. Cedar Valley Acres, 281 Neb. 706, 714, 798 N.W.2d 121, 128 (2011). *See also* *NJI2d Civ. 2.12B* (“Burden of Proof—Clear and Convincing Evidence Defined”).

“[A] court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.” Same quotation: *In re Estate of Dueck*, 274 Neb. 89, 93, 736 N.W.2d 720, 724 (2007); *Par 3, Inc. v. Livingston*, 268 Neb. 636, 641, 686 N.W.2d 369, 373 (2004); *Twin Towers Dev. v. Butternut Apts.*, 257 Neb. 511, 516, 599 N.W.2d 839, 844 (1999); *Walker v. Walker Enters., Inc.*, 248 Neb. 120, 126, 532 N.W.2d 324, 329 (1995).

A mutual mistake is a belief shared by the parties, which is not in accord with the facts. It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument. Mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

R & B Farms, 281 Neb. at 715, 798 N.W.2d at 129.

“Generally, the unilateral mistake of one party does not relieve that party from its obligation under a contract absent a showing of fraud, misrepresentation, or other inequitable conduct.” *Bachman v. Easy Parking of Am.*, 252 Neb. 325, 330, 562 N.W.2d 369, 373 (1997) (citing cases).

"The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation." *R & B Farms*, 281 Neb. at 715, 798 N.W.2d at 129.

And, of course, "[t]he fact that matters did not develop as one or all of the parties might have expected or hoped does not prove that [anyone] misrepresented anything." *Production Credit Ass'n. v. Eldin Haussermann Farms*, 247 Neb. 538, 545, 529 N.W.2d 26, 32 (1995) (quoting *O'Neill Prod. Credit Ass'n. v. Mellor*, 220 Neb. 555, 559, 371 N.W.2d 265, 267 (1985)).

NJI2d Civ. 15.22 is the pattern instruction for the affirmative defense of material misrepresentation. This part of the Comment refers to the related issue of reformation of an agreement when there has been a mutual or unilateral mistake. On the subject of a cause of action to recover a payment mistakenly made, as a result of a unilateral mistake, see *Resolution Trust Corp. v. Dial Companies, Inc.*, 5 Neb. App. 695, 564 N.W.2d 260 (1997) and the cases cited and discussed therein.

Regarding reformation on the grounds of mutual mistake, see *R & B Farms*, 281 Neb. at 715, 798 N.W.2d at 129 (involving an attempt to reform a deed; defining mutual mistake); *Oliver v. Clark*, 248 Neb. 631, 636-39, 537 N.W.2d 635, 639-41 (1995) (settlement agreement purporting to release any and all claims for accident-related damages may be set aside on grounds of mutual mistake when there are injuries of a serious character wholly unknown to the parties and not taken into consideration when release was executed; must be injury wholly unknown at time of release, as opposed to development of injury then known; discussing rule and citing cases); *Nat'l Am. Ins. Co. v. Continental W. Ins. Co.*, 243 Neb. 766, 773, 502 N.W.2d 817, 822 (1993); *Nebraska State Bank v. Pedersen*, 234 Neb. 499, 506-07, 452 N.W.2d 12, 18-19 (1990); *Omaha Door Co. v. Mexican Food Mfrs. of Omaha*, 232 Neb. 153, 439 N.W.2d 776 (1989); *Jones v. Employers Mut. Cas. Co.*, 230 Neb. 549, 560, 432 N.W.2d 535, 542 (1988); *First Fed. Sav. and Loan Ass'n of Lincoln v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988); *Eisenhart v. Lobb*, 11 Neb. App. 124, 647 N.W.2d 96 (2002) (action to reform a deed; discussing statute of limitations and discovery rule; "[a] mutual mistake is a belief shared by the parties which is not in accord with the facts," *id.* at 136, 647 N.W.2d 96, 647 N.W.2d at 108; the mutual mistake and the precise, correct terms must be proven by clear and convincing evidence, *id.*).

"Because mutual mistake was properly before the court, . . . parol evidence was properly admitted to enable the trier of fact to ascertain the parties' actual intent at the time of entering into the contract." *R & B Farms*, 281 Neb. at 713, 798 N.W.2d at 127.

Regarding the argument that, because of mutual mistake, the court should reform the agreement and then, in an action at law, award damages for breach of the reformed agreement, see *Records v. Christensen*, 246 Neb. 912, 915-17, 524 N.W.2d 757, 760-62 (1994).

Related hereto, “[g]enerally speaking, where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no basis for that party to upset the compromise.” *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 1008-09, 792 N.W.2d 484, 494-95 (2011).

IV. CAVEATS: PERHAPS-INADVERTENT JUDICIAL STATEMENTS THAT CLOUD THE PICTURE

More recently, the court said, “To recover in an action for fraud based upon a misrepresentation of fact, the plaintiff must prove . . .,” and then listed six elements. Some of the six are elements of “material misrepresentation” as it is defined in this instruction, NJI2d Civ. 15.22, and some are elements of “fraudulent misrepresentation” as it is defined in NJI2d Civ. 9.01. *Henderson v. Forman*, 240 Neb. 939, 945, 486 N.W.2d 182, 186 (1992); *Dammann v. Litty*, 234 Neb. 664, 672, 452 N.W.2d 522, 527 (1990); and cases cited in each. *Accord* *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 719, 502 N.W.2d 444, 452 (1993) (“an action for fraud based on misrepresentation of a material fact”). If these cases are fraudulent misrepresentation cases, they add the following to the tort as described in NJI2d Civ. 9.01: it must have been a misrepresentation “of a material fact.” If these cases are material misrepresentation cases, they add the following to the tort as described in NJI2d Civ. 15.22: the representation must have been fraudulent, that is, it must have been made recklessly as a positive assertion without knowledge concerning the truth of the representation.

On the other hand, and even more recently, the court listed the elements of “a cause of action for misrepresentation” and did not include any notion that the misrepresentation must be “material.” *Fulk v. McLellan*, 243 Neb. 143, 148, 498 N.W.2d 90, 95 (1993). That aspect of *Fulk* seems to deal with the problem discussed in the above paragraph, and to separate once again the misrepresentation cases in NJI2d Civ. 9.01, from the material misrepresentation cases in this instruction, NJI2d Civ. 15.22.

It was the opinion of the Committee, at the time NJI2d 9.01 and NJI2d Civ. 15.22 were drafted, that fraudulent misrepresentation of 9.01 and material misrepresentation of 15.22 were different torts and that materiality was not an element of the former and fraud was not an element of the latter. *Fulk* supports that.

Fulk, however, raises a new problem. It defines one of the essential elements as follows: “the representation was known to be false when made, was made recklessly without knowledge of its truth and as a positive assertion, [so far this is the tort described in NJI2d Civ. 9.01,] or was negligently made [now this is a different tort than the one in NJI2d Civ. 9.01].” *Fulk*, 243 Neb. at 148, 498 N.W.2d at 95. For this proposition, *Fulk* cites *Commerce Sav. Scottsbluff, Inc. v. F.H. Schafer Elevator, Inc.*, 231 Neb. 288, 436 N.W.2d 151 (1989). *Commerce Sav.* describes the cause-of-action element in question as follows: “‘that the represen-

tation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion.' " *Commerce Sav.*, 231 Neb. at 305-06, 436 N.W.2d at 163. *Commerce Sav.* does not include the "or was negligently made" language. Its inclusion in *Fulk*, without discussion and by citation to a case where it does not appear, seems to be inadvertent. See also *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 369-73, 518 N.W.2d 910, 920-22 (1994) (noting Nebraska's recognition of the tort of negligent misrepresentation and stating the elements of that tort).

In any event, one who has a cause of action in, or an affirmative defense based upon, fraudulent misrepresentation or material misrepresentation is referred to the cases discussed above.

V. A CAUSE OF ACTION BASED ON NEGLIGENT MISREPRESENTATION

One with a cause of action (as opposed to an affirmative defense) based on negligent misrepresentation is referred to *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 369-73, 518 N.W.2d 910, 920-22 (1994) (adopting the negligent misrepresentation cause of action defined at Restatement (Second) of Torts § 552 (1977), citing cases, and discussing the tort).

"Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the . . . mental state [of the party against whom it is asserted]." *Nathan v. McDermott*, 306 Neb. 216, 236, 945 N.W.2d 92, 109 (2020). These elements are listed and discussed at *NJI2d Civ. 9.01* (the tort of fraudulent misrepresentation) and 15.21 (the affirmative defense of fraudulent misrepresentation).

See also the Comment to *NJI2d Civ. 9.02* for its discussion of *Platte Valley Fed. Sav. & Loan Ass'n v. Gray*, 226 Neb. 135, 409 N.W.2d 617 (1987).

VI. A CAUSE OF ACTION FOR MATERIAL MISREPRESENTATION

"Nebraska has never recognized a tort based on material misrepresentation." *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 809, 824 N.W.2d 12, 20 (2012). Should Nebraska do so, this affirmative defense instruction may be adapted for use as a plaintiff's instruction. If that is to be done, see *Dammann v. Litty*, 234 Neb. 664, 672, 452 N.W.2d 522, 527 (1990).

A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed

before entry into the contract. Where the induced party elects to disaffirm or avoid the transaction, it may claim restitution. “Misrepresentation or nondisclosure may render a transaction voidable even if there would be no tort cause of action for deceit.”

InterCall, Inc., *supra* (footnotes omitted). *Accord deNourie & Yost Homes, LLC v. Frost*, 295 Neb. 912, 927-28, 893 N.W.2d 669, 681-82 (2017)

VII. EQUITY ACTION FOR FRAUD

Note that in an equity action for fraud, the burden of proof is not “by the greater weight of the evidence,” but “by clear and convincing evidence.” This is discussed at NJI2d Civ. 2.12B.

VIII. THE UNIFORM COMMERCIAL CODE

For cases governed by the Uniform Commercial Code, see Neb.U.C.C. § 2-721 (Reissue 2001).

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

“An essential element of actionable false misrepresentation is justifiable reliance on the representation. . . . Whether a party’s reliance upon a misrepresentation was reasonable is a question of fact. A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.” *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 814-15, 824 N.W.2d 12, 23 (2012) (footnotes and paragraph break omitted) (discussing circumstances to be considered).

Regarding subparagraph number 6 of this instruction, see the Authorities to NJI2d Civ. 15.21, above, which discuss the possibility that this subparagraph may not be proper; damage to the defendant may not be an element of this affirmative defense.

See generally the Comment, *supra*, and NJI2d Civ. 15.21, Comment and Authorities.

NJI2d Civ. 15.23

FORMS OF FALSE REPRESENTATION

A false representation may take one or more of three forms:

1. It may be a written or oral statement.
2. It may consist of (conduct, actions) intended to prevent another from learning a fact or (conduct, actions) known to be likely to prevent another from learning a fact.
3. It may consist of a person's failure to disclose a fact known to (him, her), when:
 - a. (He, She) knows that disclosure is necessary to prevent a previous representation from being either fraudulent or false and material; or
 - b. (He, She) knows that disclosure would correct the other party's mistake as to a basic assumption on which that other party is making the contract and where such nondisclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; or
 - c. (He, She) knows that disclosure would correct the other party's mistake as to the contents or effect of (their written agreement, the writing that is their agreement, a writing that evidences or embodies an agreement in whole or in part); or
 - d. The other person is entitled to know the fact because of a relation of trust and confidence between them.

COMMENT & AUTHORITIES

Use only those paragraphs that, in light of the pleadings and the evidence, will assist the jury.

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

"Where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation." *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 589, 605 N.W.2d 110, 118 (2000) (multiple quotation marks and citations omitted), *partially overruled on other grounds* by *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 927, 791 N.W.2d 317, 334 (2010). "[M]ere silence cannot constitute a misrepresentation absent a duty to disclose information." *Knights of Columbus Council 3152*, 280 Neb. at 922, 791 N.W.2d at 331.

"A misrepresentation is an assertion that is not in accord with the facts." Restatement (Second) of Contracts § 159 (1981). "[It] commonly takes the form of spoken or written words." *Id.* at comment a.

A fraudulent misrepresentation may be made by conduct as well as by spoken word. *Flakus v. Schug*, 213 Neb. 491, 495, 329 N.W.2d 859, 863 (1983), *overruled in part, on other grounds*, by *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). "Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist." Restatement (Second) of Contracts § 160 (1981).

Paragraph number 3 of this instruction, including its lettered subparagraphs, is based on the Restatement (Second) of Contracts § 161 (1981).

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

NJI2d Civ. 15.08 defines fraudulent representation. NJI2d Civ. 15.09 defines material representation. NJI2d Civ. 15.21 describes the affirmative defense of fraud in the inducement or fraudulent representation. NJI2d Civ. 15.22 describes the affirmative defense of material misrepresentation.

NJI2d Civ. 15.24

RESCISSION: CANCELLATION OF CONTRACT BY MUTUAL CONSENT

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, both of the following:

1. That none of the parties had fully performed his or her obligations under the contract; and
2. That the parties agreed to discharge each other's remaining duties under the contract.

This agreement may be written or oral or implied from the conduct of the parties.

COMMENT

I. THE PURPOSE OF RESCISSION

"The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract[.]" Same quotation: *Cinati v. Prososki*, 307 Neb. 477, 491, 949 N.W.2d 505, 517 (2020); *Kraci v. Loseke*, 236 Neb. 290, 303, 461 N.W.2d 67, 75 (1990). *Accord deNourie & Yost Homes, LLC v. Frost*, 295 Neb. 912, 928, 893 N.W.2d 669, 682 (2017). "[H]ence rescission may be unavailable unless the parties can be placed substantially in the status quo." *Cinati*, above.

Rescission “‘annul[s], abrogate[s], or unmake[s]’” a contract. *Wilson v. Misko*, 244 Neb. 526, 530, 508 N.W.2d 238, 243 (1993) (quoting *Black’s Law Dictionary* 1174 (5th ed. 1979)).

II. LEGAL RESCISSION

There is legal rescission and equitable rescission. The affirmative defense of rescission is “legal rescission.” A cause of action for rescission is “equitable rescission.” This instruction has to do with the former: the affirmative defense, i.e., legal rescission. See part II of this Comment, below.

This is the Burden of Proof part of the instruction on the affirmative defense of rescission. For the Issues and the Effect of Findings parts of the instruction, see NJI2d Civ. 15.20.

The Restatement (Second) of Contracts states that:

[Rescission involves] an agreement under which each party agrees to discharge all of the other party’s duties of performance. . . . An agreement of “partial rescission” that would discharge less than all the parties’ remaining duties of performance is treated as a modification. . . . An agreement of rescission differs from a “termination,” which “occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach” and from a “cancellation,” which “occurs when either party puts an end to the contract for breach by the other.” Uniform Commercial Code § 2-106.

Restatement (Second) of Contracts § 283, comment *a* (1981).

This instruction should not be used when one party has fully performed or the contract is unilateral (promise for an act), rather than bilateral (mutual promises). Also, appropriate modification must be made if the contract involved third-party beneficiaries. See 5A Corbin, Contracts § 1236 (1964).

Colo. Jury Inst. 4th § 30:29, Notes on Use (2009).

Modification is discussed in detail at NJI2d Civ. 15.28. “A ‘rescission’ amounts to the unmaking of a contract. . . . As opposed to rescission, a modification continues the original contract with some changes.” *TNT Cattle Co., Inc.*, 304 Neb. 890, 920, 937 N.W.2d 811, 835 (2020).

“Inasmuch as formation of a contract can be prevented by duress . . . , likewise, duress may prevent an effective rescission of an existing agreement.” *Lustgarten v. Jones*, 220 Neb. 585, 591, 371 N.W.2d 668, 672 (1985). (Regarding rescission, see this instruction, NJI2d Civ. 15.24. Regarding duress, see NJI2d Civ. 15.26; see also NJI2d Civ. 4.26.)

Where contract terms control, and there is no duress, an action for

money had and received, regarding money paid on a contract, cannot be maintained without rescission of the contract. *See* NJI2d Civ. 4.40, Comment.

Regarding seller's fraud as a basis for a buyer's right to rescind, see *Gonzalez v. Union Pac. RR. Co.*, 282 Neb. 47, 65-69, 804 N.W. 2d 424, 441-44 (2011); *Kraci v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). *See also* *Bauermeister v. McReynolds*, 253 Neb. 554, 567, 571 N.W.2d 79, 88 (1997) and *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998) (supplemental opinion).

"The party alleging fraud as the basis for rescission must prove all of the elements of the fraudulent conduct by clear and convincing evidence." *Cao*, 258 Neb. at 1031, 607 N.W.2d at 532. *Accord, e.g.*, *Schuelke*, 255 Neb. at 730, 587 N.W.2d at 373 (citing cases); *Bauermeister*, 253 Neb. at 567, 571 N.W.2d at 88. Regarding the burden of proof in an action for equitable rescission, see further NJI2d Civ. 2.12A, Comment.

"[A]ll parties to an instrument sought to be cancelled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants." *Ord, Inc.*, 276 Neb. at 789, 758 N.W.2d at 34.

On a related matter, "[w]hen the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument[.]" *McCombs Realty v. Western Auto Supply Co.*, 10 Neb. App. 962, 966, 641 N.W.2d 77, 81 (2002) (courts will enforce such a clause unless doing so "would be manifestly contrary to equity and good conscience").

For cases governed by the Uniform Commercial Code, see Neb.U.C.C. §§ 2-209, 2A-209, and 2-720 (Reissue 2001).

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

III. EQUITABLE RESCISSION

As noted in part I of this Comment, there is legal rescission and equitable rescission. *Gonzalez v. Union Pac. RR. Co.*, 282 Neb. 47, 64, 804 N.W. 2d 424, 441 (2011). The affirmative defense of rescission is "legal rescission." A cause of action for rescission is "equitable rescission." This instruction has to do with the former: the affirmative defense, i.e., legal rescission. Regarding equitable rescission, see particularly *Vasquez v. CHI Properties*, 302 Neb. 742, 760, 925 N.W.2d 304, 319 (2019); *Gonzalez, supra*; *In re Estate of Stephenson*, 243 Neb. 890, 900, 503 N.W.2d 540, 548 (1993) ("An action to rescind a written instrument is an equity action.") (multiple quotation marks and citations omitted), *partially overruled on other grounds by* *Knights of Columbus Council*

3152 v. KFS BD, Inc., 280 Neb. 904, 927, 791 N.W.2d 317, 334 (2010); Ord, Inc. v. AmFirst Bank, 276 Neb. 781, 788, 758 N.W.2d 29, 34 (2008); Cao v. Nguyen, 258 Neb. 1027, 1030, 607 N.W.2d 528, 532 (2000); Schuelke v. Wilson, 255 Neb. 726, 730, 587 N.W.2d 369, 373 (1998); Schuelke v. Wilson, 250 Neb. 334, 549 N.W.2d 176 (1996). *See also* Wilson v. Misko, 244 Neb. 526, 530, 508 N.W.2d 238, 243 (1993).

“[T]ender or return of consideration is only a condition precedent in a case where rescission is by act of the party—a legal rescission. [It] is not a condition precedent in a case involving equitable rescission—an action to obtain a decree of rescission.” *Gonzalez*, 282 Neb. at 64, 803 N.W.2d at 441.

Regarding the elements of an equitable cause of action for rescission, see *Bauermeister v. McReynolds*, 253 Neb. 554, 567, 571 N.W.2d 79, 88 (1997); *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998) (supplemental opinion); *Hayes v. Equine Equities*, 239 Neb. 964, 480 N.W.2d 178 (1992) (dissenting opinion argues *Hayes* should have been a law-action under the UCC).

Gonzalez discusses at some length equitable rescission in cases where an instrument was signed by a person illiterate or illiterate in English. *Id.* at 54-62, 803 N.W.2d at 434-40. “[T]he key qualifiers [to the rule that one who signs an instrument without reading it cannot be relieved of its burdens] are the ability to read and the absence of fraud.” *Id.* at 54, 803 N.W.2d at 435. Appellant’s allegation that she could not read was sufficient to state a claim for rescission: “sufficient to support legal or equitable relief from a release, on grounds of fraud, overreaching, or . . . absence of a meeting of the minds.” *Id.* at 55, 803 N.W.2d at 435.

Regarding the time in which an action for equitable rescission must be filed, see *Gonzalez*, 282 Neb. at 70-71, 803 N.W.2d at 444-45.

Regarding equitable rescission, *see also* NJI2d Civ. 2.12A and 15.21.

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

“Rescission of a contract is an affirmative defense which must be pleaded and cannot be asserted under a general denial.” *Rase v. Southeast Neb. Consol. Sch. Dist.*, 190 Neb. 800, 804, 212 N.W.2d 629, 632 (1973) (citing cases). “Rescission is an affirmative defense [I]t

is for the jury to determine whether facts relied on as constituting a breach justifying a rescission have been established.” *Heller v. Speier*, 119 Neb. 787, 793, 230 N.W. 835, 837 (1930). *See also*, 17B C.J.S. *Contracts* § 664 (1999).

None of the Nebraska cases on rescission states the elements of the defense. Most go no further than to state that the defense is not available therein because it was not pled. *Rase v. Southwest Neb. Consol. Sch. Dist.*, *supra*, and the cases cited therein. Many of these cases cite 17A C.J.S. *Contracts* § 629 (1963), now found at 17B C.J.S. *Contracts* § 664 (1999), which also only deals with rescission’s nature as an affirmative defense and does not state the elements of the defense. In *Lustgarten v. Jones*, 220 Neb. 585, 591, 371 N.W.2d 668, 672 (1985) the court stated that “[r]escission of a contract by a subsequent agreement of the parties requires as much a meeting of the parties’ minds as does making a contract.”

In *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995), the court defines rescission of a contract as:

[T]o abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. . . . A “rescission” amounts to the unmaking of a contract . . . and it may be effected . . . by one of the parties declaring rescission of contract without consent of [the] other if a legally sufficient ground therefor exists

Id., at 780–81, 539 N.W.2d at 644–45 (quoting Black’s Law Dictionary 1306 (6th ed. 1990)). The *Hoeft* court goes on to state that “[r]escission implies extinction of the contract which leaves the parties without a right of recovery on the contract itself.” *Hoeft*, 248 Neb. at 780–81, 539 N.W.2d at 644–45.

The elements of this defense are discussed in the Restatement:

- (1) An agreement of rescission is an agreement under which each party agrees to discharge all of the other party’s remaining duties of performance under an existing contract.
- (2) An agreement of rescission discharges all remaining duties of performance of both parties. It is a question of interpretation whether the parties also agree to make restitution with respect to performance that has been rendered.

Restatement (Second) of Contracts § 283 (1981).

Regarding an agreement of rescission, comment a to the just-quoted section of the Restatement states that “[c]onsideration is provided by each party’s discharge of the duties of the other.” Restatement (Second) of Contracts § 283 cmt. a (1981). This supports the first of the numbered paragraphs of this pattern instruction. Comment a continues: “This is

so even though one or both parties have partly performed their duties or one or both have a claim for damages for partial performance.” Note that, as discussed in the Comment to NJI2d Civ. 4.40, the remedies of rescission and damages are inconsistent.

Regarding the final paragraph of the instruction, “[i]n determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.” Same quotation: *TNT Cattle Co. v. Fife*, 304 Neb. 890, 921, 937 N.W.2d 811, 835 (2020); *Hoeft v. Five Points Bank*, 248 Neb. 772, 780–81, 539 N.W.2d 637, 644–45 (1995) (quoting *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 480, 513 N.W.2d 534, 542 (1994)).

Mutual rescission of a contract must be clear, positive, unequivocal, and decisive, and it must manifest the parties’ actual intent to abandon their contract rights. “A ‘rescission’ amounts to the unmaking of a contract. . . . As opposed to rescission, a modification continues the original contract with some changes.” *TNT Cattle Co., Inc.*, 304 Neb. at 921, 937 N.W.2d at 835.

NJI2d Civ. 15.25

UNDUE INFLUENCE—CONTRACT

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

1. That the defendant was (a person who would be subject to, susceptible to) undue influence;
2. That there was an opportunity to exercise undue influence upon the defendant;
3. That there was a (disposition to exercise, motive for exercising) undue influence upon the defendant; and
4. That the contract was the result of such undue influence.

COMMENT

A. IN GENERAL

This is the Burden of Proof part of the instruction on the affirmative defense of undue influence. For the Issues and the Effect of Findings parts of the instruction, see NJI2d Civ. 15.20. NJI2d Civ. 15.10 defines undue influence.

This defense, as described by the court, has its source in undue influence in will cases, which is described in NJI2d Civ. 16.06.

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

On a related matter, regarding the affirmative defense of lack of mental capacity on the part of a party to a contract, see *Wurst v. Blue River Bank*, 235 Neb. 197, 206–07, 454 N.W.2d 665, 670–71 (1990).

For cases governed by the Uniform Commercial Code, see Neb.U.C.C. § 2-302 (Reissue 2001).

B. CONFUSION REGARDING THE BURDEN OF PROOF

Some of the cases cited in the Authorities, below, state “the party asserting the defense must show [the elements of the defense] clearly and convincingly.” *Pawnee Cty. Bank v. Droge*, 226 Neb. 314, 321, 411 N.W.2d 324, 329 (1987). In an action at law, the burden of proof on this affirmative defense is by the greater weight of the evidence. As noted, this defense has its source in undue influence in will cases, and in those cases, there used to be confusion as to whether the burden of proof was by the greater weight of the evidence or by clear and convincing evidence. In these contract cases, the words “clearly and convincingly” were picked up from the will cases. They do not state the burden of proof in the will cases, and they do not state the burden of proof here. That problem was resolved in *In re Price’s Estate*, 223 Neb. 12, 18, 388 N.W.2d 72, 77 (1986) (discussing cases; disapproving those stating this burden as “by clear and convincing evidence,” stating general rule that burden of proving undue influence in action at law is “greater weight of the evidence,” and in equitable action is “clear and convincing evidence.”). See also NJI2d Civ. 2.12A and NJI2d Civ. 2.12B. And see NJI2d Civ. 16.06.

More recently, the confusion may have rearisen. In *re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994), states that “[t]he setting aside of a contract for undue influence requires clear and convincing evidence.” *In re Estate of Wagner*, 246 Neb. at 632, 522 N.W.2d at 165. *Wagner* cites *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991), which was an action in equity. *Miller*, 238 Neb. at 898, 472 N.W.2d at 905. Though *Wagner* does not limit its statement about clear and convincing evidence to equity actions seeking to have a contract set aside for undue influence, that limitation does seem to apply.

For the proposition that the burden of proof on the issue of undue influence in an equitable action is clear and convincing evidence, see also *Goff v. Weeks*, 246 Neb. 163, 167, 517 N.W.2d 387, 391 (1994); *Miller v. Westwood*, 238 Neb. 896, 907, 472 N.W.2d 903, 910 (1991).

“Although the burden of persuasion or the burden of going forward on the issue of undue influence may shift to the proponent of the instrument, the ultimate burden of proof remains at all times on the party asserting the issue.” *Goff*, 246 Neb. at 167, 517 N.W.2d at 392. In most contexts in the law the burden of persuasion is distinct from the burden

of going forward or the burden of production and is the same as the burden of proof. Query whether this quotation's linkage of the burden of persuasion and the burden of going forward, and its delinkage of the burden of persuasion and "the ultimate burden of proof," is in error.

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

The party alleging undue influence has the burden of proof. *David v. Tucker*, 196 Neb. 575, 580, 244 N.W.2d 197, 200 (1976). *See also* *Pawnee Cty. Bank v. Droge*, 226 Neb. 314, 321, 411 N.W.2d 324, 329 (1987).

"The elements [that must be proved] . . . to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence."

McDonald v. McDonald, 207 Neb. 217, 220-21, 298 N.W.2d 136, 138 (1980) (quoting *In re Estate of Saathoff*, 206 Neb. 793, 798, 295 N.W.2d 290, 294 (1980)). *Accord* *Caruso v. Parkos*, 262 Neb. 961, 969, 637 N.W.2d 351, 359 (2002); *Pawnee Cty. Bank v. Droge*, 226 Neb. 314, 321, 411 N.W.2d 324, 330 (1987); *Dunbier v. Rafert*, 170 Neb. 570, 588-89, 103 N.W.2d 814, 827 (1960).

Regarding the third element of the defense, the pattern instruction and the above cases speak of a "disposition to exercise undue influence for an improper purpose." *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994), states the element as "an *intent* to exercise undue influence for an improper purpose." *Id.* at 167, 517 N.W.2d at 391 (emphasis added). Disposition and intent are not synonyms. With this use of the word "intent," *Goff* cites *Pruss v. Pruss*, 245 Neb. 521, 536, 514 N.W.2d 335, 346 (1994); *Pruss* is a wills case, and it does use the word "intent." *Pruss*, in turn, cites *Miller v. Westwood*, 238 Neb. 896, 907, 472 N.W.2d 903, 910 (1991); *Miller* is a contract case, and it does not use word "intent," but rather the word "disposition." Further, later in the *Goff* opinion, the court discusses this element of "intent" and writes of whether "Weeks had an intent or disposition to exercise undue influence." *Goff*, 246 Neb. at 169, 517 N.W.2d at 392. The court seems to be using the two words as though they were synonyms. In any event, either disposition or motive seems to be the correct word, and those are the two alternatives used in the pattern instruction. That some cases use the word intent instead, seems to be inadvertent. It is possible,

however, that the third element of the defense in the pattern instruction should be written in terms of an intent instead of a disposition or motive.

The Restatement (Second) of Contracts shortens this list considerably:

(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

Restatement (Second) of Contracts § 177(1), (2) (1981). Regarding the concept of unfair persuasion, the Restatement states the following:

The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion, but they are not in themselves controlling.

Restatement (Second) of Contracts § 177 cmt. b (1981). The Restatement (Second) of Contracts § 177(3) (1981) states:

If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

For cases governed by the Uniform Commercial Code, see Neb.U.C.C. § 2-302 (Reissue 2001).

See also 17A C.J.S., *Contracts* §§ 187–194 (1999 & Supp. 2009).

NJI2d Civ. 15.26

DURESS

In connection with this defense, the defendant has the burden of proving, by the greater weight of the evidence, each and all of the following:

1. That the plaintiff threatened (here insert a statement of the threat that, if proven, constitutes duress);

2. That this threat left the defendant no reasonable alternative but to agree to the contract; [and]

3. That the defendant's agreement to the contract was a result of this threat[; and]

[4. That the contract itself was either unjust, unconscionable, or illegal].

COMMENT

This is the Burden of Proof part of the instruction on the affirmative defense of duress. For the Issues and the Effect of Findings parts of the instruction, see NJI2d Civ. 15.20.

See Restatement (Second) of Contracts, § 176 (1981), titled "When a Threat Is Improper."

On a related matter, regarding the affirmative defense of lack of mental capacity on the part of a party to a contract, see *Wurst v. Blue River Bank*, 235 Neb. 197, 206-07, 454 N.W.2d 665, 670-71 (1990).

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

For cases governed by the Uniform Commercial Code, see Neb.U.C.C. § 2-302 (Reissue 2001).

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

Duress is an affirmative defense and must be pled to be considered. Authorities, below. In *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981), the answer alleged duress as a defense. After the plaintiff rested, the trial court sustained plaintiff's demur to defendant's answer on the grounds that defendant had not alleged facts to support the conclusion that duress had been present. The Supreme Court reversed and, in a later case, explained that reversal as follows: While the defendants in *Newman Grove* did not plead any facts sufficient to support duress, "their answer nonetheless put plaintiff on notice that duress was an issue and therefore fulfilled its purpose as a pleading: to frame and limit the issues upon which a cause is to be tried." *Lease Nw. v. Davis*, 224 Neb. 617, 624, 400 N.W.2d 220, 224 (1987).

"[T]he burden of proving duress is placed upon the party alleging it." *Lustgarten v. Jones*, 220 Neb. 585, 591, 371 N.W.2d 668, 672 (1985).

“What constitutes duress is a question of law, but existence of duress is a question of fact.” *Lustgarten v. Jones*, 220 Neb. at 591, 371 N.W.2d at 672. This is the reason for the parenthetical insertion in subparagraph number 1 of this pattern instruction.

Duress by threat makes a contract voidable:

(1) If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) If a party’s manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Restatement (Second) of Contracts § 175 (1981).

“Duress is coercion that is wrongful as a matter of law.” Lawful coercion becomes impermissible when employed to support a bad-faith demand: one that the party asserting it knows (or should know) to be unjustified.” Coercion does not include hard bargaining, but it can include circumstances in which

the stronger party exploits the other’s vulnerability in a manner that passes the bounds of economic self-interest. Legitimate self-interest (and lawful coercion) encompasses the usual freedom to deal with another on one’s own terms or not at all. So long as the stronger party is not responsible for the other’s vulnerability, driving a hard bargain does not constitute duress. But the exploitation of a superior bargaining position will predictably be found wrongful when the stronger party seeks additional leverage by exploiting a vulnerability to which the weaker party (in dealing the stronger) is not properly subject.

. . . Threats to exercise what would normally be legal right may constitute duress when employed to achieve an advantage unrelated to the interest that the legal right is supposed to protect.

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 867-68, 809 N.W.2d 725, 744 (2011) (quoting the Restatement (Third) of Restitution and Unjust Enrichment (2011) (footnotes omitted; ellipsis in *City of Scottsbluff*).

“To constitute duress, there must be an application of such pressure or constraint as compels a [person] to go against [his or her] will, and takes away [his or her] agency, destroying the power of refusing to comply with the unjust demands of another.” *Haumont v. Security*

State Bank, 220 Neb. 809, 814, 374 N.W.2d 2, 6 (1985) (quoting Buhrman v. Int'l Harvester Co., 181 Neb. 633, 638, 150 N.W.2d 220, 223 (1967)). *Accord* Bock v. Bank of Bellevue, 230 Neb. 908, 914, 434 N.W.2d 310, 314 (1989).

"In Nebraska the law is well established that where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instrument is the result of duress and the contract may be voided." *Haumont v. Security State Bank*, *supra* (quoting Grasso v. Dean, 171 Neb. 648, 650-51, 107 N.W.2d 421, 423 (1961)).

"Economic duress may be found in threats, or implied threats to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement." *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 868, 809 N.W.2d at 744-45.

"[I]n order for an agreement to be voidable by reason of economic duress, it must not only have been obtained by means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal." *First Data Res., Inc. v. Omaha Steaks Int'l, Inc.*, 209 Neb. 327, 332, 307 N.W.2d 790, 793 (1981). *Accord* *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 869, 809 N.W.2d at 745; *Bock v. Bank of Bellevue*, 230 Neb. 908, 915, 434 N.W.2d 310, 314 (1989); *Lustgarten v. Jones*, 220 Neb. 585, 591-92, 371 N.W.2d 668, 672 (1985); *Carpenter Paper Co. v. Kearney Hub Publ'g Co.*, 163 Neb. 145, 152, 78 N.W.2d 80, 84 (1956).

The threat, however, "need not constitute the basis for an independent actionable wrong." *Lustgarten v. Jones*, *supra*. This is the reason that the paragraph numbered 4 is included in this pattern instruction. It is in brackets because it seems that in some cases the question of whether the contract is unconscionable or unjust will be a question of law, not fact, and this paragraph will not be given. There are threats that, if proved, result in a contract being unjust or unconscionable as a matter of law. For example, in *Haumont v. Security State Bank*, quoted above, it would be error to include this bracketed material.

In this regard, *First Data Res., Inc. v. Omaha Steaks Int'l, Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981), states the following: "If a person threatens to do what he has a legal right to do, his threat ordinarily does not constitute business coercion." *First Data Res.*, 209 Neb. at 332, 307 N.W.2d at 793 (quoting *McCubbin v. Buss*, 180 Neb. 624, 628, 144 N.W.2d 175, 178 (1966)).

It seems that the rules discussed in the pattern instruction's paragraph numbered 4 apply only in cases of economic duress. This is a further reason for bracketing this paragraph of the instruction, which

may only apply in cases of economic duress, and will not always be needed even then.

An unconscionable agreement is defined as “[a]n agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promise would accept.” Black’s Law Dictionary 68 (7th ed. 1999). Unconscionability is determined in light of all the surrounding circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print.

Parizek v. Roncalli Catholic High Sch., 11 Neb.App. 482, 486, 655 N.W.2d 404, 408 (2002). Regarding unconscionability, see also, e.g., *Henggeler v. Brumbaugh & Quandahl, P.C., LLO*, 894 F. Supp. 2d 1180, 1187 (D. Neb. 2012); *Hollins v. Debt Relief of America*, 479 F. Supp. 2d 1099, 1106 (D. Neb. 2007); *Myers v. Nebraska Inv. Council*, 272 Neb. 669, 692-93, 724 N.W.2d 776, 798 (2006). Regarding contracts that are unconscionable and therefore void as against public policy, see also *NJI2d Civ. 15.01*.

Duress is “[o]ne of the exceptions to the voluntary payment rule.” *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 867, 809 N.W.2d at 744.

The power of avoidance for business coercion is lost by electing to affirm the transaction. *McCubbin v. Buss*, 180 Neb. at 628, 144 N.W.2d at 180.

NJI2d Civ. 15.27

FAILURE OF CONSIDERATION

In connection with this defense, the defendant has the burden of proving that (here insert the claimed failure of consideration).

COMMENT

See *NJI2d Civ. 15.06*, Comment.

This is the Burden of Proof part of the instruction on the affirmative defense of failure of consideration. For the Issues and the Effect of Findings parts of the instruction, see *NJI2d Civ. 15.20*.

Regarding affirmative defenses generally, see *NJI2d Civ. 2.02D*, Comment.

In Uniform Commercial Code cases, see Neb.U.C.C. § 3-408 (Reissue 2001).

On a somewhat related matter, impairment of collateral, *see, e.g., Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 8–10, 917 N.W.2d 133, 139–41 (2018).

AUTHORITIES

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, *see* NJ12d Civ. 15.20, Comment.

The law of contracts has two concepts dealing with consideration's nonexistence: lack of consideration and failure of consideration.

■ Lack of consideration refers to the situation in which there was no consideration at the time the parties entered into the alleged agreement. In that situation, there never was a contract. *See Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 10, 917 N.W.2d 133, 141 (2018). The burden of proving that consideration existed when the agreement was made is on the party suing on the contract; he or she carries the risk of dismissal and the risk of nonpersuasion.

■ Failure of consideration refers to the situation in which there was consideration at the time the parties entered into their agreement but because of some supervening cause the consideration has failed. In that situation, assuming all of the other requirements are present, there is a contract. *See Lindsay*, 301 Neb. at 10, 917 N.W.2d at 141. The burden of proving failure of consideration is on the party defending against the suit on the contract; he or she carries the risk of dismissal and the risk of nonpersuasion.

"The party claiming that there has been a failure of consideration usually has the burden of pleading and proving the failure as an affirmative defense. Since the law presumes that there is consideration for a note, the burden of proving that the consideration for such an instrument has failed is on the maker." 7 C.J.S. *Contracts* § 133 (1999). An earlier, more awkwardly written, version of this quotation is cited at *Cornhusker Dev. & Inv. Group, Inc. v. Knecht*, 180 Neb. 873, 881, 146 N.W.2d 567, 573 (1966). As regards lack of consideration versus failure of consideration, this quotation from C.J.S. refers to lack of consideration.

"Failure of consideration occurs where, *inter alia*, the purpose of the parties' agreement or contract wholly fails." *Schuelke v. Wilson*, 255 Neb. 726, 734, 587 N.W.2d 369, 376 (1998).

Failure of consideration is an affirmative defense and, as such, the burden of proving it is on the defendant. *Schuelke*, 255 Neb. at 732, 735,

587 N.W.2d at 375; *Production Credit Ass'n v. Eldin Haussermann Farms*, 247 Neb. 538, 542, 529 N.W.2d 26, 30 (1995); *Spittler v. Nicola*, 239 Neb. 972, 976-77, 479 N.W.2d 803, 807 (1992).

Other Nebraska cases on the subject of lack of or failure of consideration relate to the familiar rule that the burden of proof follows the burden of pleading, and the proposition that something pled as an affirmative defense can become an affirmative defense. *Cornhusker Dev. & Inv. Group, Inc.*, *supra* (defendant who pled failure of consideration has burden of proof); *Blaha GMC-Jeep Inc. v. Frerichs*, 211 Neb. 103, 111, 317 N.W.2d 894, 899 (1982) (defendant who pled failure of consideration has burden of proof); *Erfmtier v. Eickhoff*, 210 Neb. 726, 731-32, 316 N.W.2d 754, 757 (1982) (where absence-of-consideration pled as an affirmative defense, burden of proof on defendant), *overruled in part, on other grounds*, by *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). Regarding the general rule that the burden of proof follows the burden of pleading, see NJI2d Civ. 2.12A, Comment.

See also 17A AM. JUR. 2d *Contracts* § 648 (2004); 1 Williston on *Contracts* § 119A (3d ed. 1957).

Cotner Coll. v. Hester's Estate, 155 Neb. 279, 291, 51 N.W.2d 612, 618 (1952) contains an early and fairly thorough discussion of failure of consideration. (Among other things, this case states that the defendant need not have made "technical rescission" of the contract to avail him-or herself of the defense of failure of consideration.)

"What is sometimes referred to as 'failure of consideration' by courts and statutes . . . is referred to in this Restatement as 'failure of performance' to avoid confusion with the absence of consideration." Restatement (Second) of *Contracts* § 237 cmt. a (1981). See also 3A Corbin, *Contracts* § 658 (1960).

Regarding consideration, see also NJI2d Civ. 15.02 and NJI2d Civ. 15.06 and the Comments thereto.

NJI2d Civ. 15.28

MODIFICATION

No pattern instruction has been prepared.

COMMENT & AUTHORITIES

Whether particular facts amount to modification is a question of law; whether such facts are proved is a question of fact. So, where the evidence is undisputed, modification is entirely a question for the court. Where the evidence is conflicting, the jury must decide what the facts are, but the judge still decides whether those facts amount to modification. 17 Am. Jur. 2d *Contracts* § 510 (2004).

Saying that the jury must decide whether certain facts are proved and the judge must decide whether those facts amount to modification means that a specific instruction will have to be drafted to cover each particular case. The judge will have to make a finding of what facts prove modification. Having done that, the judge must: state those facts in the instruction; state which party has the burden of proving them (*i.e.*, the party claiming modification); and tell the jury that if they do find those facts, they must find modification, and if they do not find those facts, they must find no modification. If there are alternative ways of finding modification, then the instruction must take those alternatives into account. NJI2d Civ. 15.01 or 15.20 may be used as a model.

Matters that seek to avoid a valid contract are affirmative defenses. They must be specifically pled; a general denial does not raise an affirmative defense. The burden of proving an affirmative defense is on the party alleging the defense. For authority for these general propositions, see NJI2d Civ. 15.20, Comment.

“[T]he modification of a guaranty of such a nature as would substantially change the liability of the parties . . . is an affirmative defense which must be pled.” *Lease Nw. v. Davis*, 224 Neb. 617, 623, 400 N.W.2d 220, 224 (1987).

[P]arties may orally modify the terms of a written executory (not fully performed) contract after its execution and before a breach has occurred, without any new consideration. But a modification of an existing contract that substantially changes the liability of the parties requires mutual assent. That assent may be express or implied.

City of Scottsbluff v. Waste Connections of Neb., 282 Neb. 848, 873, 809 N.W.2d 725, 747 (2011) (footnotes omitted). *Accord*, *e.g.*, regarding the mutual assent requirement when the modification substantially changes the liability of the parties, *Solar Motors v. First Nat’l Bank of Chadron*, 249 Neb. 758, 768, 545 N.W.2d 714, 721 (1996); *Atokad Agric. and Racing Ass’n v. Governors of the Knights of Ak-Sar-Ben*, 237 Neb. 317, 322, 466 N.W.2d 73, 78 (1991), *overruled on other grounds* *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992); *Grand Island Prod. Credit Ass’n v. Humphrey*, 223 Neb. 135, 138-39, 388 N.W.2d 807, 810 (1986). *Accord*, *e.g.*, regarding the fact that assent may be express or implied, *Atokad Agric. and Racing Ass’n*, *supra*.

It is clear that the terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration. We have also ruled that where the modification of a contract substantially changes the liability of the parties, mutual assent is required. The silence of a contracting party to a proposed modification leaves the contract unmodified.

We have also declared that a contract made for the benefit of a third party with the third party's knowledge ordinarily cannot be changed without the third party's approval.

Whorley v. First Westside Bank, 240 Neb. 975, 977-78, 485 N.W.2d 578, 581-82 (1992) (citations omitted). *Accord*, in part, Pennfield Oil Co. v. Winstrom, 272 Neb. 219, 228, 720 N.W.2d 886, 896 (2006); Waite v. A.S. Battiatto Co., 238 Neb. 151, 168, 469 N.W.2d 766, 777 (1991).

"[T]he silence of a contracting party to a proposed modification leaves the contract unmodified." Solar Motors v. First Nat'l Bank of Chadron, 249 Neb. 758, 768, 545 N.W.2d 714, 721 (1996).

On two related matters, first:

An accord and satisfaction is a discharge of an existing indebtedness by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant in full satisfaction of the claim. To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. The burden of proof to maintain an alleged accord and satisfaction is on the party seeking to enforce it. To meet this burden of proof, it is first to be shown that the minds of the parties to the accord and satisfaction met.

The key element of accord and satisfaction is the intent of the parties, which . . . as a general rule presents a question of fact.

Lone Cedar Ranches v. Jandebaur, 246 Neb. 769, 775, 523 N.W.2d 364, 369 (1994) (citations omitted). *Accord* Zornes v. Zornes, 292 Neb. 271, 277, 872 N.W.2d, 571, 576-77 (2015); Simons v. Simons, 261 Neb. 570, 575-76, 624 N.W.2d 36, 40 (2001); Mischke v. Mischke, 253 Neb. 439, 449, 571 N.W.2d 248, 256 (1997); Mackiewicz v. J.J. & Assocs., 245 Neb. 568, 582-85, 514 N.W.2d 613, 623-25 (1994); Peterson v. Kellner, 245 Neb. 515, 518, 513 N.W.2d 517, 519 (1994) (citing cases).

Second:

Tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that, were it not for the refusal of cooperation by the party to whom tendered, the condition or obligation would be immediately satisfied. . . . Furthermore, acts which, in themselves, are insufficient to make a complete tender may constitute proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is rendered impossible by circumstances not due to the fault of the tenderer.

Dick v. Koski Professional Group, P.C., 307 Neb. 599, 645, 950 N.W.2d 321, — (2020) (involving a tender of stock).

Regarding affirmative defenses generally, see NJI2d Civ. 2.02D, Comment.

D. MISCELLANEOUS GENERAL CONCEPTS

NJI2d Civ. 15.40

TERMS IMPOSED BY LAW

[If you find that there was a contract, then] (The, the) law makes the following terms part of the contract: (here list such implied terms of the contract as are appropriate under the pleadings and the evidence).

COMMENT

This instruction is to be given when the pleadings and the evidence raise a jury question concerning the breach of a term imposed on the contract by law. When this is the case, then the term-imposed-by-law allegedly breached will also be stated either in part B of NJI2d Civ. 15.01, in the paragraph thereof that is numbered 3, or in an appropriate affirmative defense instruction.

Examples of cases imposing terms by law include:

■ Duty to perform with care, skill, reasonable expediency, and faithfulness: *McGill Restoration, Inc. v. Lion Place Condominium Association*, 309 Neb. 202, 223–24, 959 N.W.2d 251, — (2021) (“[E]very contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner. In a ‘workmanlike manner’ connotes work in the same manner that a person skilled in doing such work would do it, and in a manner generally considered skillful by those capable of judging such work in the community of the performance.”); *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 850, 606 N.W.2d 85, 91 (2000) (“[A]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. A . . . failure to observe any of these conditions is a . . . breach of contract.”) (quoting *Lincoln Grain, Inc. v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984)); *Production Credit Ass’n v. Eldin Haussermann Farms*, 247 Neb. 538, 542, 529 N.W.2d 26, 30 (1995); *Lange Indus., Inc. v. Hallam Grain Co.*, 244 Neb. 465, 474, 507 N.W.2d 465, 473 (1993) (law implies building will be erected in “reasonably good and workmanlike manner and will be reasonably fit” for intended purpose); *Getzschman v. Miller Chem. Co.*, 232 Neb. 885, 899, 443 N.W.2d 260, 270 (1989) (“negligent failure to observe any of these

conditions is a tort as well as a breach of contract.”) (multiple quotation marks and citation omitted); *Schuster v. Baumfalk*, 229 Neb. 785, 795, 429 N.W.2d 339, 346 (1988); *Tibbs v. Fisher*, 208 Neb. 306, 307, 303 N.W.2d 293, 295 (1981) (every contract for work or services includes implied duty to perform same “skillfully, carefully, diligently, and in a workmanlike manner”).

While, as a general rule, “a violation of [this] duty may give rise to a breach of contract action or a tort action for negligent performance of the contract[,] . . . [w]here only economic loss is suffered and the alleged breach is of only a contractual duty . . . , then the action should be in contract rather than tort.” *Lesiak v. Central Valley Ag Co-op.*, 283 Neb. 103, 122-23, 808 N.W.2d 67, 82-83 (2012). This is discussed further at NJI2d Civ. 11.20, Comment. See also NJI2d Civ. 15.01, Authorities.

■ **Fitness of tools:** *Numon v. Stevens*, 162 Neb. 339, 341, 76 N.W.2d 232, 233 (1956) (if party to contract is to furnish “tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put”).

■ **Good faith and fair dealing:** “The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.” Same quotation: *Acklie v. Greater Omaha Packing Co.*, 306 Neb. 108, 122, 944 N.W.2d 297, — (2020) (“However, in order for the implied covenant of good faith and fair dealing to apply, there must be in existence a legally enforceable contractual agreement.” *Id.*); Application of Northeast Neb. Pub. Power Dist., 300 Neb. 237, 254, 912 N.W.2d 884, 896 (2018); *Coffey v. Planet Group*, 287 Neb. 834, 843, 845 N.W.2d 255, 263 (2014); *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 444, 810 N.W.2d 666, 674 (2011). *Accord*, *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 648-49, 950 N.W.2d 321, — (2020); *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 23, 645 N.W.2d 519, 526 (2002). See also *George v. Jones*, 168 Neb. 149, 163, 95 N.W.2d 609, 616 (1959) (implied covenant in gravel lease that lessee will work the mine as it would be usually worked under the circumstances, by an operator acting with ordinary diligence, for the advantage of both lessor and lessee); *Superior Oil Co. v. Devon Corp.*, 604 F.2d 1063, 1068-69 (8th Cir. 1979) (applying Nebraska law; implied covenant to further develop, see *George v. Jones, supra*, is applicable to oil and gas leases in Nebraska).

“The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.” *Coffey*, 287 Neb. at 844, 845 N.W.2d at 263. *Accord* *Dick*, 307 Neb. at 649, 950 N.W.2d at 360 (“[T]he covenant cannot give rise to new obligations not otherwise contained in the contract’s express terms.”).

“The nature and extent of an implied covenant of good faith and

fair dealing are measured in a particular contract by the justifiable expectations of the parties. When one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party." *Application of Northeast Neb. Pub. Power Dist.*, 300 Neb. at 254, 912 N.W.2d at 896. *Accord Coffey*, 287 Neb. at 844, 845 N.W.2d at 263 ("A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract."); *RSUI Indemnity Co.*, 282 Neb. at 444-45, 810 N.W.2d at 674.

"[A] violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract." *Dick*, 307 Neb. at 643, 950 N.W.2d at —.

The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

Coffey, 287 Neb. at 844, 845 N.W.2d at 264.

The question of a party's good faith in the performance of a contract is a question of fact. *RSUI Indemnity Co.*, 282 Neb. at 444-45, 810 N.W.2d at 674.

An employer may terminate the employment of an at-will employee at any time and without reason. This is true except when the public policy exception applies, in which case the employee can claim damages for wrongful discharge. *Coffey*, 287 Neb. at 844, 845 N.W.2d at 263-64. For more on the covenant of good faith and fair dealing, particularly in the context of an at-will employment contract, see *NJI2d Civ. 4.52*.

■ Possession of the skill necessary to perform the contract: *Rickertsen v. Carskadon*, 172 Neb. 46, 48, 108 N.W.2d 392, 394 (1961) (court correctly instructed jury that even express contracts contain implied promise that work will be done in proper manner; "by taking a job, one contracts that he has the requisite skill to perform it").

■ Time for performance: *Chilton Accounts Receivable Mgt., Inc. v. Project Life Ministries, Inc.*, 225 Neb. 482, 485, 406 N.W.2d 133, 136 (1987) (When a contract "does not provide a time for performance, a reasonable time for performance will be implied by law '[What is] a reasonable time must be determined from the general nature and circumstances of each case.' "). *Accord State ex rel. Wagner v. Amwest Surety Ins. Co.*, 280 Neb. 729, 733, 790 N.W.2d 866, 869 (2010). Regarding the time during which an offer remains open, see *NJI2d Civ. 15.41*.

On a related matter, as a general rule “statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.” In re Estate of Peterson, 221 Neb. 792, 803, 381 N.W.2d 109, 116 (1986). “[A] contract for an illegal purpose is void and unenforceable.” Central States Health & Life Co. v. Miracle Hills Ltd. P’ship, 235 Neb. 592, 596, 456 N.W.2d 474, 477 (1990). “A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.” Rath v. City of Sutton, 267 Neb. 265, 287, 673 N.W.2d 869, 889 (2004). See also NJI2d Civ. 15.01, Comment, X(C), “Some Rules of Construction.”

Additionally, see generally Restatement (Second) of Contracts § 5(2), cmt. c thereto, and the Reporter’s Note regarding comment c.

Regarding general rules of construction of contracts, see NJI2d Civ. 15.01, Comment, part X.

NJI2d Civ. 15.41

TIME DURING WHICH AN OFFER REMAINS OPEN

An offer remains open for the time stated in the offer or, if no time is stated, for a reasonable time. [An offer that is withdrawn no longer remains open.]

COMMENT & AUTHORITIES

Select the parts of this instruction that are applicable.

Regarding withdrawal of an offer, see NJI2d Civ. 15.42.

Regarding terms imposed by law and how that affects time for performance, see NJI2d Civ. 15.40, Comment.

This instruction does not apply to cases under the Uniform Commercial Code. “An offer by a merchant to buy or sell goods in a signed writing [remains open] . . . during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months.” Neb.U.C.C. §§ 2-205, 2A-205 (Reissue 2001).

The offeror is master of the offer. NJI2d Civ. 15.03, Comment. The offeror may set a time at which the offer will expire. Absent a stated time, the offer expires at the end of a reasonable time. Keller v. Bones, 260 Neb. 202, 210, 615 N.W.2d 883, 888–89 (2000); Wilkie v. Banse, 166 Neb. 138, 144, 88 N.W.2d 181, 185 (1958); Standard Oil Co. v. O’Hare, 126 Neb. 11, 17, 252 N.W. 398, 400–01 (1934); Restatement (Second) of Contracts § 41 (1981). What amount of time is reasonable is a question of fact. *Wilkie, supra*; *Standard Oil, supra*; *Restatement (Second) of Contracts, supra*.

See generally Restatement (Second) of Contracts §§ 35, *et seq.* (1981).

NJI2d Civ. 15.42

WITHDRAWAL OF AN OFFER

An offer may be withdrawn at any time before it is accepted.

[If an offer states a time limit for acceptance, then, unless the offer has been accepted, it may be withdrawn before the expiration of that stated time.]

[To be effective, withdrawal of an offer must be communicated to (identify appropriate person) before the offer is accepted.]

[No special words need to be used. Any words or conduct showing an unwillingness to enter into the proposed agreement are sufficient.]

[After an offer has been withdrawn, it cannot be accepted.]

COMMENT & AUTHORITIES

See NJI2d Civ. 15.41 and the Comment thereto.

Use whatever parts of the bracketed materials are appropriate.

This instruction applies when it is claimed an offer was withdrawn. It does not apply when it is claimed an offer has expired.

This instruction does not apply to "option contracts." On the one hand: "An offeror's power of revocation is not limited by the deposit of money or other property to be forfeited in the event of revocation, but the deposit may be forfeited to the extent that it is not a penalty." Restatement (Second) of Contracts § 44 (1981). On the other hand: "[T]he power of acceptance under an option contract is not terminated by rejection . . . unless the requirements are met for the discharge of a contractual duty." Restatement (Second) of Contracts § 37 (1981). "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." Restatement (Second) of Contracts § 25 (1981). *See also* Restatement (Second) of Contracts § 37 comment *a* (1981).

A tender of resignation by a teacher or an administrator is an offer to terminate a contract of employment and it may be withdrawn at any time before it is accepted. *Nuzum v. Bd. of Educ. of Sch. Dist. of Arnold*, 227 Neb. 387, 391, 417 N.W.2d 779, 782 (1988).

See additionally *Stremmel v. Kinney*, 226 Neb. 555, 557, 412

N.W.2d 834, 836 (1987), which states that the burden is on the offeree to show that he or she revoked acceptance of an offer prior to the communication of the acceptance to the offeror.

For cases governed by the Uniform Commercial Code, see Neb. U.C.C. §§ 2-205, 2A-205 (Reissue 2001).

The test here is not the intention of the offeror as much as the offeror's expression of intention. In other words, the key is not what is in the mind of the offeror, though that may well be relevant. Rather the key is what is understood from the offeror's words and acts. The Restatement speaks in terms of the offeror's "manifestation of an intention." Restatement (Second) Contracts § 42 (1981). It defines "manifestation of intention" as "adopt[ing] an external or objective standard for interpreting conduct; . . . the external expression of intention as distinguished from undisclosed intention." Restatement (Second) Contracts § 5, cmt. b (1981).

In addition to the above, authorities for this instruction include *Anderson v. Stewart*, 149 Neb. 660, 663, 32 N.W.2d 140, 142 (1948) (quoting Restatement, Contracts § 41 (1932)); *Lamoreaux & Peterson v. Phelan, Shirley, & Callahan*, 89 Neb. 47, 56-7, 130 N.W. 988, 992 (1911). Restatement (Second) Contracts §§ 35-49, and particularly §§ 42, 43 (1981); 17 C.J.S. *Contracts* § 50 (1963).

CHAPTER 16

WILLS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- 16.01 Statement of the Case
- 16.02 Statutes Stated
- 16.03 Disposition As Deceased Pleases
- 16.04 Testamentary Capacity—Definition
- 16.05 Testamentary Capacity—Time When Important
- 16.06 Undue Influence—Statement of the Claim
- 16.07 Undue Influence—Definition
- 16.08 Fraud
- 16.09 Duress
- 16.10 Mistake
- 16.11 Revocation

NJI2d Civ. 16.01

STATEMENT OF THE CASE

I. PROPONENT'S CLAIMS

A. ISSUES

This proceeding is to determine whether Exhibit No. _____ (here, if helpful, insert further explanation or identification of what the exhibit is, such as "a written document dated _____, 20__") is the valid Will of (name of deceased)[, who died _____, 20__].

The proponent, who is the party offering Exhibit No. _____, is (name of proponent). (He, She) claims that Exhibit No. _____ is the valid Will of (deceased).

The contestant, who is the party opposing Exhibit No. _____, is (name of contestant). (He, She) claims that Exhibit No. _____ is not the valid Will of (deceased) because (here insert a statement of the basis for the objection).

(Contestant) admits (here state what the contestant admits, by pleading or otherwise, if anything).

(Contestant) denies (here state what contestant denies).

[The court has determined as a matter of law that the following facts exist and you must accept them as true: (Here state any facts so determined).]

B. BURDEN OF PROOF

In order for you to find that Exhibit No. _____ is the valid Will of (deceased), the proponent must prove, by the greater weight of the evidence, each of the following:

1. The Will was in writing;
2. The Will was signed by (deceased);
3. At the time (he, she) signed the Will, (deceased) was either eighteen or more years of age or [a] married [person under the age of eighteen];
4. Before (deceased)'s death, the Will was signed by at least two other persons each of whom witnessed [either] the signing of the Will [or (deceased)'s acknowledgment of the signature] [or (deceased)'s acknowledgment of the Will]; and
5. When (deceased) signed Exhibit No. _____, (he, she) had the testamentary capacity to make a Will.

C. EFFECT OF FINDINGS

(If there will not be any affirmative defense instructions, then the following two paragraphs constitute Part I, C of this instruction:)

____ If (proponent) has *not* met this burden of proof, then your verdict must be that Exhibit No. _____ is *not* the valid Will of (deceased).

On the other hand, if (proponent) *has* met this burden of proof, then your verdict must be that Exhibit No. _____ is the valid Will of (deceased).

(If there will be affirmative defense instructions, then the following two paragraphs constitute Part I, C of this instruction:)

If (proponent) has *not* met this burden of proof, then your verdict must be that Exhibit No. _____ is *not* the valid Will of (deceased).

On the other hand, if (proponent) *has* met this burden of proof, then you must consider (contestant)'s claims that (here insert a statement of the claim(s) on which the contestant has the burden of proof).

II. CONTESTANT'S CLAIMS

(At this point insert such statement-of-the-claim instructions on contestant's claims as are appropriate under the pleadings and the evidence. For undue influence, insert NJI2d Civ. 16.07; for fraud, see NJI2d Civ. 16.08; for duress, see NJI2d Civ. 16.09; for mistake, see NJI2d Civ. 16.10; for revocation, see NJI2d Civ. 16.11.)

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. WHO MAY MAKE A WILL?
- III. ACTION AT LAW AND QUESTIONS OF LAW
- IV. JURISDICTION AND TRIAL TO A JURY
- V. JUDICIAL CONSTRUCTION OF THE NEBRASKA PROBATE CODE
- VI. POSSIBLE ALTERATIONS TO THE INSTRUCTION
- VII. THE SIGNATURES OF THE WITNESSES
- VIII. "OF SOUND MIND"
- IX. EVIDENTIARY BURDENS
- X. EFFECTIVE DATE OF A WILL
- XI. CONSTRUCTION OF A WILL
- XII. THE "IN WRITING" REQUIREMENT
- XIII. LAY WITNESS TESTIMONY
- XIV. A CONTRACT FOR WILLS
- XV. PROVING A LOST WILL
- XVI. ATTORNEY FEES
- XVII. TORTIOUS INTERFERENCE WITH AN INHERITANCE
- XVIII. STANDARD OF REVIEW ON APPEAL
- XIX. CROSS REFERENCES

I. IN GENERAL

This instruction is in the style of NJI2d Civ. 2.01. *See generally* NJI2d Civ. 2.01 Comment and Authorities.

II. WHO MAY MAKE A WILL?

Who may make a will? The Nebraska Probate Code states that "[a]ny individual who is eighteen or more years of age or is not a minor and who is of sound mind may make a will and thereby dispose of personal and real property at and after death and prescribe, to the extent not otherwise controlled or limited by this code, the manner of administration of his estate and conduct of his affairs after death and

until final settlement of his estate.”¹ Regarding “who is . . . not a minor,” the code defines that as any person who “marries under the age of nineteen years.”²

III. ACTION AT LAW AND QUESTIONS OF LAW

“The probate of a will is an action at law.”³ “The interpretation of the words in a will or trust is a question of law.”⁴ “The existence of a fiduciary duty and the scope of that duty are questions of law.”⁵

Regarding other matters, “[c]ounty courts . . . may apply equitable principles to matters within probate jurisdiction.”⁶ “The removal of a trustee is a question of equity, and therefore an appellate court reviews the issue *de novo* on appeal.”⁷

Regarding the standard of review on appeal, *see below* in this Comment & Authorities under the heading Standard of Review on Appeal.

IV. JURISDICTION AND TRIAL TO A JURY

“County courts can acquire jurisdiction only through legislative enactment.”⁸ “Generally, the county court has exclusive original juris-

16.01

¹Neb. Rev. Stat. § 30-2326 (Reissue 2016). *See additionally* NJ12d Civ. 16.04 for the definition of testamentary capacity.

²Neb. Rev. Stat. § 30-2209(26) (Reissue 2016). The Nebraska Probate Code differs from the Uniform Probate Code where the former allows a married person under eighteen to make a will. Nebraska Comment to Neb. Rev. Stat. § 30-2326 (Reissue 1985) (citing an old edition of Chapter 30 of the Nebraska Revised Statutes; the new edition has dropped the Nebraska Comments).

³In re Price’s Estate, 223 Neb. 12, 17, 388 N.W.2d 72, 77 (1986). *Accord*, In re Estate of Karmazin, 299 Neb. 315, 319, 908 N.W.2d 381, 386 (2018).

⁴Same quotation: In re Estate of Brinkman, 308 Neb. 117, 121, 953 N.W.2d 1, 6 (2021); In re Estate of Barger, 303 Neb. 817, 832, 931 N.W.2d 660, 672 (2019); In re Estate of Forgey, 298 Neb. 865, 880, 906 N.W.2d 618,

631 (2018); In re Estate of Etmund, 297 Neb. 455, 462, 900 N.W.2d 536, 541 (2017). *Accord* In re McGregor, 308 Neb. 405, 410, 954 N.W.2d 612, 612 (2021); In re Robert L. McDowell Revocable Trust, 296 Neb. 565, 570, 894 N.W.2d 810, 815 (2017).

⁵*Forgey*, 298 Neb. at 880, 906 N.W.2d at 631.

⁶*Washington v. Conley*, 273 Neb. 908, 914, 734 N.W.2d 306, 312 (2007). In re Estate of Adelung, 306 Neb. 646, 658-59, 947 N.W.2d 269, — (2020).

⁷In re Trust Created by Fenske, 303 Neb. 430, 537, 930 N.W.2d 43, — (2019).

⁸*Brinkman v. Brinkman*, 302 Neb. 315, 322, 923 N.W.2d 380, 386 (2019) (“[T]he [Nebraska] Constitution grants the Legislature the power to create county courts.” “[T]he Legislature has provided that county courts have the power to construe wills.” “[N]othing in the . . . Constitution . . . limits the Legislature’s ability to grant . . . county courts [such] jurisdiction”

diction over all matters relating to decedents' estates."⁹ Nebraska Revised Statutes provide that "[e]ach county court shall have . . . [e]xclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof. . . ."¹⁰ "[C]ounty courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, estate or protected persons, protection of minors and incapacitated persons, and trusts. Such courts have full power to make orders, judgments, and decrees and to take all other actions necessary and proper to administer justice in the matters which come before them."¹¹

County courts have subject matter jurisdiction over independent proceedings "brought for the sole purpose of determining Nebraska inheritance tax[es]."¹²

"[T]he county court has been given complete equity powers as to all matters within its probate jurisdiction."¹³

⁹Estate of Graham, 301 Neb. 594, 603, 919 N.W.2d 714, 722 (2018). *Accord* In re Estate of Adelung, 306 Neb. 646, 658, 947 N.W.2d 269, — (2020) (noting that, and on the facts of the case, why "this is not as simple as it sounds").

¹⁰Neb. Rev. Stat. § 24-517 (Cum. Supp. 2012). *See also* Neb. Rev. Stat. § 30-221 (Reissue 2016). *And see* *Forgey*, 298 Neb. at 883, 906 N.W.2d at 633; *Washington v. Conley*, 273 Neb. at 914, 734 N.W.2d at 311; *Ptak v. Swanson*, 271 Neb. 57, 62–63, 709 N.W.2d 337, 341 (2006) ("To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons." (quoting Neb. Rev. Stat. § 30-221 (Reissue 2008))). "There is nothing in the Nebraska Constitution that limits the Legislature's ability to grant to the county courts jurisdiction over the construction of wills." *Brinkman*, 302 Neb. at 322, 923 N.W.2d at 386.

¹¹*Forgey*, 298 Neb. at 883, 906 N.W.2d at 633 (citations omitted). *See*

also Brinkman, 302 Neb. at 322–23, 923 N.W.2d at 386.

¹²In re Estate of Marsh, 307 Neb. 893, 903, 951 N.W.2d 486, — (2020) (citing Neb. Rev. Stat. § 77-2018.02(1) (Supp. 2019)) ("We hold that published notice is not a prerequisite of a county court's subject matter jurisdiction of an independent proceeding for the sole purpose of determining Nebraska inheritance tax; rather, such jurisdiction is involved by the filing of a petition to initiate the proceeding." (interpreting § 77-2018.02(1)).

¹³*Brinkman*, 302 Neb. at 322, 923 N.W.2d 386. *See also* In re Estate of Adelung, 306 Neb. 646, 659, 947 N.W.2d 269, — (2020) stating,

In the modern era, we have upheld a county court's jurisdiction over matters related to a decedent's estate in numerous situations. These include partitioning real estate belonging to a decedent, adjudicating an claim against a decedent's estate based upon an alleged oral contract to execute a will leaving the decedent's business to the claimant employee, determining the title to personal property possessed by the decedent where ownership

"A probate court's jurisdiction and authority continue until an executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of whom it devolves."¹⁴

In *Brickman v. Brickman*, the county court and the district had exercised concurrent jurisdiction over the construction of a will. The Supreme Court applied the doctrine of jurisdictional priority, which applies when "two pending cases . . . involve the same whole issue."¹⁵ And it held that "the first court to acquire jurisdiction retain[s] it, to the exclusion of another court."¹⁶

There is no right to a jury trial in county court in probate matters.¹⁷ There is, however, a statutory provision that, under certain circumstances, allows probate matters to be transferred to district court, where a jury trial is allowed.¹⁸

was asserted by another, resolving a claim by a decedent wife's personal representative of a share of ownership of bearer bonds allegedly owned as tenants in common against a decedent husband's personal representative, and recovering an improper distribution from a pending estate pursuant to a probate statute. In each instance, jurisdiction arose from the county court's jurisdiction under § 24-517(1) [of the Nebraska Revised Statutes].

Id. at 659–60, 947 N.W.2d at ____.

Adelung goes on to discuss power of attorney, *id.* at 662–63, 947 N.W.2d at ____, and to conclude that a "county court [has] jurisdiction to 'construe a power of attorney or review the agent's conduct and grant appropriate relief.'" *Id.* at 663, 947 N.W.2d at ____.

¹⁴*Graham*, 301 Neb. at 604, 919 N.W.2d at 722.

¹⁵*Brinkman*, 302 Neb. at 319–20, 923 N.W.2d 385 (multiple internal quotation marks omitted). *Accord* *In re Estate of Adelung*, 306 Neb. 646, 659, 947 N.W.2d 269, ____ (2020).

¹⁶*Brinkman*, 302 Neb. at 319, 923 N.W.2d 384. *Accord* *Adelung*, 306 Neb. at 656, 947 N.W.2d at ____ "While jurisdictional priority is not a matter of

subject matter or personal jurisdiction, courts should enforce the . . . doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy." *Brinkman*, 302 Neb. at 323, 923 N.W.2d at 386. In this case, the probate action was filed in county court before the declaratory judgment action was filed in district court. The county court had jurisdictional priority.

¹⁷Neb. Rev. Stat. § 25-2705 (Reissue 2016); *In re Estate of Massie*, 218 Neb. 103, 106, 353 N.W.2d 735, 738 (1984); *In re Estate of Hagan*, 143 Neb. 459, 462, 9 N.W.2d 794, 797 (1943).

¹⁸Neb. Rev. Stat. § 30-2488 (Reissue 2016) and § 30-2486 (Reissue 2016).

If the claim is greater than the jurisdictional amount in subdivision (5) of section 24-517 and the personal representative requests transfer of the claim to the district court, upon payment by the personal representative to the clerk of the district court of a docket fee in the amount of the filing fee in district court, the county court shall transfer the claim to the district court as provided in section 25-2706. If the claim is transferred to the district

Upon transfer the district court shall try the case to a jury, unless waived.¹⁹

Additionally, our Supreme Court has “stated . . . that the Legislature’s grant of exclusive jurisdiction to the county court in matters relating to decedents’ estates ‘is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts.’ ”²⁰ “In reconciling this apparent tension, we have concluded that in common-law and equity actions relating to decedents’ estates, the county courts have concurrent original jurisdiction with district courts.”²¹ “[T]he court which first acquires jurisdiction should retain it to the exclusion of the other court.”²² And, of course, if that court is the district court, then, as above, the trial shall be by jury, unless waived.

V. JUDICIAL CONSTRUCTION OF THE NEBRASKA PROBATE CODE

“The underlying purpose of the Nebraska Probate Code is to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the successors.”²³

“The cardinal rule concerning a decedent’s will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.”²⁴

On the one hand, the Nebraska Probate Code shall be liberally

court, a jury trial is allowed unless waived by the parties as provided under section 25-1104.

Neb. Rev. Stat. § 30-2488 (Reissue 2016).

¹⁹Neb. Rev. Stat. § 25-1104 (Reissue 2016). Questions of law are tried to the court and questions of fact to a jury, unless waived. *Id.* When the trial is to the judge, then the “judgment of the trial court . . . tried without a jury has the effect of a jury verdict and will not be set aside unless clearly wrong.” In re Estate of Wagner, 253 Neb. 498, 501, 571 N.W.2d 76, 79 (1997). *Accord* In re Estate of Etmund, 297 Neb. 455, 462, 900 N.W.2d 536, 541 (2017) (same as *Balvin*, below); In re Estate of Balvin, 295 Neb. 346, 351, 888 N.W.2d 499, 504 (2016) (“The probate court’s factual findings have the effect of a verdict, and an appellate court will not

set those findings aside unless they are clearly erroneous.”).

²⁰*Ptak*, *supra* (quoting In re Estate of Steppuhn, 221 Neb. 329, 332, 377 N.W.2d 83, 85 (1985)).

²¹*Washington v. Conley*, 273 Neb. at 914, 734 N.W.2d at 311. *Accord*, e.g., In re Estate of Adelung, 306 Neb. 646, 665, 947 N.W.2d 269, — (2020).

²²*Washington v. Conley*, 273 Neb. at 915, 734 N.W.2d at 312.

²³In re Estate of Abbott-Ochsner, 299 Neb. 596, 610, 910 N.W.2d 504, 514 (2018). That quotation is followed by this: “Allowing a piecemeal appeal from an order appointing a special administrator defeats the purpose.” *Id.*

²⁴Same quotation: In re Estate of Brinkman, 308 Neb. 117, 123, 953 N.W.2d 1, — (2021); In re Estate of Etmund, 297 Neb. 455, 463, 900

construed to simplify and clarify the law; to discover and make effective the intent of decedents in distributions of their property; and to promote speedy and efficient resolution of will contests.²⁵ On the other hand, “[s]tatutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction.”²⁶ “Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.”²⁷

Our probate code “requires that all claims, whether absolute or contingent, be presented within certain time periods or be barred against the estate.”²⁸

Ambiguity in a will is discussed further in part XI of this Comment & Authorities, below. Patent and latent ambiguities in a will are discussed at NJI2d Civ. 16.03, Comments & Authorities.

“In interpreting the various sections of the Nebraska Probate Code, this court may examine the comments to the code.”²⁹

Regarding judicial construction of the intent of the testator or testatrix, *see* the Comment & Authorities to NJI2d Civ. 16.03

VI. POSSIBLE ALTERATIONS TO THE INSTRUCTION

“[T]he basis for [contestant’s] objection” (quoting the third paragraph of part 1(A) of this instruction) may be “undue influence, fraud, duress, mistake or revocation” (quoting Neb. Rev. Stat. § 30-2431 (Reissue 2016)). For undue influence, *see* NJI2d Civ. 16.07; for fraud, NJI2d Civ. 16.08; Duress, NJI2d Civ. 16.09; mistake, NJI2d Civ. 16.10; revocation, NJI2d Civ. 16.11.

This instruction has been prepared for use in the case where the allegation is that the deceased signed the claimed will. It states as part of the proponent’s burden of proof, proof that the deceased signed the will. Proponent can also make his or her case by proving that someone other than the deceased signed the will in deceased’s presence and at deceased’s direction. If that issue is in the case, then the above pattern

N.W.2d 536, 542 (2017). This is discussed further, including citation to additional cases, at part XI of this Comment & Authorities.

²⁵Neb. Rev. Stat. § 30-2202 (Reissue 2016); *In re Corbett’s Estate*, 203 Neb. 392, 402-03, 279 N.W.2d 89, 95 (1979).

²⁶*In re Estate of Mecello*, 262 Neb. 493, 500, 633 N.W.2d 892, 898 (2001).

²⁷*Estate of Nemetz*, 273 Neb. 918, 921, 735 N.W.2d 363 366 (2007).

²⁸*In re Estate of Ryan*, 302 Neb. 821, 826, 925 N.W.2d 336, 340 (2019) (footnote omitted; citing Neb. Rev. Stat. § 30-2492 and § 30-2485 (Reissue 2016) and discussing contingent claims).

²⁹*In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

will have to be adapted. For example, the second subparagraph of the Burden of Proof part of the instruction may be rewritten to read as follows:

“2. The Will was signed either by (deceased) or by someone else in (deceased)’s presence and at (his, her) direction;”

Or, it might be rewritten to read as follows:

“2. The Will was signed in (deceased)’s presence and at (his, her) direction;”

In a case such as this, subparagraphs 3, 4, and 6 will also have to be changed.

“[W]here a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix.”³⁰ These pattern instructions do not address the situation where part of the exhibit may be a valid will and part of it may not be. In that situation, either new instructions will have to be prepared or existing instructions will have to be adapted.

This instruction may be adapted to a case involving a self-proved will. *See* Neb. Rev. Stat. § 30-2329 (Reissue 2008). *See also* Neb. Rev. Stat. § 30-2331 (Reissue 2016) (“A written will is valid if executed in compliance with section 30-2327 or 30-2328 or if its execution complies with the law at the time of execution of the place where the will is executed or of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.”).³¹

This instruction does not take into account holographic wills. Neb. Rev. Stat. § 30-2328 (Reissue 2016) provides:

An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence.

³⁰In re Gloe’s Estate, 191 Neb. 395, 401, 215 N.W.2d 98, 101 (1974).

Accord In re Kajewski’s Estate, 134 Neb. 485, 279 N.W. 185 (1938); In re Koller’s Estate, 116 Neb. 764, 219

N.W. 4 (1928).

³¹Regarding self-proved wills, *see also* In re Flider’s Estate, 213 Neb. 153, 154–55, 328 N.W.2d 197, 198 (1982).

VII. THE SIGNATURES OF THE WITNESSES

Regarding the signature of the deceased and two witnesses, *see* Neb. Rev. Stat. § 30-2327 (Reissue 2016). The witnesses may sign at any time after the testator signs and before the testator dies, and they need not sign in the testator's presence.³²

Evidence regarding an attorney's routine practice and habit when it comes to witnessing wills is admissible as evidence that the attorney followed that routine practice or habit when having the will under litigation witnessed. At times, this will be the only evidence available. The attorney's credibility is a question for the trier of fact.³³

VIII. "OF SOUND MIND"

The Nebraska Probate Code states that "[a]ny individual who is eighteen or more years of age or is not a minor *and who is of sound mind* may make a will"³⁴ The words "sound mind" come from § 2-501 of the Uniform Probate Code. This instruction does not use the words "sound mind." The Committee believes that the requirement that the deceased have "had the testamentary capacity to make a Will," includes the concept of "sound mind." As noted below, "testamentary capacity" is defined in N.JI2d Civ. 16.04.

IX. EVIDENTIARY BURDENS

In contested cases, petitioners who seek to establish intestacy have the burden of establishing *prima facie* proof of death, venue, and heirship. Proponents of a will have the burden of establishing *prima facie* proof of due execution, death, testamentary capacity, and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.³⁵

In county and district court, the proponent of a will has the burden

³²In *re* Flicker's Estate, 215 Neb. 495, 496, 339 N.W.2d 914, 914 (1983), interpreting Neb. Rev. Stat. § 30-2327 (Reissue 2016).

³³In *re* Estate of Loftus, 26 Neb. App. 439, 445-47, 920 N.W.2d 718, 724 (2018) (citing Neb. Evid. R. 406, Neb. Rev. Stat. § 27-406(1) (Reissue 2106)).

³⁴Neb. Rev. Stat. § 30-2326 (Reissue 2016) (emphasis added).

³⁵Neb. Rev. Stat. § 30-2431 (Reissue 2016). In *re* Estate of Mecello, 262 Neb. 493, 501, 633 N.W.2d 892, 899 (2001) (proponent has burden of establishing due execution, death, testamentary capacity, and venue). Regard-

of production on the issue of lawful execution of the will and on the issue of the testamentary capacity of the testator at the time the will was made. If the proponent makes a prima facie case as to both, the burden of production on each shifts to the contestant. The burden of proof, however, stays with the proponent.³⁶

The Uniform Probate Code is different in this regard; on the issue of lack of testamentary capacity, it places both the burden of production and the burden of proof upon the contestant.³⁷

X. EFFECTIVE DATE OF A WILL

[I]t is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator. The will always speaks from the date of the testator's death, because the testator could always modify the distributions prior to her death. A will is, according to law, of an ambulatory character, and no person can have any rights in it until the testator is dead.³⁸

XI. CONSTRUCTION OF A WILL

As previously noted, "The interpretation of the words in a will or a trust present questions of law."³⁹

"The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy."⁴⁰

ing venue, *see* Neb. Rev. Stat. § 30-2410. The contestant has the burden of production and proof on the issue of undue influence. *See* NJ12d Civ. 16.06, *et seq.*

³⁶Neb. Rev. Stat. § 30-2431 (Reissue 2016); *In re Estate of Wagner*, 246 Neb. 625, 633, 522 N.W.2d 159, 166 (1994) ("self-proved will establishes prima facie proof of testamentary capacity"); *In re Flider's Estate*, 213 Neb. 153, 157, 328 N.W.2d 197, 200 (1982); *In re Camin's Estate*, 212 Neb. 490, 496-97, 323 N.W.2d 827, 833 (1982); *In re Inda's Estate*, 146 Neb. 179, 185, 19 N.W.2d 37, 41 (1945); *In re Kaiser's Estate*, 150 Neb. 295, 302-03, 34 N.W.2d 366, 372 (1948); *In re Bose's Estate*, 136 Neb. 156, 167, 285 N.W. 319, 326 (1939). It is an old

rule. *See* *Seebrook v. Fedawa*, 30 Neb. 424, 432-33, 46 N.W. 650, 651 (1890).

³⁷Neb. Rev. Stat. § 30-2431, Nebraska comment (Reissue 2016) (noting that the uniform rule was modified to retain Nebraska's preexisting rule on burden of proving testamentary capacity).

³⁸*In re Estate of Barger*, 303 Neb. 817, 839-40, 931 N.W.2d 660, 676-77 (2019).

³⁹*In re Estate of Brinkman*, 308 Neb. 117, 121, 953 N.W.2d 1, — (2021). *See further* part III of this Comment & Authorities, above.

⁴⁰Same quotation: *Estate of Brinkman*, 308 Neb. at 123, 953 N.W.2d at —; *Etmund*, 297 Neb. at 463, 900 N.W.2d at 542 (2017). This also in-

When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible.

“Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of at least two reasonable interpretations or meanings.”⁴¹

As noted below at NJI2d Civ. 16.03,

To arrive at a testator’s or testatrix’s intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will and assume that the maker of the will understood words stated in the will.⁴²

“When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.”⁴³ A patent ambiguity is distinguished from a latent ambiguity. “A patent ambiguity is one which exists on the face of an instrument.”⁴⁴ “A latent ambiguity exists when the testator’s words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe.”⁴⁵

Parol evidence is inadmissible to resolve a patent ambiguity; “the

cluded at part V of this Comment & Authorities.

⁴¹In re Estate of Etmund, 297 Neb. 455, 464, 900 N.W.2d 536, 542 (2017) (footnotes omitted). *Accord Barger*, 303 Neb. at 841, 931 N.W.2d 677. *See also* Brinkman v. Brinkman, 302 Neb. 315, 322, 923 N.W.2d 380, 386 (2019) (“[T]he [Nebraska] Constitution grants the Legislature the power to create county courts.” “[T]he Legislature has provided that county courts have the power to construe wills.” “[N]othing in the . . . Constitution . . . limits the Legislature’s ability to grant . . . county courts [such] jurisdiction”)

⁴²*Estate of Johnson*, 260 Neb. at 99, 615 N.W.2d at 103. *Accord Etmund*, above; *Mousel*, above; *In re Ritter’s Estate*, above. *See* NJI2d Civ. 16.03, below.

Regarding the use of parol evidence, *see* NJI2d Civ. 16.01, Comment.

Regarding judicial construction of the Nebraska Probate Code, *see* the Comment & Authorities to NJI2d Civ. 16.01.

⁴³In re Estate of Johnson, 260 Neb. 91, 95, 615 N.W.2d 98, 101 (2000). *See also, e.g.*, *In re Ritter’s Estate*, 227 Neb. 641, 645, 419 N.W.2d 521, 524 (1988).

⁴⁴Same quotation: *In re Estate of Brinkman*, 308 Neb. 117, 124, 953 N.W.2d 1, — (2021); *In re Estate of Mousel*, 271 Neb. 628, 631–32, 715 N.W.2d 490, 494 (2006).

⁴⁵Same quotation: *Estate of Brinkman*, 308 Neb. at 123–24, 953 N.W.2d 1, — (2021); *Barger*, 303 Neb. at 841, 931 N.W.2d at 677. *Accord Mousel*, 271 Neb. at 631–32, 715 N.W.2d at 494. An example of a latent ambiguity in a will is a will that names a beneficiary and there are two persons with that name. *Id.*

intention of the testator must be found in the will.”⁴⁶ “Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.”⁴⁷

“Extrinsic evidence is admissible both to disclose and to remove latent ambiguity of a will.”⁴⁸

The topic of patent versus latent ambiguities and the admissibility of parol evidence is also discussed at NJI2d Civ. 16.03, Comment & Authorities.

“[A] testator will not held to have disinherited an heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth.”⁴⁹

“Stepchildren are generally not included in a devise to ‘children’

”⁵⁰

XII. THE “IN WRITING” REQUIREMENT

[A] document purporting to be a will, which is otherwise sufficient, will satisfy the “in writing” requirement of § 30-2327, whether it is completely handwritten; “partly written in ink and partly in pencil[;] partly typewritten and partly printed[;] partly printed, [partly typewritten,] and partly written[;] or on a printed form,” . . . as well as other combinations of these forms and comparable permanent techniques of writing⁵¹

An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instru-

⁴⁶*Mousel*, 271 Neb. at 632, 715 N.W.2d at 494.

⁴⁷*Barger*, 303 Neb. at 841, 931 N.W.2d at 677. *Accord* *Scriven v. Scriven*, 153 Neb. 655, 664, 45 N.W.2d 760, 766 (1951).

⁴⁸*Barger*, 303 Neb. at 841, 931 N.W.2d at 677.

⁴⁹*In re Estate of Brinkman*, 308 Neb. 117, 123, 953 N.W.2d 1, — (2021) (multiple quotation marks and ellipsis ending the quotation omitted; brackets in *Estate of Brinkman*). See also, NJI2d

Civ. 16.03 Comment & Authorities, below.

⁵⁰*Burnett v. Maddocks*, 294 Neb. 152, 161, 881 N.W.2d 185, 191–92 (2016). This general rule applies unless the will states or something in the will suggests that the testator had a different intent. See, *id.* (citing authorities).

⁵¹*In re Estate of Pluhacek*, 296 Neb. 528, 535, 894 N.W.2d 325, 330 (2017), referencing Neb. Rev. Stat. § 30-2327 (Reissue 2016) and quoting 95 C.J.S. *Wills* § 204 at 201.

ment or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument., from extrinsic circumstances, or from any other evidence.⁵²

XIII. LAY WITNESS TESTIMONY

[A] nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state an opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. However, it must appear that the witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances attested to are sufficient upon which to base an opinion.⁵³

XIV. A CONTRACT FOR WILLS

In Nebraska, a contract for wills "can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills."⁵⁴

Even if such a contract for wills existed, the proper action for enforcement would not be a probate action for removal of a cotrustee. The effect of a valid contract for wills is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract.⁵⁵

"We regard with grave suspicion any claim of an oral contract to convey property at death. Such a contract is normally void on its face as violative of the statute of frauds. For those reasons, we require one trying to enforce such a contract to prove by clear and convincing evidence the existence of the contract and its terms and that because of partial

⁵²Neb. Rev. Stat. § 30-2328 (Reissue 2016).

⁵³In re Estate of Wagner, 246 Neb. 625, 635, 522 N.W.2d 159, 167 (1994). Regarding opinion evidence in Nebraska generally, see *NJI2d Civ. 1.42* and the cases and authorities discussed therein.

⁵⁴Neb. Rev. Stat. § 30-2351 (Reissue 2016).

⁵⁵In re Estate of Stuchlik, 289 Neb. 673, 684-85, 857 N.W.2d 57, 67 (2014) (footnotes omitted). See also, e.g., In re Nicholson's Estate, 211 Neb. 805, 806-11, 320 N.W.2d 739, 741-43 (1982).

performance, the agreement is outside the effect of the statute of frauds."⁵⁶

XV. PROVING A LOST WILL

If the case involves proof of a lost will then the burden of proof part of this instruction will have to be changed from the greater weight of the evidence to clear and convincing evidence. There is a presumption that a will lost while in the possession of the testator has been revoked. This presumption must be overcome by clear and convincing evidence.⁵⁷

XVI. THE TIMING OF THE TRANSFER OF PROPERTY TO HEIRS

When a person dies, the title to his or her property immediately devolves in the heirs, subject to administration. Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title.⁵⁸

XVII. ATTORNEY FEES

Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. And in a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. When an at-

⁵⁶*Eggers v. Rittscher*, 247 Neb. 648, 653-55, 529 N.W.2d 741, 744-45 (1995). See also *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994); *Powell v. Am. Charter Fed. Sav. and Loan Ass'n*, 245 Neb. 551, 514 N.W.2d 326 (1994); *NJI2d Civ. 16.11*, Comment. Clear and convincing evidence is discussed at *NJI2d Civ. 2.12A* and *2.12B*.

⁵⁷*Johnson v. Anderson*, 278 Neb. 500, 505, 771 N.W.2d 565, 569 (2009) ("A lost will may be proved by secondary evidence that is clear and convincing."); *In re Estate of Mecello*, 262 Neb. 493, 501-04, 633 N.W.2d 892, 899-902 (2001) (holding that proponent of a will lost while in the possession of the testator satisfied the burden of proof by clear and convincing evidence to overcome the presumption

that such a will is a revoked will, that, therefore, the doctrine of *amino revocandi* did not apply, and upholding a copy of that will); *First Nat. Bank in Kearney v. Bunn*, 195 Neb. 829, 831, 241 N.W.2d 127, 128 (1976); *In re Drake's Estate*, 150 Neb. 568, 35 N.W.2d 417 (1948). Regarding clear and convincing evidence see *NJI2d Civ. 2.12A* and *2.12B*.

⁵⁸*Harts v. County of Knox*, 308 Neb. 1, 5, 952 N.W.2d 199, 203 (2020) (internal quotation marks and footnotes omitted). The quotation continues, "In other words, 'the right to possession of an intestate's property and the right to take through intestate succession accrue immediately on the death of the ancestor, subject only to the control of the court for purposes of administering the estate.'" *Id.*

torney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.⁵⁹

“[I]f a fiduciary is found guilty of a breach of duty or the court orders the fiduciary to account to the estate, the estate is not liable for the fiduciary’s attorney fees.”⁶⁰

Attorney fees are discussed at length at NJI2d Civ. ch. 4, Intro., at 9.

XVIII. TORTIOUS INTERFERENCE WITH AN INHERITANCE

“[W]e decline to adopt the tort of intentional interference with an inheritance.”⁶¹

XIX. STANDARD OF REVIEW ON APPEAL

“An appeal from the county court’s allowance or disallowance of a claim in probate will be heard as an appeal from an action at law. . . . [A]n appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party who is entitled to every reasonable inference deducible from the evidence. The probate court’s factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.”⁶²

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on

⁵⁹In re Estate of Forgey, 298 Neb. 865, 892, 906 N.W.2d 618, 638 (2018) (citations omitted) (finding attorney fees warranted where a trustee “clearly breached” his or her “duty to inform and report for decades and the beneficiary had little choice but to file litigation to resolve any doubts about the trust’s administration.” *Id.* at 893, 906 N.W.2d at 639). Regarding attorney fees and surcharges, also see particularly In re Estate of Graham, 301 Neb. 594, 919 N.W.2d 714 (2018).

The Nebraska Uniform Trust Code states that trustees owe the beneficiaries of a trust duties that include loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting. *Id.* at 881, 906 N.W.2d

at 632.

⁶⁰In re Trust Created by Martin, 266 Neb. 353, 361, 664 N.W.2d 923, 929 (2003).

⁶¹Litherland. v. Jergens, 291 Neb. 775, 785, 869 N.W.2d 92, 99 (2015) (adequate remedies existed in probate court).

⁶²In re Estate of Karmazin, 299 Neb. 315, 319, 908 N.W.2d 381, 386 (2018) (footnotes omitted). *See also* In re Estate of Marsh, 307 Neb. 893, 901, 952 N.W.2d 486, 494 (2020) (same quotation but for first sentence); In re Estate of Radford, 304 Neb. 205, 208, 933 N.W.2d 595, — (2019) same final sentence); In re Estate of Barger, 303 Neb. 817, 832, 931 N.W.2d 660, 672 (2019).

the record made in the county court. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.⁶³

"In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue."⁶⁴ "[T]he appellate court does not reweigh the evidence and must consider the evidence in the light most favorable to the successful party, who is entitled to every reasonable inference available from the evidence."⁶⁵

"When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below."⁶⁶

"A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion."⁶⁷

⁶³In re Estate of Adelung, 306 Neb. 646, 656, 947 N.W.2d 269, — (2020) (footnotes omitted). *Accord, e.g.*, In re Estate of Loder, 308 Neb. 210, 214, 953 N.W.2d 541, 545 (2021) (same quotation but for final sentence); In re Estate of Marsh, 307 Neb. at 901, 951 N.W.2d at —; In re Estate of Radford, 304 Neb. 205, 208, 933 N.W.2d 595, — (2019); Barger, 303 Neb. at 832, 931 N.W.2d at 672; In re Estate of Graham, 301 Neb. 594, 601, 919 N.W.2d 714, 721 (2018) ("Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record."); In re Henry B. Wilson, Jr., 300 Neb. 455, 461, 915 N.W.2d 50, 55 (2018); In re Estate of Forgey, 298 Neb. 865, 879–80, 906 N.W.2d 618, 631 (2018); In re Estate of Etmund, 297 Neb. 455, 462, 900 N.W.2d 536, 541 (2017); In re Estate of Psota, 297 Neb. 570, 574, 900 N.W.2d 790, 794 (2017); In re Robert L. McDowell Revocable Trust, 296 Neb. 565, 570, 894 N.W.2d 810, 815 (2017); In re Estate of Pluhacek, 296 Neb. 528, 534, 894 N.W.2d 325, 329 (2017); In re Estate of Balvin, 295 Neb. 346, 351, 888 N.W.2d 499, 503–04 (2016); In re Estate of Nemetz, 273

Neb. 918, 919, 735 N.W.2d 363, 365 (2007); In re Estate of Lamplough, 270 Neb. 941, 944, 708 N.W.2d 645, 649 (2006).

⁶⁴*Forgey*, 298 Neb. at 880, 906 N.W.2d at 631.

⁶⁵Same quotation: In re Estate of Brinkman, 308 Neb. 117, 121, 953 N.W.2d 1, — (2021); *Estate of Graham*, 301 Neb. at 601, 919 N.W.2d at 721. *See also*, In re Urbanovsky's Estate, 191 Neb. 308, 311, 215 N.W.2d 74, 76 (1974) ("[W]hen the proponent has secured the verdict of the jury, in reviewing evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom.").

⁶⁶Same quotation: *Estate of Brinkman*, 308 Neb. at 121, 953 N.W.2d at —; *Barger*, 303 Neb. at 832, 931 N.W.2d at 672.

⁶⁷*Forgey*, 298 Neb. at 880, 906 N.W.2d at 631.

XX. CROSS REFERENCES

No-contest clauses in wills are mentioned at NJI2d Civ. 16.06 Comment & Authorities.

For the definition of testamentary capacity, *see* NJI2d Civ. 16.04. *See also* NJI2d Civ. 16.05.

Regarding “irrevocable reciprocal wills,” *see* NJI2d Civ. 16.11, Comment.

Regarding the statute of limitation, *see* NJI2d Civ. 2.02D, Comment & Authorities.

Notice requirements from a personal representative to a creditor filing a claim against an estate are discussed at length at *In re Estate of Loder*.⁶⁸

On behalf of NCLE, Inc., Jack Gatz has written a useful article on what needs to be proved, how, and by whom, when probating a will.⁶⁹

NJI2d Civ. 16.02

STATUTES STATED

Nebraska statutes provide (here quote or set out the substance of applicable statutes not otherwise covered by these instructions).

COMMENT & AUTHORITIES

Chapter 30 of the Revised Statutes of Nebraska is titled “Decedents’ Estates; Protection of Persons and Property.” Article 23 of Chapter 30 is titled “Intestate Succession and Wills.” Part 5 of article 23, Neb. Rev. Stat. §§ 30-2326 through 30-2338 (Reissue 2016), is titled “Wills.” Article 24 of Chapter 30 is titled “Probate of Wills and Administration.”

“Chapter 30, article 24, of the Nebraska Revised Statutes addresses the probate and administration of wills and provides the rules in Nebraska for both informal and formal probate of wills, including the

⁶⁸*In re Estate of Loder*, 308 Neb. 210, 211–13, 215–17, 953 N.W.2d 541, 544–48 (2021).

⁶⁹Jack Gatz, *Evidence Problems in Probate*, in *Index 6, Estate Planning and Probate* (NCLE, Inc. 1987).

rules for supervised administration. This chapter is based upon the Uniform Probate Code.”¹

NJI2d Civ. 16.03

DISPOSITION AS DECEASED PLEASES

Individuals have the right to control their property during their life and the right, by a valid Will, to dispose of their property as they please at their death.

The law does not require that people will their property to family members. The law does not require that the terms of a Will be reasonable, conventional, or fair. Your verdict in this case may not be based upon your personal views as to what (deceased) should have done [with (his, her) property].

COMMENT & AUTHORITIES

“The cardinal rule concerning a decedent’s will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.”¹

To arrive at a testator’s or testatrix’s intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will and assume that the maker of the will understood words stated in the will.²

“There is a presumption that a testator intends to dispose of his or her entire estate and not to die intestate as to either a part or the whole

16.02

¹In re Estate of Odenreider, 286 Neb. 480, 486, 837 N.W.2d 756, 762 (2013).

16.03

¹In re Estate of Etmund, 297 Neb. 455, 463, 900 N.W.2d 536, 542 (2017) *Accord* In re Estate of Barger, 303 Neb. 817, 840, 931 N.W.2d 660, 677 (2019); In re Estate of Mousel, 271 Neb. 628, 633, 715 N.W.2d 490, 495 (2006); In re Estate of Johnson, 260 Neb. 91, 99, 615 N.W.2d 98, 103 (2000); In re Ritter’s Estate, 227 Neb. 641,

644–45, 419 N.W.2d 521, 524 (1988); In re Walker’s Estate, 224 Neb. 812, 818, 402 N.W.2d 251, 256 (1987).

²In re Estate of Johnson, 260 Neb. at 99, 615 N.W.2d at 103. *Accord* Barger, 303 Neb. at 832, 931 N.W.2d at 677; Etmund, above; Mousel, above; In re Ritter’s Estate, above.

Regarding the use of parol evidence, see NJI2d Civ. 16.01, Comment.

Regarding judicial construction of the Nebraska Probate Code, see the Comment & Authorities to NJI2d Civ. 16.01.

thereof. However, this presumption cannot supplant the actual intent of the testator as derived from the language of the will.”³

“When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.”⁴ A patent ambiguity is distinguished from a latent ambiguity. A patent ambiguity is one which exists on the face of an instrument.”⁵ “A latent ambiguity exists when the testator’s words are susceptible of more than one meaning, and the uncertainty arises not upon the words of the will as looked at in themselves, but upon those words when applied to the object or subject which they describe.”⁶

Parol evidence is inadmissible to resolve a patent ambiguity; “the intention of the testator must be found in the will.”⁷ “Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.”⁸ “Extrinsic evidence is admissible both to disclose and to remove latent ambiguity of a will.”⁹

The topic of patent versus latent ambiguities is also discussed at NJI2d Civ. 16.01, Comment & Authorities.

“[A] testator will not held to have disinherited an heir except where that conclusion is impelled by the express provisions or by necessary implication from provisions specifically set forth.”¹⁰

³Johnson, 260 Neb. at 99, 615 N.W.2d at 103 (citation omitted). Accord In re Estate of Corrigan, 218 Neb. 723, 358 N.W.2d 501 (1984); Allemand v. Weaver, 208 Neb. 618, 305 N.W.2d 7 (1981).

⁴Johnson, 260 Neb. at 95, 615 N.W.2d at 101. See also, e.g., In re Ritter’s Estate, 227 Neb. 641, 645, 419 N.W.2d 521, 524 (1988).

⁵Mousel, 271 Neb. at 631–32, 715 N.W.2d at 494. Accord, In re Estate of Brinkman, 308 Neb. 117, 124, 953 N.W.2d, — (2021);

⁶Same quotation: *Estate of Brinkman*, 308 Neb. at 123–24, 953 N.W.2d at —; In re Estate of Barger, 303 Neb. 817, 841, 931 N.W.2d 660, 677 (2019). Accord, e.g., Mousel, 271 Neb. at 631–32, 715 N.W.2d at 494. An example of a latent ambiguity in a will is a will

that names a beneficiary and there are two persons with that name. *Id.*

⁷Mousel, 271 Neb. at 632, 715 N.W.2d at 494.

⁸Same quotation: *Estate of Brinkman*, 308 Neb. at 123, 953 N.W.2d at 7; Barger, 303 Neb. at 841, 931 N.W.2d at 677 (2019). Accord *Scriven v. Scriven*, 153 Neb. 655, 664, 45 N.W.2d 760, 766 (1951).

⁹Barger, 303 Neb. at 841, 931 N.W.2d at 677.

¹⁰In re Estate of Brinkman, 308 Neb. 117, 123, 953 N.W.2d 1, — (2021) (multiple quotation marks and ellipsis ending the quotation omitted; brackets in *Estate of Brinkman*). See also, NJI2d Civ. 16.01 Comment & Authorities, under the heading Construction of a Will, below.

“There is no common law right of inheritance. The right of inheritance is purely a creature of statute and must be determined not as a matter of sentiment but as a matter of law.”¹¹

As far back as 1906 our Supreme Court stated that there is no right more valued than that of disposition of one's own property by will. The right is not dependent on its judicious exercise nor on others' notions of equality—in fact, “the very object of a will is to produce inequality.”¹² Furthermore, the will is not required to recognize relatives. One is entitled to control his or her property “while living and, by will, to direct its use after his death, subject only to restrictions as are imposed by law.”¹³

“Stepchildren are generally not included in a devise to ‘children’”¹⁴

NJI2d Civ. 16.04

TESTAMENTARY CAPACITY—DEFINITION

In Instruction No. _____, I said that one of the things (proponent) has to prove is that when (deceased) executed Exhibit No. _____ (he, she) had what the law calls “testamentary capacity.”

People have testamentary capacity if they:

1. Know the nature of (their acts, the act of making and executing a Will, the nature of their acts in making and executing a Will);
2. Know the nature and extent of their property;
3. Know the proposed disposition of their property; and
4. Know the natural objects of their bounty.

[Testamentary capacity is not necessarily the same as medical soundness of mind. People may be rational upon one or more subjects

¹¹In re Estate of Brionez, 8 Neb. App. 913, 918, 603 N.W.2d 688, 692–93 (2000) (quoting In re Estate of Luckey, 206 Neb. 53, 57, 291 N.W.2d 235, 238 (1980)).

¹²In re Isaac's Estate, 76 Neb. 823, 830, 107 N.W. 1016, 1019 (1906).

¹³*Id.* at 830, 107 N.W. at 1019 (noting that “[t]he law . . . secures equality of distribution where a man dies intestate . . .”), *quoted in* In re

Bose's Estate, 136 Neb. 156, 162–63, 285 N.W. 319, 324 (1939). *See also, e.g.,* In re Urbanovsky's Estate, 191 Neb. 308, 311, 215 N.W.2d 74, 76 (1974).

¹⁴Burnett v. Maddocks, 294 Neb. 152, 161, 881 N.W.2d 185, 191–92 (2016). This general rule applies unless the will states or something in the will suggests that the testator had a different intent. *See, id.* (citing authorities).

and still not have testamentary capacity. And they may have testamentary capacity even though they (are elderly, are ill, are unable to transact some business affairs, have peculiar habits, are eccentric, are slovenly, are subject to delusions or other mental or physical infirmities, have an impediment of speech, have a weak understanding, et cetera). You may consider any evidence of these things along with all of the other evidence in the case, when deciding whether (deceased) had testamentary capacity when (he, she) executed Exhibit No. _____.]

COMMENT

The first paragraph of this instruction is written for the case where there is no issue as to whether deceased executed the purported will, but there is an issue as to whether, at the time, deceased possessed testamentary capacity. The final sentence of the final paragraph of the instruction is also written for the case where execution is not in issue. Where there is an issue as to whether deceased executed the document, the first paragraph may have to be changed. The following paragraph is offered as an example of an appropriate change:

"In Instruction No. _____, I said that one of the things (proponent) has to prove is that at the time (deceased) executed Exhibit No. _____, if in fact (he, she) did execute Exhibit No. _____, (he, she) had what the law calls 'the required testamentary capacity.' "

Likewise, if the final sentence is given, it may have to be rewritten.

This pattern instruction says that to have testamentary capacity a person must "[k]now and understand the natural objects of [his or her] bounty." There are two troublesome things about this clause regarding which those using this instruction should be aware.

■ First, while it is not necessarily the case, quite often the "objects" referred to will be people. Since we do not often think of people as objects, this use of that word may carry a potential for confusion. On the facts of a particular case, it may be possible, and it may aid the understanding of the jury, to substitute something more specific for "objects."

■ Second, "bounty" is not a word commonly used in the sense in which it is used here. Consequently, its use here may be confusing to the jury. If it is possible, and if doing so aids the understanding of the jury, substitute another word for "bounty." The Committee was unable to come up with an acceptable substitute. Perhaps users of this work will do better in this regard. Or perhaps it is best left to the argument of counsel to explain the use of the word in this instruction. (As used

here, "bounty" is most often defined to mean generosity, goodness, kindness, or virtue, I O.E.D. 1024 (1933), which points out the difficulty in finding an acceptable substitute for a pattern jury instruction.)

Lay witness opinion as to a testator's mental condition is discussed in *In re Estate of Wagner*.¹

Regarding the time when one must possess testamentary capacity, see NJI2d Civ. 16.05, and the Comment thereto.

AUTHORITIES

"[A] person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty is competent to make a will."² "An individual does not lack testamentary capacity because he holds an unjust prejudice or belief generally regarded as peculiar and unsound."³

"Gross eccentricities, slovenliness in dress, peculiarities of speech and manner are not facts sufficient to disqualify a person from making a will." *In re Frazier's Estate*, 131 Neb. 61, 267 N.W. 181 (1936). For a case underscoring how far a jury and court may go to overlook eccentric behavior, see *In re Scoville's Estate*, 149 Neb. 415, 31 N.W.2d 284 (1948).

However, relevant evidence of lack of testamentary capacity includes, among other strange behavior, unfair prejudice against friends and relatives, *In re Noren*, 119 Neb. 653, 230 N.W. 495 (1930); and loss of memory and rapid mood swings, *In re Wahl's Estate*, 151 Neb. 812, 39 N.W.2d 783 (1949). A fair reading of [sic] the cases indicates that eccentric behavior which is relevant to the manner in which the decedent conducts business is more likely to have a bearing on testamentary capacity than eccentric behavior generally.

.....

In *In re Gunderman's Estate*, 102 Neb. 590, 168 N.W. 359 (1918), the contestant was able to make a convincing case that the testator was drunk at the time he made the contested will, and therefore lacked testamentary capacity.⁴

This instruction states that in order to have testamentary capacity

16.04

¹*In re Estate of Wagner*, 246 Neb. 625, 635, 522 N.W.2d 159, 167 (1994), which is quoted at NJI2d Civ. 16.01, Comment & Authorities, part XI. Regarding opinion evidence in Nebraska generally, see NJI2d Civ. 1.42 and the

cases and authorities discussed therein.

²*In re Kleeb's Estate*, 211 Neb. 763, 767, 320 N.W.2d 459, 461 (1982).

³*Id.* at 769, 320 N.W.2d at 462.

⁴Jack Gatz, Evidence Problems in Probate, in Index 6, Estate Planning

a person must “know” certain things. The cases cited in these Authorities interchangeably use the words “know,” “understand,” and “know and understand.” Know: “1 a(1): to apprehend immediately with the mind or with the senses: perceive directly: have direct unambiguous cognition of . . . 2 a: to have cognizance, consciousness, or awareness of: have within the mind as something apprehended, learned, or understood.”⁵ Understand: “1: to grasp the meaning of . . . 2: to know, consider, or accept as a fact, truth, or principle without further mention or explanation or without utter certainty.”⁶ It seems that either word (or both) may be used.

In addition to the cases cited above, *see, e.g.*, the cases cited in this footnote.⁷

NJI2d Civ. 16.05

TESTAMENTARY CAPACITY—TIME WHEN IMPORTANT

To make a valid Will, a person has to have testamentary capacity when (he, she) signs (his, her) Will, not at any other time.

In this case, there is evidence of (deceased)’s mental condition at times other than the time [it is claimed] (he, she) signed Exhibit No. _____. You may consider that evidence only in so far as it is relevant to deciding whether (he, she) had testamentary capacity at the time [at which it is claimed] (he, she) signed Exhibit No. _____.

and Probate, at 2 (NCLE, Inc. 1987) (ellipses in original).

⁵Merriam-Webster Unabridged Dictionary, <http://unabridged.merriam-webster.com/unabridged/know> (last visited Feb. 9, 2018).

⁶Merriam-Webster Unabridged Dictionary, <http://unabridged.merriam-webster.com/unabridged/unders tand> (last visited Feb. 9, 2018).

⁷In re Estate of Wagner, 246 Neb. 625, 633, 522 N.W.2d 159, 166 (1994) (“self-proved will establishes prima facie proof of testamentary capacity”); In re Peterson’s Estate, 232 Neb. 105, 111, 439 N.W.2d 516, 520 (1989); In re Villwok’s Estate, 226 Neb. 693, 697, 413 N.W.2d 921, 924 (1987); In re

Flider’s Estate, 213 Neb. 153, 155, 328 N.W.2d 197, 199 (1982) (even with self-proved will, not precluded from proving lack of testamentary capacity or undue influence); In re Camin’s Estate, 212 Neb. 490, 494–96, 323 N.W.2d 827, 832–33 (1982) (mental competence and testamentary capacity not necessarily same); In re Knott’s Estate, 164 Neb. 365, 369, 82 N.W.2d 568, 572 (1957); In re Kaiser’s Estate, 150 Neb. 295, 302–03, 34 N.W.2d 366, 372 (1948); In re Goist’s Estate, 146 Neb. 1, 12, 18 N.W.2d 513, 519 (1945); In re Frazier’s Estate, 131 Neb. 61, 267 N.W. 181 (1936) (reviewing cases); In re Clapham’s Estate, 73 Neb. 492, 493–94, 103 N.W. 61, 61–62 (1905).

COMMENT & AUTHORITIES

The words "it is claimed" are in brackets. If the execution of the exhibit is not in issue, drop the word claimed.

This pattern has been prepared for the case where deceased signed the will him-or herself, and not for the case where the will was signed by someone else in the presence of and at the direction of the deceased. In the latter case, the instruction will have to be rewritten. The following is an example of how that might be done:

"To make a valid Will, a person has to have testamentary capacity either when (he, she) signs (his, her) Will or, if (he, she) does not sign it (himself, herself), when someone else signs it in (his, her) presence and at (his, her) direction, and not at any other time.

"In this case, there is evidence of (deceased)'s mental condition at times other than the time [it is claimed] Exhibit No. _____ was signed. You may consider that evidence only in so far as it is relevant to deciding whether (he, she) had testamentary capacity at the time [at which it is claimed] Exhibit No. _____ was signed."

When decedent's testamentary capacity at the time of the execution of the will submitted for probate is in issue, the proponent of the will has the burden of proving capacity.¹ In addition, if the proponent offers into evidence what he or she claims is a prior will executed by decedent, the proponent has the burden of providing an adequate foundation for the prior will; that includes the burden of establishing that the testator possessed adequate testamentary capacity at the time the prior wills were executed.² There does not seem to be a clear statement of a rule that applies when, to the issue of lack of testamentary capacity or undue influence, for example, the contestant offers what he or she claims is a prior will executed by decedent. "In at least one case, however, the court was obviously influenced by such evidence."³

Testamentary capacity refers, of course, to the testator's state of mind at the time he or she executed the will.⁴

See NJI2d Civ. 16.04 for the definition of testamentary capacity.

16.05

¹See NJI2d Civ. 16.01.

²In re Camin's Estate, 212 Neb. 490, 494-96, 323 N.W.2d 827, 832-33 (1982).

³Jack Gatz, *Evidence Problems in Probate*, in *Index 6, Estate Planning*

and *Probate*, at 2 (NCLE, Inc. 1987), quoting *In re Noren's Estate*, 119 Neb. 653, 658, 230 N.W. 495, 498 (1930).

⁴In re Peterson's Estate, 232 Neb. 105, 111, 439 N.W.2d 516, 520 (1989); *In re Estate of Villwok*, 226 Neb. 693, 697, 413 N.W.2d 921, 924 (1987); *Schoch's Estate v. Kail*, 209

NJ12d Civ. 16.06

UNDUE INFLUENCE—STATEMENT OF THE CLAIM

A. ISSUES

(Contestant) claims that Exhibit No. _____ is not the valid Will of (deceased) because (here insert the name or other identification of the appropriate person or group) exerted undue influence over (deceased).

(Proponent) admits (here state what proponent admits, by pleading or otherwise, if anything).

(Proponent) denies (here state what proponent denies).

B. BURDEN OF PROOF

In connection with this claim of undue influence, the burden is on (contestant) to prove by the greater weight of the evidence each of the following:

1. That (deceased) was (a person who would be subject to, susceptible to) undue influence;
2. That there was an opportunity to exercise undue influence upon (deceased);
3. That there was a (disposition to exercise, motive for exercising) undue influence upon (deceased); and
4. That Exhibit No. _____ was the result of such undue influence.

C. EFFECT OF FINDINGS

If (contestant) *has* met this burden of proof on (his, her) claim of undue influence, then your verdict must be that Exhibit No. _____ is not the valid Will of (deceased).

If (contestant) *has not* met this burden of proof on (his, her) claim of undue influence, you must disregard the claim of undue influence and [(your verdict must be that Exhibit No. _____ is the valid Will of

Neb. 812, 814, 311 N.W.2d 903, 906 (1981). *See also, e.g.*, In re Stidworthy's Estate, 168 Neb. 494, 96 N.W.2d 421 (1959); In re O'Donnell's Estate, 158 Neb. 583, 64 N.W.2d 116 (1954);

In re Fehrenkamp's Estate, 154 Neb. 488, 48 N.W.2d 421 (1951); In re Goist's Estate, 146 Neb. 1, 18 N.W.2d 513 (1945); In re Inda's Estate, 146 Neb. 179, 19 N.W.2d 37 (1945).

(decedent), you must turn your attention to the other issues in these instructions)].

COMMENT & AUTHORITIES

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- IX. UNDUE INFLUENCE IN CONTRACT ACTIONS
- X. UNDUE INFLUENCE IN CONVEYANCES OF REAL ESTATE

I. VARIOUS GROUNDS FOR CHALLENGING A WILL

"Generally courts have held that the following types of claims constitute will contests: lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or a subsequent revocation of the will by a later document."¹ These concepts are discussed at NJI2d Civ. 16.06 through 16.11; regarding the distinctions among these concepts, see the Comment & Authorities to NJI2d Civ. 16.06 through 16.11.

A no-contest clause in a will is unenforceable where there is probable cause to believe that one or more of the grounds for a will contest exists. For example, if there is probable cause to believe that the will

16.06

¹In re Estate of Barger, 303 Neb. 817, 833, 931 N.W.2d 660, 673 (2019) (footnoting authorities). See Neb. Rev.

Stat. § 30-2431 (Reissue 2016) ("Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation.").

was executed under undue influence, then the no-contest clause is not enforceable.²

II. THE ELEMENTS OF UNDUE INFLUENCE

"To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence."³

III. BURDEN OF PROOF

A. THE INFLUENCE MUST BE UNDUE

"[N]ot every exercise of *influence* will vitiate a will; it is the exercise of *undue influence* which does so. Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator."⁴

"There may be influences directing the will-maker's attention to proper obligation which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence."⁵

Suspicious circumstances, when coupled with proof of a confidential or fiduciary relationship, that have indicated an instance of undue influence include (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations

²Barger, 303 Neb. at 835, 931 N.W.2d at 674 (discussing no-contest clauses at some length, id, at 833-35, 931 N.W.2d at 672-74).

³Same quotation: Barger, 303 Neb. at 835, 931 N.W.2d at 674; In re Estate of Clinger, 292 Neb. 237, 248, 872 N.W.2d 37, 48 (2015); In re Estate of Hedke, 278 Neb. 727, 743, 775 N.W.2d 13, 28 (2009). *Accord* Pruss v. Pruss, 245 Neb. 521, 537, 514 N.W.2d 335, 346 (1994) (regarding element number 3 of the burden of proof part of the instruction, the instruction speaks of a "disposition" to exercise undue influence and *Pruss* speaks of an "intent" to exercise undue influence; regarding this choice of words, see N.J.2d Civ. 15.25, Comment); In re Estate of Novak, 235 Neb. 939, 941,

458 N.W.2d 221, 224 (1990); In re Peterson's Estate, 232 Neb. 105, 110, 439 N.W.2d 516, 520 (1989); In re Price's Estate, 223 Neb. 12, 21, 388 N.W.2d 72, 79 (1986); In re Massie's Estate, 218 Neb. 103, 108, 353 N.W.2d 735, 739 (1984); In re Gloe's Estate, 191 Neb. 395, 400, 215 N.W.2d 98, 101 (1974); In re Goist's Estate, 146 Neb. 1, 18 N.W.2d 513 (1945).

⁴In re Price's Estate, 223 Neb. 12, 18, 388 N.W.2d 72, 77 (1986) (emphasis added; citing cases). *Accord*, e.g., In re Estate of Hedke, 278 Neb. 727, 743, 775 N.W.2d 13, 28 (2009); In re Peterson's Estate, 232 Neb. 105, 110, 439 N.W.2d 516, 520 (1989).

⁵In re Knott's Estate, 164 Neb. 365, 369-70, 82 N.W.2d 568, 572 (1957).

with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.⁶

B. UNDUE INFLUENCE BY WHOM?

1. In General

Subparagraphs 2 and 3 of the Burden of Proof part of this pattern state that there must have been an opportunity and a disposition to exercise undue influence upon deceased. They do not say that any particular person or group must have exercised the undue influence. This is because a clause of a will procured by undue influence is invalid regardless of who applied the pressure to the deceased. "Undue influence exercised by anyone, whether [that person] or another gains by its exercise, renders the will or part thereof thus procured worthless."⁷

2. Decedents Cannot Unduly Influence Themselves

In the case of *In re Rohde's Estate*,⁸ the contestant made the novel argument that the undue influence was brought about by the decedent's own conduct. The court said that the undue influence that "overcomes the will of the testator must be undue influence exercised on the testator by someone else so that the testamentary disposition is not really the testator's own."⁹ Should this sort of novel argument be made again, it may be necessary to adapt the instruction to make it even more clear that "undue influence" must come from without.

C. THE INITIAL BURDEN

The burden of proving undue influence is on the contestant.¹⁰ In a will contest, undue influence must be proved by the greater weight (a.k.a. the preponderance; see NJI2d Civ. 2.12A) of the evidence.¹¹

⁶Barger, 303 Neb. at 835, 931 N.W.2d at 674.

⁷*In re Gloe's Estate*, 191 Neb. at 402, 215 N.W.2d at 101. For more of the invalidation of part of a will by reason of undue influence, see part V of this Comment & Authorities, below.

⁸*In re Rohde's Estate*, 195 Neb. 403, 238 N.W.2d 243 (1976).

⁹*Id.* at 403-04, 238 N.W.2d at 245 (citing cases).

¹⁰Neb. Rev. Stat. § 30-2431 (Reissue 2016). *E.g.*, *In re Estate of Clinger*, 292 Neb. 237, 248, 872 N.W.2d 37, 48 (2015); *Goff v. Weeks*, 246 Neb. 163, 168, 517 N.W.2d 387, 392 (1994) ("Although the burden of persuasion (sic) or the burden of going forward on the

D. BURDEN IF CONTESTANT MAKES A PRIMA FACIE CASE

When the contestant evidences facts that make a prima facie case of undue influence, then the burden of going forward with the evidence shifts to the proponent, while the burden of proof stays with the contestant.¹² This is nothing new or different from most any other case.¹³ It seems that the quantum of evidence that the proponent needs to overcome opponent's prima facie case is simply the most commonly applied quantum, that is, the greater weight of the evidence (a.k.a. preponderance of the evidence).¹⁴

issue of undue influence may shift to the proponent of the instrument, the burden of proof remains at all times on the party asserting the issue.”; where the Court refers to the burden of persuasion, it must have meant to refer to the burden of production, as burden of persuasion and burden of proof are synonymous); *Pruss v. Pruss*, 245 Neb. 521, 537, 514 N.W.2d 335, 346 (1994); *In re Estate of Novak*, 235 Neb. 939, 941, 458 N.W.2d 221, 224 (1990); *In re Villwok's Estate*, 226 Neb. 693, 697, 413 N.W.2d 921, 924 (1987); *In re Kleeb's Estate*, 211 Neb. 763, 768, 320 N.W.2d 459, 462 (1982); *In re Knott's Estate*, 164 Neb. 365, 369-70, 82 N.W.2d 568, 572 (1957); *In re O'Donnell's Estate*, 158 Neb. 583, 592, 64 N.W.2d 116, 122 (1954); *In re Bowman's Estate*, 143 Neb. 440, 447, 9 N.W.2d 801, 805 (1943).

¹¹*In re Estate of Wagner*, 246 Neb. 625, 632, 522 N.W.2d 159, 165 (1994); *Goff v. Weeks*, 246 Neb. 163, 168, 517 N.W.2d 387, 391 (1994); *In re Price's Estate*, 223 Neb. 12, 18, 388 N.W.2d 72, 77 (1986) (discussing cases; noting that the general rule in an action at law, such as the probate of a will, is that undue influence must be proved by the greater weight of the evidence; disapproving that part of *In re Massie's Estate*, 218 Neb. 103, 108, 353 N.W.2d 735, 739 (1984), which had stated the burden as clear and convincing evidence).

¹²*In re Estate of Novak*, 235 Neb. 939, 942, 458 N.W.2d 221, 224 (1990); *In re Estate of Clinger*, 292 Neb. 237, 249-50, 872 N.W.2d 37, 48-49 (2015)

(recognizing that this is just a statement of the shift of the burden of going forward); *In re Estate of Hedke*, 278 Neb. 727, 744, 775 N.W.2d 13, 29 (2009) (listing common suspicious circumstances). Regarding undue influence and presumptions, see *NJI2d Civ. 2.14A* and *G. Michael Fenner, About Presumptions in Civil Actions*, 17 *Creighton L.Rev.* 307, 311-12 (1984), both citing and discussing *Matter of McGowan's Estate*, 197 Neb. 596, 250 N.W.2d 234 (1977).

¹³*Estate of Novak*, *supra*, states that when the contestant makes a prima facie case of undue influence “a presumption of undue influence arises therefrom.” This use of the word “presumption” is unlike the rule regarding presumptions codified at *Neb. Rev. Stat. § 27-301* (Reissue 2016); it is not a true presumption, but rather, as discussed at *NJI2d Civ. 2.14A*, part II(B), simply a reference to the contestant establishing his or her prima facie case; therefore, it is improper to give a presumption instruction). See further the following footnote.

¹⁴*But see Hedke*, 278 Neb. at 744, 775 N.W.2d at 28-29 (footnotes omitted).

[T]he ultimate burden of persuasion for undue influence remains with the contestant throughout the trial. We have not, however, determined what quantity of proof will rebut a presumption of undue influence. [After discussing its conflicting statements, the Court continues.] It appears that we have made

[I]t is not necessary to separate each fact supported by the evidence and allocate it under one or more of the . . . four essential elements requisite to establish the exercise of undue influence; rather the trier of fact is to view the entire evidence and rest the decision upon whether the evidence as a whole is of such a nature as to prove each of the elements.¹⁵

E. CIRCUMSTANTIAL EVIDENCE

Undue influence “is usually surrounded by all possible secrecy.” For that reason, direct evidence is usually lacking and undue influence may, and often must, be proved by circumstantial evidence.¹⁶

contradictory statements regarding the quantity of proof that would satisfy the proponent’s burden to rebut the presumption.

Our case law on the proof necessary to rebut a presumption of undue influence is inconclusive. We have not treated every similar presumption as disappearing upon the opponent’s introduction of contradictory evidence sufficient to support an opposing inference. But the parties have not presented arguments on the quantity of proof issue, and we do not need to resolve this tension here. Even if the presumption of undue influence disappeared upon [the proponent’s] production of contradictory evidence, we believe the court was clearly wrong. As discussed below, under any standard of proof, the evidence overwhelmingly outweighed any evidence [the proponent] adduced to rebut the presumption.

Since “the ultimate burden of persuasion for undue influence remains with the contestant throughout the trial,” and since the contestant’s burden of proof regarding undue influence is the greater weight of the evidence, *see* part III(C) of this Comment & Authorities, above, it seems clear that once the con-

testant enters evidence of undue influence and the proponent enters evidence to the contrary, then it is simply a question for the trier of fact, who must weigh the evidence and, with the burden of proof on the contestant, decide which party’s evidence preponderates.

¹⁵*In re Price’s Estate*, 223 Neb. 12, 21, 388 N.W.2d 72, 79 (1986). *Accord*, e.g., *In re Estate of Hedke*, 278 Neb. 727, 743, 775 N.W.2d 13, 28 (2009); *In re Polly’s Estate*, 174 Neb. 222, 224-25, 117 N.W.2d 375, 378 (1962). *See* part II of this Comment & Authorities, above, for a statement of the four essential elements.

¹⁶*In re Estate of Hedke*, 278 Neb. at 743, 775 N.W.2d at 28. *Accord* *In re Estate of Clinger*, 292 Neb. 237, 249, 872 N.W.2d 37, 48 (2015); *Goff v. Weeks*, 246 Neb. 163, 168, 517 N.W.2d 387, 392 (1994); *In re Villwok’s Estate*, 226 Neb. 693, 698, 413 N.W.2d 921, 925 (1987); *In re Price’s Estate*, 223 Neb. 12, 18-21, 388 N.W.2d 72, 77-79 (1986) and *id.* at 23, 388 N.W.2d at 80 (Krivosha, C.J., concurring in the result); *Ditloff v. State Farm Fire and Cas. Co.*, 225 Neb. 375, 379, 406 N.W.2d 101, 104 (1987); *NJI2d Civ. 1.31*, Comment; G. Michael Fenner, *Circumstantial Evidence in Nebraska*, 19 Creighton L.Rev. 236 (1986).

F. MOTIVE OR OPPORTUNITY ALONE IS NOT ENOUGH

Undue influence cannot be inferred from motive or opportunity alone.¹⁷ “Moreover, mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence.”¹⁸

IV. OPINION TESTIMONY

Regarding opinion testimony in probate cases, see NJI2d Civ. 16.01, Comment & Authorities, part XI and the cases and authorities cited there.

V. UNDUE INFLUENCE INVALIDATING ONLY PART OF A WILL

Undue influence may render only part of a will invalid: “Undue influence exercised by anyone, whether [that person] or another gains by its exercise, renders the will or part thereof thus procured worthless.”¹⁹

[W]here a will contains a bequest due to undue influence, the will may stand as to other bequests not so procured

[W]here a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix.²⁰

The key here is “a part of a will,” as in a part that was not subjected to undue interference. This is as opposed to a bequest to a legatee who was not involved in the undue influence. In *Gloe’s Estate*,²¹ the part of the will allegedly procured through undue influence benefited four sisters, one of whom had nothing to do with the application of undue influence. The one sister argued that this particular part of the will should be retained as to her, as though it were contained in some other, untainted part of the will. The Court disagreed:

The portion of Item V [of the will] which benefits [the one sister] is an inseparable and integral part of Item V and under the evidence it was as much the result of undue influence as the rest

¹⁷*E.g.*, In re Estate of Andersen, 177 Neb. 374, 386, 128 N.W.2d 843, 850 (1964); In re Estate of Gorthy, 169 Neb. 769, 781, 100 N.W.2d 857, 864 (1960); In re Estate of Inda, 146 Neb. 179, 183, 19 N.W.2d 37, 40 (1945).

¹⁸Pruss v. Pruss, 245 Neb. 521, 536, 514 N.W.2d 335, 346 (1994). *Accord, e.g.*, In re Estate of Wagner, 246 Neb. 625, 635, 522 N.W.2d 159, 167

(1994).

¹⁹In re Gloe’s Estate, 191 Neb. 395, 402, 215 N.W.2d 98, 101 (1974).

²⁰In re Gloe’s Estate, *supra*. *Accord* In re Kajewski’s Estate, 134 Neb. 485, 279 N.W. 185 (1938); In re Koller’s Estate, 116 Neb. 764, 219 N.W. 4 (1928).

²¹In re Gloe’s Estate, *supra*.

of the paragraph. The contention that a benefit received by an individual as a result of undue influence ought to be sustained simply because she did not personally participate in bringing the undue influence to bear on the testatrix must be rejected. Item V benefited the four sisters equally. It cannot be said to be invalid as to the three sisters who actively exerted undue influence upon the testatrix but valid as to [the other sister] who benefited equally by their action.²²

The whole part of the will was invalid.

These pattern instructions do not address the situation where part of the will may be a valid will and part of it may not be. In that situation, either new instructions will have to be prepared or existing instructions will have to be adapted.

VI. THE BRACKETS IN THE FINAL PART OF THE INSTRUCTION

The final part of the final paragraph of the instruction contains a parenthetical choice. It is in brackets to alert the reader to the following: It is possible to have more than one defense; where that is the case, the first clause within the brackets, the first of the parenthetical choices, will not be appropriate; the second one should be.

VII. UNDUE INFLUENCE IN TRANSFERS BY GIFT

*Fremont Nat'l Bank & Trust Co. v. Beerbohm*²³ and *Molholm v. Lynes*²⁴ are actions to set aside transfers of property accomplished by gift, rather than will, on the grounds of undue influence. Both stand for the proposition that the rule is the same in the case of a gift as in the case of a will.

VIII. UNDUE INFLUENCE IN TRANSFERS BETWEEN LIVING PERSONS

Regarding an action to set aside an inter vivos transfer of property on the grounds of undue influence, which is an action in equity, see *Peterson v. Peterson*.²⁵

IX. UNDUE INFLUENCE IN CONTRACT ACTIONS

Regarding undue influence as an affirmative defense in a contract action, see NJI2d Civ. 15.10 and 15.25.

²²*In re Gloe's Estate*, 191 Neb. at 401, 215 N.W.2d at 101 (1974).

²³*Fremont Nat'l Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767, 770 (1986).

²⁴*Molholm v. Lynes*, 185 Neb. 707, 714-15, 178 N.W.2d 566, 570 (1970).

²⁵*Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988).

X. UNDUE INFLUENCE IN CONVEYANCES OF REAL ESTATE

In re Price's Estate notes that the burden of proof regarding the defense of undue influence in a will contest is a preponderance of the evidence, while the burden of proof regarding undue influence in the conveyance of real estate is clear and convincing evidence. "The reason for the different treatment rests . . . not on the nature of the instruments involved, both of which are of equal dignity, but in the nature of the causes of action involved."²⁶ The difference in treatment rests on the fact that the former is an action at law, whereas the latter is one in equity.²⁷ Regarding these two burdens, see generally NJI2d Civ. 2.12A and 2.12B.

NJI2d Civ. 16.07

UNDUE INFLUENCE—DEFINITION

"Undue Influence" is influence that overpowers a person's mind and destroys that person's free choice in regard to the act of making a Will; it causes (him, her) to express the will of another rather than (his, her) own. The controlling factor is the effect of the influence on the mind of the person making the Will [rather than the means employed, or the extent or degree of the influence exerted, or the identity of the person exerting the influence].

[The fact that a person has a motive and an opportunity to exert influence upon a person making a Will is not enough by itself to establish undue influence.]

COMMENT & AUTHORITIES

See NJI2d Civ. 16.06, Comment & Authorities. This definition is supported by the cases cited in this footnote.¹

²⁶In *re Price's Estate*, 223 Neb. 12, 17, 388 N.W.2d 72, 77 (1986).

²⁷*Id.* See also, e.g., *Peterson v. Peterson*, 230 Neb. 479, 486, 432 N.W.2d 231, 236 (1988) ("An action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and . . . undue influence must be proved by clear and convincing evidence. [A]n action alleging undue influence in a probate context lies at law, and, as such, . . . must be proved by a preponderance of the evi-

dence."). The burden of proving an oral contract for a will and the burden of proving a lost will is clear and convincing evidence. See, NJI2d Civ. 16.01, Comment & Authorities, parts XII and XIII respectively.

16.07

¹*E.g.*, In *re Estate of Clinger*, 292 Neb. 237, 248, 872 N.W.2d 37, 48 (2015) ("manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's"); In *re Estate of Wagner*, 246 Neb. 625, 635, 522 N.W.2d 159, 167 (1994); In *re*

NJI2d Civ. 16.08

FRAUD

No pattern instruction has been prepared.

COMMENT & AUTHORITIES

Along with undue influence, duress, mistake, and revocation, fraud in its procurement is one of the grounds on which a contestant can challenge a will.¹ These concepts are discussed in NJI2d Civ. 16.06 through 16.11; regarding the distinctions among these concepts, see the Comments to NJI2d Civ. 16.06 through 16.11.

There are not many Nebraska cases even mentioning the subject of fraud as grounds for contesting a will, let alone any setting out the essential elements of such a case of fraud. For that reason, the Committee has not drafted a pattern instruction. *Page on the Law of Wills*, as quoted below, states what its authors consider to be the essential elements of a claim of fraud. It may be that those elements put into an instruction in the style of NJI2d Civ. 16.06 would be an appropriate instruction on this subject.

The Committee has found two Nebraska cases in which the subject is mentioned. In one the Court stated, "Fraud employed in procuring a will, no less than coercion, may justify it being set aside. Both are equivalent to undue influence, and both are usually present in the same transaction."² And in the other, the court stated, "Undue influence is not dissimilar to fraud."³

Fraud in the procurement of a will is generally considered a species of undue influence, though the two are not exactly synonymous; that is, undue influence may result from a fraud as well as from coercion, the fraud being employed as a means

Estate of Novak, 235 Neb. 939, 941, 458 N.W.2d 221, 224 (1990); In re Price's Estate, 223 Neb. 12, 18, 388 N.W.2d 72, 77 (1986); Tilden v. Beckmann, 203 Neb. 293, 307, 278 N.W.2d 581, 589 (1979); Andersen v. Andersen, 177 Neb. 374, 384, 128 N.W.2d 843, 849 (1964); In re Stidworthy's Estate, 168 Neb. 494, 497-98, 96 N.W.2d 421, 424 (1959); In re Fehrenkamp's Estate, 154 Neb. 488, 498, 48 N.W.2d 421, 428 (1951); In re Goist's Estate, 146 Neb. 1, 13, 18 N.W.2d 513, 520 (1945); In re Kajewski's Estate, 134 Neb. 485, 489-91, 279 N.W. 185,

187-88 (1938); In re Koller's Estate, 116 Neb. 764, 771, 219 N.W. 4, 7 (1928).

16.08

¹See Neb. Rev. Stat. § 30-2431 (Reissue 2016) ("Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation.").

²In re Paisley's Estate, 91 Neb. 139, 146, 135 N.W. 435, 437 (1912), quoting 1 Underhill, *Wills* § 151.

³In re Price's Estate, 223 Neb. 12, 18, 388 N.W.2d 72, 77 (1986).

of securing that influence over the testator which compels the testator to the testamentary act. However, some jurisdictions consider a fraud objection to the validity of will as distinct from an undue influence objection, though both are equally destructive of the will; a fraud on a testator willfully deceives the testator's free agency, while undue influence overmasters it.

Whether the claim of invalidity is based on fraud or undue influence, either must amount to coercion, compulsion, or a constraint which destroys the testator's free agency.⁴

"[W]here a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix."⁵ This is discussed at NJI2d Civ. 16.06, Comment & Authorities, part V. These pattern instructions do not address the situation where part of the will may be valid and part of it may not be. In that situation, either new instructions will have to be prepared or existing instructions will have to be adapted.

In addition to the above discussion of the similarities and differences between fraud and undue influence, *Page on The Law of Wills* notes that fraud must also be distinguished from innocent mistake.⁶ And it states the essential elements of a claim of fraud in the procurement of a will as follows:

Fraud which causes testator to execute a will consists of statements which are false, which are known to be false by the party who makes them, which are material, which are made with the intention of deceiving testator, which deceive testator, and which cause testator to act in reliance upon such statements.⁷

Regarding the elements of fraudulent concealment used by the surviving spouse to rescind an antenuptial agreement, see *In re Estate of Stephenson*.⁸

Regarding fraudulent renunciation, the Court has stated: "[A] renunciation properly effected pursuant to Neb. Rev. Stat. § 30-2352 (Reissue 2016) and prior to distribution is not a 'transfer' and therefore not a

⁴79 Am.Jur.2d *Wills* § 395 (2002) 2015).
(footnotes omitted).

⁵In re Gloe's Estate, 191 Neb. 401, 215 N.W.2d 98, 101 (1974).

⁷*Id.* at § 14.3.

⁶1 Schoenblum, *Page on the Law of Wills*, § 14.1 (Matthew Bender

⁸In re Estate of Stephenson, 243 Neb. 890, 899, 503 N.W.2d 540, 547 (1993).

fraudulent transfer under the [Uniform Fraudulent Transfer Act,] Neb. Rev. Stat. §§ 36-701 through 36-712 (Reissue [2016]).”⁹

NJI2d Civ. 16.09

DURESS

No pattern instruction has been prepared.

COMMENT & AUTHORITIES

Along with undue influence, fraud, mistake, and revocation, duress in its procurement is one of the grounds on which a contestant can challenge a will. *See* Neb. Rev. Stat. § 30-2431 (Reissue 2016) (“Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation.”). These concepts are discussed in NJI2d Civ. 16.06 through 16.11; regarding the distinctions among these concepts, *see* the Comments to NJI2d Civ. 16.06 through 16.11.

The Committee has not found any Nebraska cases on the subject of duress in the procurement of a will. Even though duress is listed separately in the statute just quoted, it may be that there is no need for a separate instruction on duress: the differences between duress and undue influence may be such that the instructions on undue influence, NJI2d Civ. 16.06 and 16.07, will be satisfactory. Indeed, neither Am. Jur. nor C.J.S. treats duress as a grounds for challenge separate from undue influence, and the cases from other jurisdictions that do address the subject seem to treat duress as simply one form of undue influence.¹

If duress is an issue for the jury, and if a new instruction does have to be drafted, then it may be that an instruction based on the following discussion and written in the style of NJI2d Civ. 16.06 would be appropriate.

Duress, in this connection, may be defined as the use of coercion or force to such a degree that it destroys the free agency and will power of testator. Duress and undue influence are frequently confused, owing to a fondness for similes in judicial opinions. Thus it has been said that the influence to be undue

⁹*Essen v. Gilmore*, 259 Neb. 55, 60, 607 N.W.2d 829, 834 (2000).

16.09

¹*See, e.g., In re Will of McNeil*, 749 S.E.2d 499, 505 n. 5 (N.C. 2013) (“Duress is the result of coercion and may be described as the extreme of undue influence and may exist even when the victim is aware of all facts

material to his decision.”); *Matter of Rosasco*, 927 N.Y.S.2d 819 (N.Y. Sur. Ct. 2011) (“In fact, in the American law of wills, the concepts of duress and undue influence are so intertwined that several major Trusts and Estates textbooks omit discussion of duress altogether or explain the idea only in connection with undue influence.”).

must amount to a moral coercion. Duress is not, however, a necessary element of undue influence; and it is error to instruct the jury that influence must amount to force or coercion in order to affect the will as undue influence. Still less is physical force a synonym for undue influence. The exercise of actual duress, which causes testator to make a will that he would not otherwise have made, will render the will invalid. This is occasionally expressed by saying that the duress amounts to undue influence. Threats, force, and violence exerted toward testator to induce him to make his will, if successful, will amount to undue influence, or more exactly, will avoid the will. Threats and violence towards those closely related to testator, who are the natural objects of his bounty, will, if they cause testator to make a will that he would not otherwise have made, render such will invalid. In the law of wills, duress is often classed under undue influence.²

"[W]here a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix."³ This point is discussed at NJI2d Civ. 16.06, Comment & Authorities, part V. These pattern instructions do not address the situation where part of the exhibit may be a valid will and part of it may not be. In that situation, either new instructions will have to be prepared or existing instructions will have to be adapted.

NJI2d Civ. 16.10

MISTAKE

No pattern instruction has been prepared.

COMMENT & AUTHORITIES

Along with undue influence, fraud, duress, and revocation, mistake seems to be one of the grounds on which a contestant can challenge a will.¹ These concepts are discussed in NJI2d Civ. 16.06 through 16.11; regarding the distinctions among these concepts, see the Comments to NJI2d Civ. 16.06 through 16.11.

Mistake may be defined, in a wills context, as action taken or based upon false data or erroneous belief. Since fraud and

²1 Schoenblum, *Page on the Law of Wills*, § 15.144.1 (Matthew Bender 2015) (transposition of lines corrected) (footnotes omitted).

³In re Gloe's Estate, 191 Neb. 395, 401, 215 N.W.2d 98, 101 (1974).

16.10

¹Neb. Rev. Stat. § 30-2431 (Reissue 2016) states, "Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation."

innocent misrepresentation also involve action taken upon false data or erroneous belief, the definition of mistake must go a step farther than that just given in order for mistake to be distinguished from fraud and misrepresentation. In each of these three cases the testator's mind is subjectively the same. The difference consists in the cause or the way in which the ignorance or erroneous belief was reached. In mistake, the testator's reliance upon false data is self induced and is not due, in any way, to the beneficiary who might happen to profit by the mistake or by any third person. In fraud the testator acts upon false data or under a mistaken belief as a result of another person's misconduct done with the intent to deceive the testator. In innocent misrepresentation, the erroneous belief is caused by a third person who might or might not be the beneficiary who profits thereby, but is caused in good faith without intent to deceive.

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As the facts which show mistake frequently go further and show fraud or undue influence, problems of mistake are not presented in the law of wills with the frequency with which they are presented in the law of contracts. Mistake, as far as it can be separated from other legal ideas, consists of an unconscious ignorance or forgetfulness of some fact, which is not caused by the beneficiary who gains thereby; and as a result of which testator executed a will which otherwise he would not have executed.²

One commentator engaged in a thorough analysis of mistake as a grounds for contesting a will and concluded that common-law relief from mistake as such is rare. His conclusion broke the question down into two types of mistake: mistake in the inducement and mistake in the expression. As a general rule, the common law denies relief from the effects of mistake in the inducement. It treats mistake in the expression as an interpretation problem: relief from its effects may be granted if there is ambiguous language to be interpreted; otherwise, relief will be denied.³

The Committee has only found one Nebraska case on the subject of mistake as a grounds for contesting a will. It seems to indicate that the general rule just discussed—little relief from the effects of mistake in a will—applies in Nebraska. In this case, the deceased had believed that an inter vivos transfer of one fourth of his assets to his wife would satisfy her right to one fourth of his estate at the time of his death: he

²1 Schoenblum, *Page on the Law of Wills*, §§ 13.1, 13.2 (Matthew Bender 2015). *in Wills—Part I: A Comparative Analysis of Existing Law*, 47 B.U.L. Rev. 303, 414 (1967).

³Henderson, *Mistake and Fraud*

was mistaken. The court stated that the situation in which it found itself

was the result of a mistake of law. "The testator is bound to find and employ apt words to express his meaning; and if, knowing the words intended to be used, he approves them and executes his will, then he knows and approves the contents of his will, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect." "* * * it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless."⁴

Even though it is listed separately in Neb. Rev. Stat. § 30-2431 (Reissue 2016), quoted above, it may be that there is no need for a jury instruction on mistake. First, it seems rare that mistake will be grounds for invalidating all or part of a will.⁵ Second, it may be that mistake on the part of the testator is taken care of in an action for reformation, an equitable action for which there is no jury instruction because there is no jury. Even "[e]quity, however, has regularly refused to grant reformation."⁶

If instruction is required, one will have to be drafted. NJI2d Civ. 16.06 may be used as a form.

If relief is to be granted from the effect of mistake in part of a will, that does not necessarily result in the entire will being declared invalid: If the mistake can be corrected, then the will can stand; if the part of the will in which the mistake appears can be severed from the rest, then the rest can stand.⁷ "[W]here a part of a will is valid and part is invalid, the valid bequests should be sustained unless that would do injustice to the beneficiaries under the will or defeat the general intent of the testatrix."⁸ This point is discussed at NJI2d Civ. 16.06, Comment & Authorities, part V. These pattern instructions do not address the situation where part of the exhibit may be a valid will and part of it may not be. In that situation, either new instructions will have to be prepared or existing instructions will have to be adapted.

⁴Sadler v. Sadler, 184 Neb. 318, 322, 167 N.W.2d 187, 189 (1969) (citations omitted).

⁵Sadler v. Sadler, *supra*; Henderson, *supra*; Comment, *Proof and Effect of Mistake As to the Provisions of Wills*,

38 Mo.L.Rev. 48 (1973); *Page on Wills*, *supra*.

⁶*Page on Wills*, *supra*, at § 13.8.

⁷*Page on Wills*, *supra*, at § 13.5.

⁸*In re Gloe's Estate*, 191 Neb. at 401, 215 N.W.2d at 101.

NJI2d Civ. 16.11

REVOCATION

No pattern instruction has been prepared.

COMMENT & AUTHORITIES

Along with undue influence, fraud, duress, and mistake, revocation is one of the grounds on which a contestant can challenge a will.¹ These concepts are discussed in NJI2d Civ. 16.06 through 16.11; regarding the distinctions among these concepts, *see* the Comments to NJI2d Civ. 16.06 through 16.11.

If instruction is required, one will have to be drafted. NJI2d Civ. 16.06 may be used as a form. Whatever instruction is prepared should be tailored to address the particular form of revocation alleged and what it takes to prove that kind of revocation.

Revocation . . . is the recalling, annulling, voiding, or invalidating of a testamentary instrument which, but for such revocation, would have been given effect as the last will and testament. The power of a testator to revoke is of equal stature and importance as the power to make a will in the first place, and one of the inherent characteristics of a will is its revocability.²

Specific Nebraska law on the subject of the revocation of a will includes the following:

Neb. Rev. Stat. § 30-2332 (Reissue 2016) states:

A will or any part thereof is revoked

(1) by a subsequent will which, as is evident either from its terms or from competent evidence of its terms, revokes the prior will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the presence of and by the direction of the testator.

16.11

¹Neb. Rev. Stat. § 30-2431 (Reissue 2016) states, “Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or re-

vocation.”

²*Page on Wills, supra*, at § 21.1. The details of revocation are the subject of all of Chapter 21 of that work.

"If revocation is by a subsequent will, it must be properly executed."³ It is possible to prove revocation by proving the existence of a subsequent will even though the subsequent will is lost; however, proving the existence of a subsequent will without some proof of its contents is not enough to prove revocation.⁴

A subsequent will may revoke a prior will either by a clause expressly doing so or by an inconsistent disposition of testator's property.⁵ Courts do not favor revocation by implication, however, and, where possible, they will construe a subsequent will in such a way as to give effect to both it and the previous will.⁶

Partial revocation is permitted.⁷ Where a subsequent will does not expressly revoke a prior will and the two instruments are not so plainly inconsistent that they are incapable of standing together and some but not all of the provisions of the two are inconsistent, then the prior will is revoked only to the extent of the inconsistencies.⁸

Alterations in a will by a stranger to it, done without the knowledge of the testator, are without effect. They are mere spoliation.⁹

Revocation of a will by operation of law is the subject of chapter 21, part V of *Page on the Law of Wills*, part A thereof deals with revocation by a change in the size and nature of the estate and part B with revocation by a change in domestic relations.¹⁰

A reciprocal will, like any other, is revoked by the execution of a later will. Consequently, when a party, who has entered into an agreement to make reciprocal wills makes a

³Neb. Rev. Stat. § 30-2332 comment (Reissue 2016). *Accord* In re Thompson's Estate, 214 Neb. 899, 902, 336 N.W.2d 590, 592 (1983).

⁴Williams v. Miles, 68 Neb. 463, 477, 94 N.W. 705, 710-11 (1903), *reh. denied*, 68 Neb. 463, 96 N.W. 151 (1903); Williams v. Miles, 87 Neb. 455, 455, 127 N.W. 904, 904 (1910) (citing syllabus).

⁵Williams v. Miles, 68 Neb. 463, 476, 94 N.W. 705, 710 (1903), *reh. denied*, 68 Neb. 463, 96 N.W. 151 (1903). *See* In re Estate of Thompson, 214 Neb. 899, 902-03, 336 N.W.2d 590, 592-93 (1983) Finding no evidence that the subsequent "will" was properly executed). Of course, even a seemingly express clause revoking prior wills is insufficient if its authenticity

cannot be established. *See Mecello*, 262 Neb. at 515, 633 N.W.2d at 908 (Connelly, J., concurring) (giving no effect to a note attached to a will, reading "This is my will . . . All others are Revoked!"—where the county court made a factual finding that the signature on the note did not resemble deceased's).

⁶Thompson, *supra*.

⁷*See* Neb. Rev. Stat. § 30-2332 (Reissue 2016) (quoted in text above).

⁸Williams v. Miles, 68 Neb. at 477, 94 N.W. at 710.

⁹In re Diener's Estate, 79 Neb. 569, 572-73, 113 N.W. 149, 150 (1907).

¹⁰*Page on Wills*, *supra*, at §§ 21.66-21.111.

later will, either before or after the death of the other party, his reciprocal cannot be admitted to probate since it is not his last will This is so even though [the last will] is subject to the rights of affected persons to compel a distribution of the estate under the agreement to make reciprocal wills. The remedy of such affected persons is, however, in equity, and not in the probate court, the latter court having no choice but to distribute the estate under the last will in the absence of a decree of an equity court directing a different disposition under the agreement for reciprocal wills.¹¹

“ ‘A claim that a subsequent revoking will is a breach of an agreement for the making of irrevocable reciprocal wills may properly be asserted in a court of equity, but not in the probate court by contesting the later will or by objection to a decree of distribution.’ ”¹²

Regarding mutual wills executed in connection with an agreement supported by consideration becoming, upon the death of one party and the probate of that party's will, an irrevocable contract, see *Pruss v. Pruss*¹³ and *Powell v. American, Charter Federal Savings and Loan Association*.¹⁴ (Further regarding contracts to devise property at death, see NJI2d Civ. 16.01, Comment.)

¹¹In re Middaugh's Estate, 179 Neb. 25, 27–28, 136 N.W.2d 217, 219–20 (1965).

¹²*Youngblood v. Am. Bible Soc'y*, 227 Neb. 472, 474, 418 N.W.2d 554, 556 (1988) (quoting *Syllabus of the court.*) *Kimmel v. Roberts*, 179 Neb.

25, 136 N.W.2d 217 (1965)).

¹³*Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994).

¹⁴*Powell v. Am. Charter Fed. Sav. and Loan Ass'n*, 245 Neb. 551, 514 N.W.2d 326 (1994).

CHAPTER 17

MISCELLANEOUS CIVIL-ACTION INSTRUCTIONS ADDED AFTER THE FIRST PUBLICATION OF NJI2d CIV.

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
|-------|--|
| 17.01 | Private Nuisance |
| 17.02 | Tortious Interference with a Business Relationship or Expectancy |

NJI2d Civ. 17.01

PRIVATE NUISANCE

I. BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of [private] nuisance], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant committed the claimed (act, conduct, et cetera);
2. That the (act, conduct, et cetera) interfered with plaintiff's use and enjoyment of (land);
3. That the interference was:
 - a. intentional and unreasonable; or
 - b. unintentional and (here insert a statement of what the jury must find to establish that the interference is otherwise actionable under the rules controlling liability for negligence, recklessness, or abnormally dangerous conditions or activities);
4. That this interference was a proximate cause of some damage to plaintiff; and
5. The nature and extent of that damage.

II. DEFINITIONS**A. INTENTIONAL**

An interference is intentional if the act is done:

1. With the purpose of causing the interference; or
2. With knowledge the interference is resulting; or
3. With knowledge the interference is substantially certain to result.

B. UNREASONABLE

An interference is unreasonable if a reasonable person would conclude:

1. The (gravity, seriousness) of the damage to the plaintiff outweighs the (utility, usefulness or beneficial nature) of the defendant's (act, conduct, et cetera); or
2. The damage to the plaintiff is significant and the (financial burden, cost) of paying for this and similar damage to others is low enough that it is practical to pay that amount and continue the (act, conduct, et cetera).

C. GRAVITY OR SERIOUSNESS

The (gravity, seriousness) of the damage resulting from an intentional interference with someone else's use and enjoyment of land is judged by its effect on a reasonable person, giving consideration to the following:

1. The nature and extent of the damage involved, including the degree and the duration of the interference, and including all damage suffered by the plaintiff and any damage suffered by or threatened against others;
2. The value to society of the (type, kind) of use or enjoyment interfered with;
3. The extent to which the particular use or enjoyment of land that is being interfered with is suitable to the character of the (locality, location of the land, area around the land);
4. The ability of those damaged to avoid the damage, and the burden of doing so.

D. UTILITY OR USEFULNESS

The (utility, usefulness or beneficial nature) of the (act, conduct, et cetera) that causes an interference with someone else's use and enjoyment of land is judged through the eyes of a reasonable person, giving consideration to the following:

1. The social value attached to the primary purpose of the (act, conduct, et cetera);
2. The suitability of the (act, conduct, et cetera) to the locality; and
3. The impracticality of preventing or avoiding the interference.

SPECIAL NOTE

Part II(B) of this instruction defines "unreasonable." It states that an interference is unreasonable if, among other things, "[t]he damage to the plaintiff is *significant*." (Emphasis added.) The text following heading XII in the Comment & Authorities, below, explains why the Committee chose the word "significant." That part of the Comment & Authorities also notes that *Johnson v. Knox City Partnership*¹ uses the word "substantial."² Those using this instruction might consider substituting the word "substantial" in place of the word "significant."

COMMENT & AUTHORITIES

- I. IN GENERAL
- II. ACTION AT LAW OR IN EQUITY
- III. NUISANCE VERSUS NEGLIGENCE
- IV. NUISANCE VERSUS TRESPASS
- V. "PRIVATE NUISANCE"
- VI. "ACT, CONDUCT, *ET CETERA*"
- VII. "COMMITTED THE CLAIMED ACT"
- VIII. "PRIVATE USE AND ENJOYMENT OF LAND"
 - A. "PRIVATE"
 - B. "USE AND ENJOYMENT"
 - C. "LAND"
- IX. "OTHERWISE ACTIONABLE"
- X. "INTENTIONAL"
- XI. "UNREASONABLE"
- XII. "SIGNIFICANT"

17.01

273 Neb. 123, 728 N.W.2d 101 (2007).

¹Johnson v. Knox City P'ship,

²Id. at 131, 728 N.W.2d at 107.

- XIII. "GRAVITY" AND "UTILITY"
- XIV. THE REASONABLE PERSON STANDARD
- XV. LEGITIMATE BUSINESSES AS NUISANCE

I. IN GENERAL

These are the Burden of Proof and Definitions parts of the Statement of the Case instruction for use in a tort action for private nuisance. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model.

The instruction is drafted for the case where the defendant's action, as opposed to inaction, is being litigated. The tort can result from a failure to act.³ The instruction may need some tailoring where the gravamen of a complaint is a failure to act.

This instruction is written in the present tense. For example, subparagraph number 3 of Part II(B)(1) or the instruction defines gravity or seriousness of the invasion in part as follows: "The extent to which the particular use or enjoyment of land that is being interfered with is suitable to the character of the (locality, location of the land, area around the land)." The critical time is the date of the invasion, not the date the use or enjoyment began and not the date of the trial. The character of a locality can change over time. An invasion may be the result of an act that was not suitable to the locality at the time of the invasion, but is suitable to the locality by the time of the trial. Similarly, a use that is invaded may have been suitable to the locality on the date the use began, but may not have been suitable at the time the invasion began. Similarly, a use unsuitable at the time of the invasion may be suitable by the time of the trial. The point is, there may be cases where it will be necessary to change some of the verbs in the instruction to past tense to ensure that the jury is valuing the interests involved as of the proper date.

Use only those subparagraphs of the instruction as are appropriate to the pleadings and the evidence. For example, if everyone agrees that the defendant committed the act in question, that will be stated in the Issues part of the instruction and subparagraph 1 of part I of the pattern will be omitted. As a second example, if it is decided as a matter of law that the act in question constitutes an "interference," then subparagraph 2 of part I will be omitted.

³Restatement (Second) of Torts below, in part V of this Comment).
§ 824 (1979) (quoted and discussed

Bargmann v. Soll Oil Co.,⁴ *Kopecky v. National Farms, Inc.*,⁵ and *Hall v. Phillips*⁶ adopt the Restatement's approach to the question of tort liability for a private nuisance.

Hall v. Phillips states:

[W]e hold that in a law action one may be subject to liability for a tortious private nuisance (1) if the defendant's conduct is a proximate cause of an invasion of another's interest in the private use and enjoyment of land and (2) if the invasion is intentional and unreasonable or is otherwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities.⁷

Particular authorities for part II, the definitional part of this instruction, are found below in various subparts of this Comment & Authorities. Those parts of the instruction are based on the Restatement (Second) of Torts and on *Kopecky v. National Farms, Inc.*,⁸ cited and discussed below.

See also, e.g., the discussion of the law of nuisance in the cases footnoted here.⁹

II. ACTION AT LAW OR IN EQUITY

Regarding the differences between an action for equitable relief against a nuisance and an action at law to recover damages suffered as a result of a nuisance, see the cases and authority cited in this footnote.¹⁰

III. NUISANCE VERSUS NEGLIGENCE

Private nuisance is a way to recover for an invasion of an interest

⁴*Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1028, 574 N.W.2d 478, 486 (1998).

⁵*Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

⁶*Hall v. Phillips*, 231 Neb. 269, 278, 436 N.W.2d 139, 145 (1989).

⁷*Id.*, citing Restatement (Second) of Torts § 822 (1979).

⁸Restatement (Second) of Torts *supra* and *Kopecky, supra*.

⁹*Johnson v. Knox City P'ship*, 273 Neb. 123, 132, 728 N.W.2d 101, 108 (2007) (cattle confinement facility); *Stephens v. Pillen*, 12 Neb. App. 600, 681 N.W.2d 59 (2004) (hog con-

finement operation); *Thomsen v. Greve*, 4 Neb. App. 742, 550 N.W.2d 49 (1996) (smoke from wood-burning stove).

¹⁰Action at law: *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989) (discussing the difference between the action at law and in equity in private nuisance cases). Actions in equity: *Johnson v. Knox City P'ship*, 273 Neb. 123, 728 N.W.2d 101 (2007); *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950). See generally, Restatement (Second) of Torts § 822 comment d (1979).

in the use and enjoyment of land. The reference point is "the interest invaded and not . . . the type of conduct that subjects the actor to liability."¹¹ True, the invasion must be intentional and unreasonable or must result from negligent, reckless, or abnormally dangerous conduct, that is, there must be liability-forming conduct, but the point of reference is the interest invaded.

This is important because a focus on the type of conduct involved can lead to attempts to distinguish private nuisance from, say, negligence.¹² Private nuisance is not distinguished from negligence, but is a type of interest that may be invaded in a number of ways, including negligently.

The invasion may be intentional. If so, it must also be unreasonable.¹³ The invasion may be unintentional. If so, it must also be negligent, reckless, or abnormally dangerous.¹⁴

IV. NUISANCE VERSUS TRESPASS

The Restatement (Second) of Torts distinguishes nuisance from trespass as follows:

In [both trespass and nuisance], liability may arise from an intentional or an unintentional invasion. For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.

. . . .

The two actions, trespass and private nuisance, are . . . not entirely exclusive or inconsistent, and in a proper case in which the elements of both actions are fully present, the plaintiff may have his choice of one or the other, or may proceed upon both.¹⁵

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land."¹⁶

¹¹Restatement (Second) of Torts § 822 comment b (1979).

¹²*Id.*

¹³*Id.* at § 822 comment c.

¹⁴*Id.*

¹⁵*Id.* at § 821D comments *d* and *e*.

¹⁶*Stephens v. Pillen*, 12 Neb. App.

V. "PRIVATE NUISANCE"

In its introductory clause, this instruction uses the word private, in brackets. There are two types of nuisance, public and private. "A public nuisance is an unreasonable interference with a right common to the general public."¹⁷ "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."¹⁸ The word "private" is in the introductory clause to highlight this difference. It is in brackets because it probably would not serve any purpose to include it in the instruction given to the jury. This is so because the distinction between the private and public nuisance is not a distinction the jury is likely to be required to make.

Uses of land are either private or public. The uses that members of the public are privileged to make of public highways, parks, rivers and lakes, are "public" as distinguished from "private." By private use is meant a use of land that a person is privileged to make as an individual, and not as a member of the public. This [instruction] do[es] not deal with invasions of interests in public uses of land, and the phrase "use and enjoyment" is always used here in the sense of "private use and enjoyment."¹⁹

VI. "ACT, CONDUCT, *ET CETERA*"

At various places, the instruction offers the parenthetical choice "(act, conduct, et cetera)." As noted above, in part I of this Comment & Authorities, the tort can result from a failure to act.

"The conduct necessary to make the actor liable for . . . a private nuisance may consist of (a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the . . . private interest."²⁰ However, the situations where an actor may be liable for a failure to act are more limited than situations involving an affirmative act causing the nuisance.

Three situations are commonly recognized: failure to prevent third parties from causing a nuisance on one's land, failing to prevent a nuisance resulting from an existing artificial condition on one's land,

600, 606, 681 N.W.2d 59, 65 (2004).

¹⁷Restatement (Second) of Torts § 821B (1979).

¹⁸Johnson v. Knox City P'ship, 273 Neb. 123, 131, 728 N.W.2d 101, 107 (2007), quoting Hall v. Phillips, 231 Neb. 269, 272, 436 N.W.2d 139,

142 (1989), in turn quoting Restatement (Second) of Torts § 821D (1979).

¹⁹Restatement (Second) of Torts § 821D comment c (1979).

²⁰Id. at § 824 (1979). See also id. at § 838, et seq., for a discussion of liability from a failure to act.

and failing to prevent a public nuisance resulting from an existing natural condition on one's land if the resultant nuisance affects a public highway.

(1) "A possessor of land which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable" and the possessor knows the activity will involve unreasonable risk of causing a nuisance and "he consents to the activity or fails to exercise reasonable care to prevent the nuisance."²¹

(2) If an existing artificial condition on one's land is otherwise actionable, the possessor may be liable if they "know[] or should know of the condition and the nuisance or unreasonable risk of nuisance involved . . . knows or should know that it exists without the consent of those affected by it," and "has failed after a reasonable opportunity to take reasonable steps to abate the condition."²²

(3) Ordinarily, a possessor of land is not liable for a nuisance resulting solely from a natural condition, unless they "know[] or ha[ve] reason to know that a public nuisance caused by natural conditions on his land near a public highway" exists and they do not "exercise reasonable care to prevent an unreasonable risk of harm to persons using the highway."²³

Conduct is the word used in the *Hall* case and the Restatement. The Committee offers the parenthetical choice "(act, conduct, et cetera)" because a word other than conduct may have to be substituted, especially in the case of a failure to act. Even in a case where conduct would work, another word might be more precise and more easily understood by the jury. It might be best to tailor this part of the instruction to the case at bar. In any event, whatever words are used here should relate back to the wording of the Issues part of the instruction.

VII. "COMMITTED THE CLAIMED ACT"

This relates to subparagraph 1 of part I of the instruction. The instruction is written in terms of an "act." The tort can be committed by an "omission," a failure to act. See part VI of this Comment & Authorities, *supra*. In a case where the gravamen of the complaint is a failure to act, this part of the instruction will have to be changed accordingly.

VIII. "PRIVATE USE AND ENJOYMENT OF LAND"

This relates to subparagraph 2 of part I of the instruction.

²¹*Id.* at § 838.

²³*Id.* at § 840.

²²*Id.* at § 839.

A. "PRIVATE"

The Restatement refers to a plaintiff's "private use and enjoyment of land."²⁴ The Nebraska Supreme Court also refers to the plaintiff's "private use and enjoyment of land."²⁵ The instruction refers to the plaintiff's "use and enjoyment of (land)." The instruction drops the use of the word private. This is not a fact question, not a question to be submitted to the jury. Regarding public versus private nuisance, see part V of this Comment & Authorities, *supra*.

B. "USE AND ENJOYMENT"

"Use and enjoyment of land" may not always be the best words to use in the instruction itself. For example, the *Hall* case involved a herbicide applied to a corn crop, and applied non-negligently, by the way. Fifteen days later, an extraordinarily high wind blew some of this soil onto a neighbor's land and, more importantly, onto the neighbor's bean crop. This allegedly reduced the yield from the bean crop. To refer to the plaintiff's "use and enjoyment" of his bean crop may be an awkward way of making the appropriate point. If the only "invasion of plaintiff's use and enjoyment of land" alleged in the case is damage to plaintiff's bean crop, and if, as a matter of law, damage to plaintiff's bean crop is an invasion of plaintiff's interest in the private use and enjoyment of land, then it would be appropriate to redraft this instruction as follows:

"1. That defendant's herbicide damaged plaintiff's beans.

"2. That defendant's application of his herbicide was either:

"a. . . .

"b. . . .

"3. The nature and extent of that damage."

C. "LAND"

The instruction speaks of "an invasion of plaintiff's interest in the use and enjoyment of (land)." It does not say whose land. The Restatement limits recovery "to those who have property rights and privileges in respect to the use and enjoyment of the land affected."²⁶ This includes the person in possession of the land, whether or not that person is the owner. It includes an owner who has a present or future right to the use and enjoyment of the land. It also includes "owners of easements and profits in the land"; and "owners of nonpossessory estates in the land

²⁴Restatement (Second) of Torts § 822 (1979). 436 N.W.2d 139 (1989).

²⁶Restatement (Second) of Torts

²⁵Hall v. Phillips, 231 Neb. 269, § 821E (1979).

that are detrimentally affected by interferences with its use and enjoyment.”²⁷

The word “land” is in parentheses to suggest case-by-case substitution. Rather than using the word land, the Committee suggests describing the land, if possible, by giving its address or its name. For example, if the “land” in question is a home at 123 Nebraska Ave., then subparagraph 2 of Part I could read

“That the (act, conduct, *et cetera*) interfered with the plaintiff’s use and enjoyment of the home at 123 Nebraska Ave.”

If the “land” is this same home and the plaintiff is the owner, this part of the instruction can read

“ . . . interfered with plaintiff’s use and enjoyment of her home at 123 Nebraska Ave.”

Or, if plaintiff is the owner, but not the occupier, of the house in question:

“ . . . the use and enjoyment of the home she owns at 123 Nebraska Ave.”

Or

“ . . . the use and enjoyment of their land.”

Or any number of variations on these themes.

IX. “OTHERWISE ACTIONABLE”

This relates to subparagraph 3(b) of part I of the instruction.

The *Hall* case states the following as a part of one of the ways a tortfeasor may be liable for a private nuisance: “[O]therwise actionable under rules controlling liability for negligence or liability for abnormally dangerous conditions or activities.”²⁸ The Committee picked up that language in subparagraph 3(b) of part I of the instruction. We do not mean to exclude the possibility that there may be some other rule of case or statutory law, other than the two stated, that would satisfy this part of the burden of proof.

The comment to the Restatement adds this:

²⁷*Id.*

cord Restatement (Second) of Torts § 822 (1979).

²⁸*Hall v. Phillips*, 231 Neb. 269, 278, 436 N.W.2d 139, 145 (1989). *Ac-*

The term "otherwise actionable" is used to indicate that in addition to the requirements listed earlier in this Section, the other elements of a cause of action for harm caused by reckless, negligent or abnormally dangerous conduct, stated in other parts of this Restatement, must be present in order to establish liability when the invasion of a person's interest in the use and enjoyment of land is unintentional.²⁹

Whatever other negligent or abnormally dangerous conduct (or other rule of law) is in issue should be specified and the instruction relating thereto should be inserted at this point or referenced at this point and given elsewhere in the instructions.

X. "INTENTIONAL"

This relates to subparagraph 3(a) of part I of the instruction and to part II(A) of the instruction.

Use of the words "intentional and unreasonable" has something to do with the difference between nuisance and trespass, as explained in the Restatement (Second) of Torts § 821D comments *d* and *e* (1979), and as discussed above, in part IV of this Comment & Authorities.

Part II(A) of this instruction, the definition of "intentional," is based on the discussion in *Hall v. Phillips*,³⁰ which follows the approach of the Restatement.³¹

An invasion of someone else's interest is intentional if it is done with the purpose of causing the invasion or with knowledge the invasion is resulting, or with knowledge the invasion is substantially certain to result.³² What must be intentional is the invasion, not just the conduct.³³ The focus is on the actor's knowledge.³⁴

In the case of a continuing invasion where the first invasion is

²⁹Restatement (Second) of Torts § 822 comment h (1979).

³⁰*Hall v. Phillips*, 231 Neb. 269, 273, 436 N.W.2d 139, 142 (1989). *Accord* *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1028, 574 N.W.2d 478, 486 (1998); *Stephens v. Pillen*, 12 Neb. App. 600, 606, 681 N.W.2d 59, 65 (2004).

³¹Restatement (Second) of Torts § 825 (1979).

³²*Hall v. Phillips*, *supra*; Restatement, *supra*, § 825.

³³Harvey Perlman, Annual Insti-

tute on the Annual Survey of Nebraska Law, Nebraska Tort Liability 1988-1989, Review and Comments 19 (1989).

³⁴Restatement, *supra*, at § 825 comment *c*. *Accord* *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 1028, 574 N.W.2d 478, 486 (1998) (noting court has adopted Restatement's approach to law of nuisance; "intentional" invasion includes act done with intent to invade, with knowledge invasion is occurring, or with knowledge invasion is substantially certain to result).

unintentional, subsequent invasions become intentional after the actor knows the invasion is occurring.³⁵ The invasion need not be motivated by ill will.³⁶

Instruction defining the word intentional may not be necessary in every case where there is instruction on private nuisance. This definition is included for those cases where it will be helpful to the trier of fact.

Note that the three numbered subparagraphs of this part of the instruction are alternative, not cumulative.

XI. "UNREASONABLE"

This relates to subparagraph 3(a) of part I of the instruction and to part II(B) of the instruction.

As discussed above, in part IV of this Comment & Authorities, use of the words "intentional and unreasonable" has something to do with the difference between nuisance and trespass.

Part II(B) of this instruction is supported by *Kopecky v. National Farms, Inc.*,³⁷ *Hall v. Phillips*,³⁸ and the Restatement.³⁹

This part of the instruction states: "The (gravity, seriousness) of the damage to the plaintiff outweighs the (utility, usefulness, or beneficial nature) of the defendant's (act, conduct, et cetera)." An invasion of someone else's interest is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct, or . . . the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation for the conduct not feasible."⁴⁰ In other words,

the trier of fact must determine whether the gravity of harm outweighs the utility of the defendant's conduct or whether the defendant's conduct causes serious harm, but payment of compensatory damages would render the defendant's continued conduct unfeasible. Even if utility of a defendant's conduct outweighs the gravity of the harm caused by the intentional invasion in a private nuisance, a defendant may still be liable if (1) the defendant's conduct causes severe harm and (2) the

³⁵Restatement, *supra*, at § comment d.

³⁶*Id.* at comment c.

³⁷*Kopecky v. National Farms, Inc.*, 244 Neb. 846, 851-53, 510 N.W.2d 41, 48 (1994).

³⁸*Hall v. Phillips*, 231 Neb. 269, 274-75, 436 N.W.2d 139, 143 (1989).

³⁹Restatement (Second) of Torts § 826 (1979).

⁴⁰*Id.*

defendant's compensation for the invasion will not prohibit the defendant's utilitarian conduct.⁴¹

When drafted as a pattern instruction this language is difficult to understand. Regarding subparagraph 2 of Part II(B) of this instruction, as is true regarding other parts of the instruction, where there is a need for this subparagraph, the Committee suspects a better subparagraph can be drafted in the context of the case in which the need arises. In this regard, the Restatement states:

It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying . . .

In a damage action for an intentional invasion of another's interest in the use and enjoyment of land, therefore, the invasion is unreasonable not only when the gravity of the harm outweighs the utility of the conduct, but also when the utility outweighs the gravity—provided the financial burden of compensating for the harms caused by the activity would not render it unfeasible to continue conducting the activity.⁴²

XII. "SIGNIFICANT"

Subparagraph 2 of part II(B) of the instruction speaks of "(significant)" damage. The Restatement variously uses the words serious, significant, and severe. From those, the Committee chose "significant" because it is not such a charged word as the other two. *Johnson v. Knox City Partnership*⁴³ uses the word "substantial": "With respect to a nuisance in the contest of an action in equity, the invasion of or interference with another's private use and enjoyment of land need only be substantial."⁴⁴

XIII. "GRAVITY" AND "UTILITY"

This relates to parts II(B)(1) and (2) of the instruction.

The gravity of harm is its seriousness from the objective, legal standpoint, and the utility of conduct is its meritoriousness from the same standpoint. The gravity or seriousness of harm from a legal standpoint is not necessarily the same as its seriousness from the standpoint of the person harmed . . . Likewise, the utility or meritoriousness of conduct from a legal

⁴¹*Hall*, 231 Neb. at 274-75, 436 N.W.2d at 143.

⁴²Restatement (Second) of Torts § 826 comment f (1979).

⁴³*Johnson v. Knox City P'ship*, 273 Neb. 123, 728 N.W.2d 101 (2007).

⁴⁴*Id.* at 131, 728 N.W.2d at 107.

standpoint is not always the same as its meritoriousness from the standpoint of the actor.⁴⁵

Furthermore, the Restatement talks of liability only to those who suffer significant harm “of a kind that would be suffered by a normal person.”⁴⁶ This is why the introductory clause to part II(B) and parts II(B)(1) and (2) of the instruction states a reasonable person standard.

Factors that go into the trier of fact’s decision regarding the gravity of the harm are discussed, and examples are given, at Restatement (Second) of Torts § 827 (1979). Factors that go into the trier of fact’s decision regarding the utility of the conduct are discussed, and examples are given, at Restatement (Second) of Torts § 828 (1979). These factors are for the jury’s consideration.⁴⁷

Regarding the admissibility of evidence of “social utility,” see *Kopecky v. National Farms, Inc.*⁴⁸

Discussion in the Restatement is relevant to subparagraph 1,⁴⁹ subparagraph 2,⁵⁰ subparagraph 3,⁵¹ and subparagraph 4 of part II(B)(1)⁵² of the instruction.

XIV. THE REASONABLE PERSON STANDARD

This relates to the introductory clauses of parts II(B) and II(B)(1) and II(B)(2). Regarding the use of the reasonable person standard, see Restatement (Second) of Torts.⁵³

“Whether noise is sufficient to constitute a nuisance depends upon its effect upon the ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities.”⁵⁴ “Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and must be

⁴⁵Restatement (Second) of Torts § 826 comment d (1979).

⁴⁶*Id.* at § 821F (1979)

⁴⁷Restatement (Second) of Torts § 826, comment e (1979).

⁴⁸*Kopecky v. National Farms, Inc.*, 244 Neb. 846, 858–59, 510 N.W.2d 41, 51 (1994).

⁴⁹Restatement (Second) of Torts § 827 comment c (1979).

⁵⁰*Id.* at § 827 comment f.

⁵¹*Id.* at § 827 comment g.

⁵²*Id.* at § 827 comment i.

⁵³*Id.* at § 821F. See also, *id.* at § 826 comment d and the discussion,

supra, in part XIII of this Comment & Authorities.

⁵⁴*Kaiser v. Western R/C Flyers, Inc.*, 239 Neb. 624, 631, 477 N.W.2d 557, 562 (1991) (noise generated by operating model airplanes, though annoying, did not rise to level of nuisance), quoting *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 101-02, 362 N.W.2d 27, 29 (1985). Accord *Johnson v. Knox City P'ship*, 273 Neb. 123, 132, 728 N.W.2d 101, 108 (2007) (regarding physical discomfort, the act is judged not by the actual discomfort of the plaintiff, but by the “actual physical discomfort to one of ordinary sensibilities”; it is presumed that the plaintiff has ordinary sensi-

based upon an objective standard of reasonableness. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.”⁵⁵

There is something disquieting about the final, oft repeated, sentence of that quotation: “It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.” The cases cited seem to say that the legal standard is the ordinary person. If that is so, then what are we to make of oft repeated statement that the “plaintiff has ordinary sensibilities,” “absen[t] evidence to the contrary”?⁵⁶ Together, these statements seem to say that the test is that of the ordinary person until one party or the other introduces evidence that the plaintiff’s sensibilities are different than those of the “ordinary person.”

XV. LEGITIMATE BUSINESSES AS NUISANCE

With respect to an action in equity, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. A legal and proper activity may be a nuisance in fact simply because of its location.

... Where one’s business operation as conducted materially and injuriously affects the comfort and enjoyment and

bilities—absent evidence to the contrary). To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 270, 512 N.W.2d 626, 632 (1994); *Flansburgh v. Coffey*, 220 Neb. 381, 385, 370 N.W.2d 127, 131 (1985); *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 236–37, 361 N.W.2d 556, 570 (1985). There is a presumption, in the absence of evidence of insensibilities of the plaintiff to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.

⁵⁵*Kaiser, supra. Accord, e.g., Johnson v. Knox City P’ship*, 273 Neb. 123, 132, 728 N.W.2d 101, 108 (2007); *Goeke, supra; Flansburgh, supra; Cline, supra. Accord* Restatement

(Second) of Torts § 826, comment c (1979) (“The unreasonableness of an intentional invasion is determined from an objective viewpoint. The question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.”).

⁵⁶Oft repeated: *see, e.g.*, all of the cases cited the preceding footnote and other cases cited therein.

property rights of those in the vicinity, it becomes a nuisance and may be enjoined.⁵⁷

NJI2d Civ. 17.02

TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP OR EXPECTANCY

I. BURDEN OF PROOF

Before the plaintiff can recover against the defendant [on (his, her, its) claim of interference with a (valid business relationship or expectancy)], the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the claimed (valid business relationship or expectancy) existed;
2. That the defendant knew the (valid business relationship or expectancy) existed;
3. That the defendant interfered with the (valid business relationship or expectancy) (as claimed, in one or more of the ways claimed);
4. That the interference was intentional;
5. That the interference was unjustified;
6. That the interference was a proximate cause of some damage to the plaintiff; and
7. The nature and extent of that damage.

II. DEFINITIONS

A. INTENTIONAL

An interference with a business relationship is intentional if it is done either:

1. With the purpose of causing the interference, even if there was another purpose in addition, or
2. With knowledge the interference is substantially certain to result.

⁵⁷Johnson v. Knox City P'ship, 107-08 (2007) (citations omitted).
273 Neb. 123, 131-32, 728 N.W.2d 101,

B. UNJUSTIFIED

An interference with a business relationship or expectancy is unjustified if (see part 5 of the Comment & Authorities, below).

COMMENT & AUTHORITIES

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- II. THE ESSENTIAL ELEMENTS OF THE TORT
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- XI. THE PRIVILEGE OF A COMPETITOR
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- XIII. CIVIL DAMAGE ACTIONS BASED ON THE FELONY OF INTENTIONALLY DRIVING ANOTHER OUT OF BUSINESS
- XIV. MEMBERS OF A CORPORATION MAY NOT MAINTAIN A CLAIM FOR TORTIOUS INTERFERENCE WITH THE BUSINESS RELATIONSHIPS OF THE CORPORATION
- XV. PRODUCT DISPARAGEMENT

I. IN GENERAL

This is the Burden of Proof instruction to be used in the tort action for tortious interference with a business relationship or expectancy. For the Issues and Effect of Findings parts of the instruction, use NJI2d Civ. 2.01 as a model.

Some actions may be brought as either contract or tort actions. See NJI2d Civ. 15.01, Comment.

In a related area, that is, breach-of-contract affirmative defenses based on extreme impracticability or impossibility, fraud, misrepresentation, false representation, undue influence, and duress, see NJI2d Civ. 15.20, 15.21, 15.22, 15.23, 15.25, and 15.26, respectively.

For additional depth on this subject, see Professor Harvey Perlman's important article in the *University of Chicago Law Review*.¹

II. THE ESSENTIAL ELEMENTS OF THE TORT

These are the five essential elements of a plaintiff's case for tortious interference with a business relationship or expectancy. (1) the existence of a valid business relationship or expectancy. (2) The one charged with interfering with that relationship or expectancy knew of its existence. (3) The one charged with interfering with that relationship or expectancy committed an unjustified intentional act of interference. (4) The interference proximately caused some damage to the one whose relationship or expectancy was interfered with. (5) the amount of that damage.²

III. A VALID BUSINESS RELATIONSHIP OR EXPECTANCY

Throughout, this instruction parenthetically refers to a "valid business relationship or expectancy." Those words are used because they define the boundaries of the tort and they are the words of the cases and other authorities. They are in parentheses to alert the reader that those words are not to be used in the instruction actually given. Instead, specify the relationship. That is, insert a word such as "contract" or "partnership" or whatever word or phrase describes the particular relationship involved. Regarding this substitute, keep in mind the value of using the words that will be most helpful to the jury, perhaps the words used by counsel and the witnesses during the trial.

17.02

¹Harvey Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61 (1982).

²*E.g.*, *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 679, 950 N.W.2d 321, — (2020); *George Clift Enterprises, Inc. v. Oshkosh Feedyard Corporation*, 306 Neb. 775, 813, 947 N.W.2d 510, — (2020) ("One of the basic elements of tortious interference with a business relationship requires an intentional act that induces or causes a breach or termination of the relationship or expectancy."); *Denali Real Estate, LLC v. Denali Custom Builders, Inc.*, 302 Neb. 984, 1004, 926 N.W.2d 610, 626–27 (2019); *Thompson v. Johnson*, 299 Neb. 819, 828, 910 N.W.2d 800, 806 (2018); *Midland Properties, L.L.C. v. Wells Fargo, N.A.*, 296 Neb. 407, 413, 893 N.W.2d 460,

465 (2017); *Sulu v. Magana*, 293 Neb. 148, 157, 879 N.W.2d 674, 681 (2016); *Steinhausen v. HomeServices of Nebraska, Inc.*, 289 Neb. 927, 944–45, 857 N.W.2d 816, 831 (2015); *Professional Management Midwest, Inc. v. Lund Co.*, 284 Neb. 777, 789, 826 N.W.2d 225, 234–35 (2012); *The Lamar Co., LLC v. City of Fremont*, 278 Neb. 485, 497, 771 N.W.2d 894, 906 (2009) (concerning allegations that a governmental subdivision interfered with a business relationship or expectancy); *Recio v. Evers*, 278 Neb. 405, 417–18, 771 N.W.2d 121, 131–32 (2009); *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 275 Neb. 642, 663, 748 N.W.2d 626, 647 (2008); *Pony Exp. Cab and Bus, Inc. v. Ward*, 662 F. Supp. 85, 89 (D. Neb. 1987). *See also* *Prosser and Keeton on the Law of Torts* §§ 129, 130 (W. Keeton gen. ed. 5th ed. 1984).

If the business relationship is in issue, the jury should be told what they need to find in order to find that the business relationship existed. In that regard, look for an appropriate definitional instruction elsewhere in this volume.

IV. KNOWLEDGE OF THE RELATIONSHIP AND INTENT TO INTERFERE

Intent includes acting for the primary purpose of interfering with the performance of the contract. It includes acting with a desire to interfere even when the actor has an additional purpose in mind. It includes acting with knowledge that the interference is certain or substantially certain to occur as a result of the action.³

V. "UNJUSTIFIED" INTERFERENCE

A. THE INTERFERENCE MUST BE "UNJUSTIFIED"

Early Nebraska cases referred to an "intentional act of interference," without a qualifier such as "improper" or "unjustified." It seemed clear, however, that there is in this tort an element of "improper" interference. That is, some interference is actionable, some is not. (For examples of some acts of "interference" that are not actionable, see below in this Comment & Authorities.)

Since interference alone is not enough,⁴ there must be a qualifier. The difficulty is in coming up with a qualifier that applies across the board, a qualifier that can be put into the pattern and will work in most cases.⁵ The Committee was unable to come up with such a word or phrase.

Originally, in the first version of this instruction, the Committee used the word "improper" because it is the word used by Prosser and the Restatement.⁶ This instruction uses the word "unjustified" because since the first publication of *NJI2d Civ.* "unjustified" is the encompassing descriptive word used by the Nebraska Supreme Court. For example: "[A]n unjustified intentional act of interference on the part of the interferer."⁷ "Any suggestion . . . that an intentional but justified

³Restatement (Second) of Torts § 766 comment j (1977).

⁴See, e.g., *Matheson v. Stork*, 239 Neb. 547, 551, 477 N.W.2d 156, 160 (1991).

⁵Professor Perlman's article discusses this problem at some length. Harvey Perlman, *Interference with Contract and Other Economic Expec-*

tancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61 (1982).

⁶Prosser and Keeton on the Law of Torts §§ 129, 130, at 979, 1009 (W. Keeton gen. ed. 5th ed. 1984); Restatement (Second) of Torts § 766 (1977).

⁷See, e.g., *Matheson*, 239 Neb. at 551, 477 N.W.2d at 160.

interference may subject the interfering party to liability is disapproved.”⁸

B. WHAT INTERFERENCE IS “UNJUSTIFIED” INTERFERENCE?

To assist in determining whether the interference is “unjustified,” Nebraska has adopted the seven-factor balancing test of the Restatement (Second) of Torts. Under the Restatement’s general test, factors to consider in determining whether interference with a business relationship is “improper” include: (1) the nature of the actor’s conduct, (2) the actor’s motive, (3) the interests of the other with which the actor’s conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor’s conduct to the interference, and (7) the relations between the parties. Thus, we would ordinarily use these factors in order to determine whether interference is “improper” and, thus, “unjustified” under our law.⁹

This is a list of important factors, but it is not exhaustive.¹⁰

Professor Perlman’s article, mentioned in part I of, and cited throughout in, this Comment & Authorities gives examples of what is unjustified, including “unlawful”¹¹ or independently tortious acts.¹²

The reader may be struck, as was the author of this Comment &

⁸*Id.* *Accord* The Lamar Co., LLC v. City of Fremont, 278 Neb. 485, 497, 771 N.W.2d 894, 906 (2009); Recio v. Evers, 278 Neb. 405, 418, 771 N.W.2d 121, 132 (2009) (“In order to be actionable, interference with a business relationship must be both intentional and unjustified. An intentional, but justified, act of interference will not subject the interferer to liability.”) (footnotes omitted); Macke v. Pierce, 266 Neb. 9, 15, 661 N.W.2d 313, 318 (2003); Wiekhorst Bros. Excavating & Equipment Co. v. Ludewig, 247 Neb. 547, 557, 529 N.W.2d 33, 40 (1995) (holding that intentional, but justified, act of interference will not subject interferer to liability).

⁹*Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 679–80, 950 N.W.2d 321, — (2020) (“The issue is whether, upon a consideration of the relative significance of the factors involved, the conduct should be per-

mitted without liability, despite its effect of harm to another.” *Id.* at 680, 950 N.W.2d at —.”). *Accord*, *Huff v. Swartz*, 258 Neb. 820, 829, 606 N.W.2d 461, 468 (2000); *Thompson v. Johnson*, 299 Neb. 819, 829, 910 N.W.2d 800, 807 (2018) (same quotation, but without the final sentence) (“Ordinarily, we would use these factors to determine whether interference is ‘improper’ and, thus, ‘unjustified’ under our law.”); *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 275 Neb. 642, 663, 748 N.W.2d 626, 647 (2008); *Sulu v. Magana*, 293 Neb. 148, 158, 879 N.W.2d 674, 682 (2016) (footnotes omitted; referencing Restatement (Second) of Torts § 767 (1977)).

¹⁰*Sulu*, *supra*; *Aon Consulting*, *supra*.

¹¹Harvey Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev.

Authorities, by how unhelpful “the seven-factor balancing test” from above actually is when it comes to preparing jury instructions. What we seem to have here is an attempt to define activities that, while neither unlawful nor otherwise tortious, produce social loss.¹³

One thing is clear, however.

“One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other’s contractual relation, by giving the third person

“(a) truthful information, or

“(b) honest advice within the scope of a request for the advice.

“The truthfulness of the information provided correlates to whether the interference is unjustified. If the information provided is truthful, the inference is *not* unjustified.”¹⁴

Generally, this is so even when truthful information is provided with actual malice. “[M]alicious motive is a factor which may be considered in determining whether interference is unjustified,”¹⁵ but, standing alone, it generally it is not enough.¹⁶ This is so because of the

61, 69, *et seq.* (1982).

¹²*Id.* at 78, *et seq.* Neither “unlawful” nor “independently tortious” can be substituted in the pattern instruction for the word “unjustified,” because neither is sufficiently comprehensive. Those substitutions may, however, work in individual cases: For example, if the allegations and the evidence both argue that it is the illegality (and only illegality) of the act in question that makes it unjustified, then perhaps illegal may be substituted for unjustified.

¹³*Id.* at 128.

¹⁴*Sulu v. Magana*, 293 Neb. 148, 158-59, 879 N.W.2d 674, 682 (2016) (emphasis added; footnotes omitted), quoting Restatement (Second) of Torts § 772 at 50 (1977)). *Accord* *Recio v. Evers*, 278 Neb. 405, 421, 771 N.W.2d 121, 133 (2009). “[A] person does not incur liability for interfering with a business relationship by giving truth-

ful information to another.” *Thompson v. Johnson*, 299 Neb. 819, 829, 910 N.W.2d 800, 807 (2018). “[B]ecause [the defendants] deduced evidence that their communications with MPS were truthful and therefore not ‘unjustified,’ they disproved an essential element of tortious interference with a business relationship and made a prima facie showing that they were entitled to summary judgment . . . [and] the burden shifts to the party opposing the motion . . .” *Id.* at 830, 910 N.W.2d at 808 (paragraph break omitted).

¹⁵Same quotation: *Thompson*, 299 Neb. at 829, 910 N.W.2d at 807; *Recio*, 278 Neb. at 425, 771 N.W.2d at 136, *Huff*, 258 Neb. at 829, 606 N.W.2d at 469.

¹⁶“While a malicious motive is a factor which may be considered in determining whether interference is unjustified, and may indeed weigh heavily toward such a finding, it is

general rule that there cannot be any liability “for the communication of truthful information.”¹⁷

Similarly, “[t]he fact that hatred or desire for revenge was part of the reason is insufficient to make interference improper if the conduct is directed at least in part to advancement of [a party’s] own competitive interest and social benefits arising therefrom.”¹⁸ *Lamar Co v. City of Fremont* discusses when competition is an improper motive.¹⁹

C. WHAT TO DO IN THE INSTRUCTION WITH REGARD TO THE WORD “UNJUSTIFIED”

As noted above, the word “unjustified” is in the pattern because it is the qualifier used by the Nebraska Supreme Court. Admittedly, this word is too vague and undefined to stand on its own in an instruction to the jury. Given this, there seem to be two choices: (1) substitute a more specific word or phrase for the word “unjustified” and delete or rewrite Part II(B) of the pattern instruction; or (2) leave the word unjustified in the instruction and define it in Part II(B). What could be substituted depends on the particular case. Some examples can be found elsewhere in this Comment & Authorities, including Professor Perlman’s article cited in part I.

VI. DAMAGE

The fact that a defendant intentionally interfered with plaintiff’s business relationship does not necessarily mean plaintiff was harmed.²⁰ Just as elsewhere in the law of torts, the plaintiff must prove harm.²¹

VII. A CONSPIRACY TO INTERFERE

“A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.”²² “A claim of civil conspiracy requires the plaintiff to establish that the defendants had an

generally insufficient standing alone to establish that fact under the seven-factor balancing test . . .) *Huff*, 258 Neb. at 829, 606 N.W.2d at 469.

¹⁷*Thompson*, 299 Neb. at 829, 910 N.W.2d at 807.

¹⁸*The Lamar Co., LLC v. City of Fremont*, 278 Neb. 485, 498, 771 N.W.2d 894, 906 (2009), quoting *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 842, 320 N.W.2d 759, 762 (1982) (brackets added in *Lamar*).

¹⁹*See Lamar*, 278 Neb. at 497–98, 771 N.W.2d at 905–06, and the authorities cited and discussed there.

²⁰*See Pokorski v. McAdams*, 204 Neb. 725, 731–32, 285 N.W.2d 824, 827–28 (1979).

²¹*See Pokorski v. McAdams*, 204 Neb. 725, 731–32, 285 N.W.2d 824, 827–28 (1979).

²²Same quotation: *George Clift Enters. v. Feedyard Corp.* 306 Neb. 775, 813, 947 N.W.2d 510, — (2020);

expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff.”²³

“[A] conspiracy is not a separate and independent tort in itself; rather, is dependent upon the existence of an underlying tort. So, without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.”²⁴ Additionally, “In proving conspiracy to tortiously interfere with a business relationship, a claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy.”²⁵

VIII. INTERFERENCE WITH A MARITAL RELATIONSHIP

The tort of intentional interference with a contract is not available as regards interference with the marital relationship.²⁶

IX. REFUSAL TO CONTINUE AN AT-WILL BUSINESS RELATIONSHIP

“Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will em-

Eicher v. Mid Am. Fin. Invest. Corp., 275 Neb. 462, 478, 748 N.W.2d 1, 15 (2008).

²³Same quotation: *E.g.*, *George Clift Enters.*, 306 Neb. at 813, 947 N.W.2d at 537 (2020); *Salem Grain Storage Co., v. Grain and Barge Co.*, 297 Neb. 682, 701, 900 N.W.2d 909, 923-24 (2017).

²⁴*George Clift Enters.*, 306 Neb. at 813, 947 N.W.2d at — (“The gist of a civil conspiracy action is not the conspiracy charged, but the damage the plaintiff claims to have suffered due to the wrongful acts of the defendants.”). *Accord, e.g.*, *Litherland v. Jurgens*, 291 Neb. 775, 785, 869 N.W.2d 92, 99 (2015) (“We decline to adopt the tort of intentional interference with an inheritance”). *Eicher, supra.* (“[D]efendants violated the [Consumer Protection Act] and committed fraudulent misrepresentation. There are, therefore, multiple underlying violations to support a claim of civil conspiracy.”).

²⁵*Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994). *Accord Koster v. P & P Enterprises, Inc.*, 248 Neb. 759, 764, 539 N.W.2d 274, 278 (1995) (defining and discussing

civil conspiracy). *See also Hatcher v. Bellevue Volunteer Fire Dept.*, 262 Neb. 23, 36-38, 628 N.W.2d 685, 696-97 (2001) (holding that conspiracy is not a separate tort but, as a tort, is dependent on the existence of an underlying tort); *Mike Pratt & Sons, Inc. v. Metalcraft, Inc.*, 222 Neb. 333, 383 N.W.2d 758 (1986) (finding no conspiracy to interfere with distributorship).

²⁶*Speer v. Dealy*, 242 Neb. 542, 543, 495 N.W.2d 911, 913 (1993) (Noting that neither is alienation of affection or intentional infliction of emotional distress) (citing Neb. Rev. Stat. § 25-21,188 (Reissue 1995)). *See also Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 720-21, 508 N.W.2d 907, 912 (1993) (noting that alienation of affection no longer is a tort in Nebraska and finding neither the tort of intentional infliction of mental distress nor an action in loss of consortium available as substitute for action in alienation of affection or criminal conversion; also citing § 25-21,188). Regarding alienation of affection, *see also* Chapter 4, Introduction, *supra*.

ployee at any time or without reason.”²⁷ “One who causes intended or unintended harm to another by refusing to continue a [terminable-at-will] business relation with [that other,] . . .” is not liable for that harm.”²⁸ Fitting this rule into the Nebraska Supreme Court’s statement of the essential elements of the tort of interference with a business relationship, it must be either that this is not an “act of interference” or it is not an act of “unjustified” interference. (Note that this rule must be distinguished from the rule discussed in the next part of this Comment & Authorities, which applies when a third party interferes with the employment of an at-will employee.)

In a case where there is an issue whether there was, on the one hand, tortious interference with a business relationship or, on the other, refusal to continue a terminable-at-will business relationship, the pattern instruction may be inadequate. It may be necessary to adapt the pattern: (1) to make it clear that there is a distinction between discontinuing a terminable-at-will business relationship, even when done with knowledge that the other party to the relationship “expects” it to continue and will be damaged if it is not, and, on the other hand, tortious interference with a business relationship or expectancy; and (2) to tell the jury how that distinction is drawn.

For details regarding a contract for employment at will, see NJI2d Civ. 4.52.

X. INTERFERENCE WITH A BUSINESS RELATIONSHIP OR EXPECTANCY BY A COEMPLOYEE

Most of the Nebraska cases on this subject involve suits by the employee, against the employer, and not suits by the employee against another individual or entity other than the employer. In *Huff v. Swartz*, after a lengthy discussion of the subject, the Court held

that an at-will employment relationship can be the subject of a tort action for intentional interference with a business relationship or expectancy and that such an action may be maintained against a coemployee who acts as a third party to the relationship by taking actions for his or her own personal benefit, or for the benefit of an entity other than the employer.”²⁹

XI. THE PRIVILEGE OF A COMPETITOR

An example of what might be considered interference, but is not ac-

²⁷*Huff v. Swartz*, 258 Neb. 820, 831–32, 606 N.W.2d 461, 470 (2000).

²⁸*Buhrman v. International Harvester Co.*, 181 Neb. 633, 636, 150 N.W.2d 220, 223 (1967) (multiple quotation marks and citations omitted).

Accord Huff, 258 Neb. at 830, 606 N.W.2d at 469 (2000).

²⁹*Huff v. Swartz*, 258 Neb. 820, 831–32, 606 N.W.2d 461, 470 (2000) (including a lengthy discussion of the point).

tionable interference, is the privilege of a competitor. It is not improper interference with a business relationship when Business Person causes Customer not to enter into a contract with Business Person's Competitor if: (1) the contract is in an area in which they compete; (2) Business Person does not employ "wrongful means;" (3) Business Person's acts do not create or continue an unlawful restraint of trade; and (4) Business Person's purpose is, at least in part, to advance his or her interest in competing with Competitor.³⁰

XII. THE PRIVILEGE OF A DESIGN PROFESSIONAL

[D]esign professionals acting within the scope of their contractual obligations are privileged to give the owner advice which may lead to the termination of a contractor. Absent a showing of bad faith or malice, a design professional's intentional, but justified, act of interference will not subject it to liability for tortious interference with business.³¹

XIII. CIVIL DAMAGE ACTIONS BASED ON THE FELONY OF INTENTIONALLY DRIVING ANOTHER OUT OF BUSINESS

Neb. Rev. Stat. § 59-821 (Reissue 2010) provides that any person injured by a violation of §§ 59-801 to 59-831 (Reissue 2010) may bring a civil damage action. Section 59-805 provides that one who intentionally drives another out of business shall be guilty of a felony.³²

XIV. MEMBERS OF A CORPORATION MAY NOT MAINTAIN A CLAIM FOR TORTIOUS INTERFERENCE WITH THE BUSINESS RELATIONSHIPS OF THE CORPORATION

"[T]he relationship or expectancy interfered with 'must belong to the party asserting the claim.' Members of an LLC cannot, in their own behalf, maintain a claim for tortious interference with the business relationships or expectancies of the LLC."³³

³⁰Restatement (Second) of Torts § 768 (1977); *Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 673, 689-82, 950 N.W.2d 321, — (2020); *Miller Chem. Co., Inc. v. Tams*, 211 Neb. 837, 841, 320 N.W.2d 759, 762 (1982).

³¹*Wiekhorst Bros. Excavating & Equip. Co. v. Ludewig*, 247 Neb. 547, 557, 529 N.W.2d 33, 40 (1995).

³²*Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828

N.W.2d 147 (2013) discusses damage actions under § 59-821, which allege violation of § 59-805.

³³*Steinhausen v. HomeServs. of Neb., Inc.*, 289 Neb. 927, 945, 857 N.W.2d 816, 831 (2015) ("That a member of an LLC might experience reduced distributions . . . does not convert the claim to one in behalf of the member personally.") (paragraph break and footnote omitted).

XV. PRODUCT DISPARAGEMENT

On a related matter, see *JB Assocs., Inc. v. Nebraska Cancer Coal.*³⁴ concerning product disparagement claims under Neb. Rev. Stat. § 87-302 (Cum. Supp. 2018).

³⁴*JB Assocs., Inc. v. Nebraska Cancer Coal.*, 303 Neb. 855, 932 Neb. 71 (2019).

XV. PRODUCT DISPARAGEMENT

Reported for: In a stated matter, see JB. Assoc., Inc. v. Nebraska Cancer Coal Co. concerning product disparagement claims under Neb. Rev. Stat. § 87-302 (Cum. Supp. 2018).

JB Assoc., Inc. v. Nebraska Cancer Coal Co. 303 Neb. 855, 932 Neb. (2019).

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1992 CHAIRMAN'S PREFACE

This volume contains pattern jury instructions for use in all criminal trials in all trial courts of Nebraska.

A working manuscript of this volume was published in May of 1989. Since that time the members of the Supreme Court Committee have met to consider every comment, suggestion, or criticism of any instruction included in the working manuscript.

The instructions in this volume are the product of the combined intellect, knowledge, and skill of the members of the Supreme Court Committee. Committee members argued vigorously over the appropriate choice of word or phrase, over which interpretation of a line of cases was correct, over the most likely interpretation of statutory language, and over what to do when the Nebraska Supreme Court seemed never directly to have addressed a particular question. Every instruction was debated until a consensus was reached. Committee members labored patiently, diligently, and with the utmost dedication to the task at hand. Their reward was the excitement of the collegial effort and the satisfaction of doing a job worth doing—and doing it well.

Extra recognition is due to the reporter for this project, Professor Josephine R. Potuto of the Law College at the University of Nebraska in Lincoln. Professor Potuto wrote the first draft of each instruction and was responsible for each and every redraft. She provided the numbering scheme and overall organization of the volume. She also was responsible for all research and for the substantive content and scope of the comment following each instruction. None of her work was accepted at face value but instead was scrutinized closely by the Committee. She had to defend all her research and every word that she wrote. When overruled by the Committee (which was seldom), Professor Potuto accepted it with good grace and humor. Her drafting ability and tenacity in writing what the members of the Committee determined to be the law are to be commended.

Special thanks are due to the Law College at the University of Nebraska, which provided a substantial amount of support in the form of secretarial time, photocopying, postage, paper, computer time, and much more. On behalf of each member of the Committee, I express our appreciation for all of this support.

On behalf of each member of the Committee, I also express appreciation to Judge Dale E. Fahrnbruch who chaired the Com-

CHAIRMAN'S PREFACE

mittee as it drafted civil pattern instructions and then chaired the criminal pattern instruction drafting project from its inception until May of 1989. Judge Fahrnbruch did an outstanding job, setting a standard of excellence and diligence that was a challenge to follow.

To each member of the Committee, I express my personal appreciation and commendation. Although at times members disagreed vigorously as to how an instruction should be worded, always there was good humor, patience for opposing views, and courtesy to other members. It is a privilege and pleasure to serve as the chairman of such a distinguished group.

ROBERT MORAN, CHAIRMAN
Nebraska Supreme Court Committee
on Practice and Procedure

1992 REPORTER'S PREFACE

As the Reporter for Nebraska Pattern Jury Instructions to be used in Criminal Trials [NJI2d Crim. (1992)], my responsibilities were to research the law, draft each pattern instruction (and redraft until approved by the Supreme Court Committee on Criminal Practice and Procedure), devise a workable numbering scheme and organizational structure, and write Comments that both explained the language of an instruction in light of Nebraska law and described the intended use of an instruction. Committee members approved each instruction, reviewed the scope and content of the Comments, approved the NJI2d Crim. (1992) numbering scheme and organizational structure, and approved the material contained in the introductory materials and in the appendix.

The Committee worked long and hard on the civil instructions before I signed on to do criminal instructions. Members worked equally long and hard to complete this volume. They spent much time, effort, and thought in assuring that each instruction provides the best and most comprehensible statement of Nebraska law. NJI2d Crim. (1992), in its entirety, is the result.

I greatly have enjoyed and benefitted from working with members of the Committee. They have taught me much about Nebraska substantive criminal law and trial practice. They also have pushed me to reevaluate my view of the scope and meaning of the criminal law generally as well as the appropriate roles of judge, jury, and counsel.

I thank each member of the Committee for his hard work, challenging questions, and willingness to give time for consultation. I also thank each member for the good will, humor, and spirit that he brought to the Committee work. Special thanks go to the Honorable Dale Fahrnbruch, who chaired the Committee throughout most of the NJI drafting project, and the Honorable Robert Moran, the current chairman. They each provided encouragement, leadership, and unflagging support.

I came to this drafting project with the firm belief that instructions should be written plainly, that they should avoid legal jargon, that they should state the law and leave argument to the lawyers, and that as much as possible they should be tailored to the facts of each particular case (as compared to instructing generally on all circumstances that might have occurred). I joined a Committee that already had made—and implemented—these

judgments in drafting NJI2d Civil (1989).

NJI2d Crim. (1992) clearly builds and borrows from the efforts made in drafting NJI2d Civil (1989). In that respect I owe a special debt to Professor Mike Fenner, the reporter for the civil instructions. Several of the NJI2d Crim. (1992) instructions simply parallel instructions he drafted. For many others his work, and particularly his Comments, provided a starting point for my drafting.

This project could not have been completed without the support provided me and the Committee by the College of Law at the University of Nebraska and its dean, Harvey Perlman. The support was visible in the secretarial time devoted to the project and in the Law College's underwriting xeroxing, mail, and other costs. It also was there through the willingness of my colleagues to think through drafting problems with me. Of special mention here are Dean Harvey Perlman, Professor John Gradwohl, and Professor Roger Kirst, my colleague both on the Committee and on the faculty of the Law College at Nebraska.

Thanks also go to the Law College staff, most of whom were pulled in at one time or another to see this project through. Deserving special mention are my secretary, Donna Seefeld, and Mari Crispin, administrator of Law College Seminars.

I have been fortunate to have worked with many able and industrious Nebraska law students to get this project done. Each contributed a great deal. I regretted each graduation. (In that we shared our only major difference of opinion.) These students are Lesa Druliner, Jeffrey Mashek, Julie Slips, Tom Shanahan, Celia Terenzio, and Mitzi Phalen. Certainly I thank and commend them for their work. The bench, the bar—and the Nebraska citizens who tomorrow will serve on juries—all owe them a large debt.

Finally, I would like to thank Antoinette and the late Joseph Potuto. Without them, nothing else would have been possible.

JOSEPHINE R. POTUTO
RICHARD H. LARSEN PROFESSOR OF
Constitutional Law and
Reporter For Nji2d Crim. (1992)

University of Nebraska
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October 1992

RULE ADOPTED BY THE SUPREME COURT OF NEBRASKA REGARDING NEBRASKA JURY INSTRUCTIONS

On March 8, 1989 the Supreme Court of Nebraska adopted the following rule to govern the use of NJI2d pattern jury instructions, Civil and Criminal:

(a) Nebraska Jury Instructions, Second Edition (NJI2d), is designed for use when the instruction correctly states the law and the pleadings and evidence calls for such an instruction. Where applicable, a trial judge may utilize an appropriate NJI instruction.

(b) The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions. The trial court may direct counsel for either party to prepare designated instructions. Counsel may object at the conference on instructions to any instruction regardless of who prepared it. At the conference on instructions, each counsel should aid the trial court by stating any specific objection that he or she has on any instruction proposed to be given.

The rule of practice adopted by this court on November 20, 1968, requiring use of the Nebraska Jury Instructions is hereby rescinded.

NEBRASKA LAW GOVERNING PATTERN JURY INSTRUCTIONS: WHEN REQUIRED; HOW INTERPRETED

The Rule Adopted by the Supreme Court of Nebraska, provided in full on page ix *supra*, authorizes use of an NJI2d pattern instruction, civil or criminal, when the instruction correctly states the law and its use is warranted by the pleadings and evidence at trial. The pattern instructions in NJI2d Crim. (1992) were drafted with reference to Nebraska statutory law current through the 1989 Cumulative Supplement to Neb. Rev. Stat. The instructions also reflect Nebraska Supreme Court opinions through 1991.

It is a trial judge's duty in a criminal case to aid the jury to arrive at a verdict by instructing it in "plain and clear" language; *Brown v. State*, 111 Neb. 486, 488-89, 196 N.W. 926, 927 (1924); in an instruction reduced to writing (unless counsel waive on the record in open court). Neb. Rev. Stat. § 25-1111 (Reissue 1989); Neb. Rev. Stat. § 29-2016(7) (Reissue 1989). *See Grandsinger v. State*, 161 Neb. 419, 438-39, 73 N.W.2d 632, 646 (1955) (cautionary instructions during trial and other evidentiary instructions outside § 25-1111 written requirement). *See also Schreiner v. State*, 155 Neb. 894, 54 N.W.2d 224 (1952) (§ 29-2016 written requirement applies to rulings of law, not cautionary instructions). Instructing in plain and clear language does not mean, however, that words "of common usage" must be defined. *State v. Lewis*, 184 Neb. 111, 120, 165 N.W.2d 569, 575 (1969).

A judge must instruct on all essential issues raised by the charges or the theory of the defense and supported by the evidence. *State v. Brown*, 235 Neb. 374, 455 N.W.2d 547 (1990); *State v. Graham*, 234 Neb. 275, 450 N.W.2d 673 (1990); *State v. Bachkora*, 229 Neb. 421, 424, 427 N.W.2d 71, 73 (1988); *State v. Clayburn*, 223 Neb. 333, 335, 389 N.W.2d 314, 316 (1986); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). The duty to instruct generally on the law does not mean that an instruction must track the exact language of the Nebraska Supreme Court in stating a rule of law. *State v. Reeves*, 216 Neb. 206, 218, 344 N.W.2d 433, 442 (1984).

A judge's duty to instruct on all essential issues arises independent of counsel request; failure to instruct is prejudicial error.

Id. The duty to instruct permits additional explanatory instructions if requested by the jury and considered necessary by the judge. *State v. Suggett*, 189 Neb. 714, 718, 204 N.W.2d 793, 796 (1973).

By contrast to general instructions on essential issues, a judge need not instruct specifically on a particular phase of a case unless requested by counsel. *State v. Lenz*, 227 Neb. 692, 694, 419 N.W.2d 670, 672 (1988); *State v. Buchanan*, 210 Neb. 20, 24, 312 N.W.2d 684, 687 (1981); *State v. Claire*, 193 Neb. 341, 344, 227 N.W.2d 15, 17 (1975); *State v. Russo*, 187 Neb. 348, 350, 190 N.W.2d 853, 854 (1971). Even so, not every requested instruction must be given. An instruction that unduly emphasizes a part of the evidence should be refused. *State v. Medina*, 227 Neb. 736, 739, 419 N.W.2d 864, 867 (1988); *State v. Harrison*, 221 Neb. 521, 525, 378 N.W.2d 199, 202 (1985); *State v. Thielen*, 216 Neb. 119, 119, 342 N.W.2d 186, 188 (1983) (court may refuse requested instruction where substance of that instruction is covered by instructions actually given). An instruction may be given only if supported by evidence in the record. *See, e.g., State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986) (self defense); *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984) (entrapment); *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978) (manslaughter when murder is charged). Thus, an instruction that contains "an assumption of the existence of a material fact upon which there was no evidence offered or received" should be refused even if the instruction otherwise contains a correct statement of the law. *Bell v. State*, 159 Neb. 474, 482, 67 N.W.2d 762, 768 (1954).

The language of a particular instruction must be evaluated not in isolation but in the context of all the instructions that were given. There is no prejudicial error if all the instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues. *State v. Rincker*, 228 Neb. 522, 533, 423 N.W.2d 434, 442 (1988); *State v. Copple*, 224 Neb. 672, 699, 401 N.W.2d 141, 159 (1987); *State v. Dondlinger*, 222 Neb. 741, 749, 386 N.W.2d 866, 871-72 (1986); *State v. Andersen*, 213 Neb. 695, 705, 331 N.W.2d 507, 513 (1983) (repetition of instruction reversible error only if effect is to mislead jury).

Ordinarily, counsel who requests an instruction cannot later predicate error on the giving of that instruction. *State v. American Theatre Corp.*, 193 Neb. 289, 296, 227 N.W.2d 390, 394 (1975); *Starkweather v. State*, 167 Neb. 477, 490, 93 N.W.2d 619, 625-26 (1958). Moreover, counsel who fails to object to an instruction at submission may challenge the instruction on appeal only by showing plain error. *State v. Lenz*, 227 Neb. 692, 694, 419 N.W.2d 670, 672 (1988); *State v. Ryan*, 226 Neb. 59, 93, 409 N.W.2d 579, 600 (1987); *State v. Duis*, 207 Neb. 851, 855, 301 N.W.2d 587, 590

NEBRASKA LAW GOVERNING PATTERN JURY

(1981). *See* Neb. Rev. Stat. § 25-1139 (Reissue 1989) (when giving or refusing to give instruction materially prejudices “substantial rights of the litigant” appeal may be taken without regard to whether objection was made at trial).

To establish as reversible error a trial judge’s refusal to give a requested instruction, an appellant must show that (1) the instruction was a correct statement of law; (2) the instruction was warranted by the evidence; and (3) the appellant was prejudiced by the refusal to give the instruction. *State v. Reynolds*, 235 Neb. 662, 691, 457 N.W.2d 405, 423 (1990).

USE NOTE

Each chapter of NJI2d Crim. (1992) is preceded by an introduction containing information generally applicable to instructions in that chapter. Additionally, notes on the use of a particular instruction also appear in the Comment following each instruction. A pattern instruction should be given only after a judge reads its accompanying Comment as a Comment often contains important caveats about the use of an instruction, suggested alternative language for various situations that may arise, and cross references to other possibly relevant instructions.

With the exception of the instructions in Chapter 1, the pattern instructions assigned an NJI2d Crim. (1992) number are all drafted to be given at the end of the trial. With regard to some of these instructions, particularly the evidence instructions contained in Chapter 5, an instruction ordinarily also will be given during the trial. The wording of the NJI2d Crim. (1992) closing instruction should serve as a guide for wording the instruction that is given during the trial. As an additional aid, for selected instructions the appendix contains suggested language to be used to instruct during the trial.

LANGUAGE OF INSTRUCTIONS; ARGUMENT OF COUNSEL

A major goal of the Supreme Court Committee on Criminal Practice and Procedure was to simplify each NJI2d Crim. (1992) instruction as much as possible and to assure that each instruction was comprehensible to lay jurors. The Committee made a concerted effort to use plain English, not legal jargon, and to avoid long, textual instructions that give with the one hand and then take away with the other. The Committee did this by including in each instruction only that information which is necessary for the jury to decide the issues allocated to it; the Committee made a conscious decision to leave to argument of counsel the task of articulating facts or inferences from the evidence.

Under the structure of NJI2d Crim. (1992), therefore, argument of counsel—while of course properly limited to correct statements of the law and to the facts in evidence—should not be limited to the language of a particular instruction. Indeed, under the structure of NJI2d Crim. (1992) language deliberately was omitted from the instructions on the theory that it more properly was lawyer argument and in the expectation that lawyers would be permitted to make those arguments.

STYLE CONVENTIONS

NJI2d Crim. (1992) instructions reflect style conventions employed to avoid the repetitive use of lengthy phrases in each instruction as well as to avoid the repetitive use of lengthy explanations in each Comment. These style conventions must be understood to assure proper use of an instruction. The style conventions are as follows.

A. The participants in a trial are sometimes designated only by their status, *e.g.*, defendant, law enforcement officer, victim. Frequently the pattern instruction contains a parenthetical “(here insert name).” Whenever this parenthetical appears, the Committee recommends that a name be used. In other situations it may be advisable to designate a person by using his title as well as his name (*e.g.*, Officer Jones) or, on occasion, by using only his name and omitting his title.

B. The body of an NJI2d Crim. (1992) instruction normally does not include draft language to cover all possible fact variations that might occur in a particular case. Instead, the draft language accomodates the typical case. The most obvious example of this convention is that the language of an instruction usually is drafted in the singular, *e.g.*, the defendant, the victim, the crime. Where the facts of a particular case involve multiple participants or crimes, the plural should be substituted. Similarly, if a particular instruction is drafted in the plural (because that seemed to the Committee to be the likely typical case) and the singular is appropriate, then the singular should be substituted.

C. NJI2d Crim. (1992) instructions anticipate that, of all possible fact variations covered by statute or caselaw, only those variations relevant to the particular facts should be in an instruction. For example, consider an elements instruction for the crime of Assault in the third degree, Neb. Rev. Stat. § 28-310 (Reissue 1989). That crime is defined as either (a) intentionally, knowingly, or recklessly causing bodily injury or (b) threatening another in a menacing manner. When the prosecution alleges simply a threat under (b) and there is no evidence to support a claim that the defendant caused injury to another, then the only part of the statutory definition that should be given to the jury is that contained in part (b).

D. Virtually all NJI2d Crim. (1992) instructions contain material in parentheses. The Committee used parentheses to indicate places where the instruction must be tailored. Parentheses are

used in one of three ways:

(1) To contain a menu of possible choices from which the judge is to select the most appropriate one in the circumstances. When it is necessary to explain why a menu of choices is provided an explanation will be found in the Comment to the instruction.

The most obvious, and recurring, parenthetical illustrating a menu (and one requiring no explanation in the Comment) is that of "(his, her)." It clearly was not possible in the pattern instruction to know in advance the sex of a participant. Yet it clearly is the Committee intent that the instruction be tailored to reflect this.

With regard to the use of parentheticals containing a menu, one more thing needs to be said. Occasionally the particular menu choices themselves are contained in parentheticals. In these cases, parentheses (and not the more common convention of brackets) are used both to contain the menu of choices AND to contain a particular menu choice. The menu choices are separated by a comma. For example, in NJI2d Crim. 3.0 (1992) (ELEMENTS; EFFECT OF FINDINGS (No Insanity Defense)) the following language appears:

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are:

The style convention translates to the following two choices:

Choice 1. The elements of (here insert crime) are:

Choice 2. Regarding (here insert crime), the elements of the state's case are:

(2) To contain a general description of the kind of tailoring called for, but no examples. For example, NJI2d Crim. 1.2 (1992) (NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE) contains the parenthetical, "(here insert crimes with particulars of time, place, victim)."

(3) To contain a choice between specific language to be employed and a general description of the kind of tailoring called for. For example, NJI2d Crim. 3.6 (1992) (ELEMENTS OF THEFT; EFFECT OF FINDINGS; VALUE DECLARED) contains the parenthetical "(property involved, here insert item taken)." The words "property involved" actually may be employed in the value instruction. If the judge elects to identify specifically the item taken, then obviously she would not use the phrase provided—"here insert item taken"—but would identify the item.

STYLE CONVENTIONS

(4) To set off a word as a signal that it should not be used unthinkingly and that a substitution may be preferable. These parentheses neither contain examples of tailoring nor a general statement of the kind of tailoring required. Instead, these parentheses alert a judge to consider tailoring. For example, NJI2d Crim. 7.1 (1992) (SELF DEFENSE (No Deadly Force)) uses the parenthetical "(any such use of force)" to suggest that, in a case in which the defendant hit the victim with a bat, a judge might substitute a fact-particular phrase for the general phrase.

E. A number of the pattern instructions contain material in brackets. The Committee used brackets exclusively to set off material that should not be used routinely. Material that should not be used routinely is of two types: material that always contains a permissive element (in the judge's discretion, it may or may not be given) and material that sometimes must be given and sometimes must not be.

In the former type case, where the brackets indicate a permissive element, the brackets tell a judge that she may, but need not, include the bracketed material when giving the instruction. An example of this use of brackets may be found in paragraph (7) of NJI2d Crim. 1.0 (1992) (FUNCTION OF JUDGE, JURY, COUNSEL; EVIDENCE):

You shall not discuss this case with anyone, including the other members of the jury, until the case is submitted to you for your verdict. After that, and until the court has accepted your verdict, you may only discuss the case with other members of the jury during deliberations [in the jury room] [with all members present]. Do not let others talk to you about this case, and do not listen to any conversations on the subject.

In the latter type case, where the brackets indicate that the material is mandatory, but only in particular cases, the brackets alert a judge to consider whether the facts in a particular case require the giving (or require the omission) of the bracketed material. An example of this latter use of brackets may be found in NJI2d Crim. 3.5 (1992) (ELEMENTS OF FELONY MURDER; EFFECT OF FINDINGS). Proximate cause normally is not at issue in Felony Murder. To cover a case where it is at issue—for example, where the victim died of a heart attack, the following bracketed language is provided in NJI2d Crim. 3.5 (1992):

[Causing the death of (here insert victim's name) means that (his, her) death came in a natural and continuous sequence from the defendant's acts and that without those acts the death would not have occurred.]

This final bracketed paragraph must be given if there is an issue regarding causation. It otherwise never should be given.

COVERAGE: DESCRIPTION AND EXPLANATION

A. COMPARISON WITH NJI2d Civil (1989).

NJI2d Crim. (1992) contains all the pattern instructions drafted for use in criminal trials in Nebraska. It thus is a companion to NJI2d Civil (1989), which contains all the pattern instructions drafted for use in civil trials.

NJI2d Crim. (1992) and NJI2d Civil (1989) each are entirely self-contained. Instructions that apply both to criminal and civil trials thus appear in both NJI2d Crim. (1992) and in NJI2d Civil (1989) and are assigned NJI2d Crim. (1992) and NJI2d Civil instruction numbers. As an example, consider DIRECT AND CIRCUMSTANTIAL EVIDENCE, NJI2d Crim. 5.0 (1992) and NJI2d Civil 1.31 (1989). In general, an instruction that appears in both NJI2d Crim. (1992) and NJI2d Civil (1989) is worded identically in each. *Compare* NJI2d Crim. 5.0 (1992) *with* NJI2d Civil 1.31 (1989). In some cases, however, an instruction titled identically in both NJI2d Crim. (1992) and NJI2d Civil (1989) and covering the identical subject is nonetheless worded differently in NJI2d Crim. (1992) as contrasted with NJI2d Civil (1989). *Contrast* NJI2d Crim. 9.0 (1992) (SUBMISSION) *to* NJI2d Civil 5.01 (SUBMISSION). In these cases the wording is different because of the different requirements or concerns present in a criminal case.

NJI2d Civil (1989) contains substantive civil instructions (negligence, eminent domain, etc.). NJI2d Crim. (1992), by contrast, contains few instructions regarding substantive crimes. These instructions, all found in Chapter 3, are NJI2d Crim. 3.3 (1992) (ELEMENTS OF ATTEMPT); NJI2d Crim. 3.4 (1992) (ELEMENTS OF CRIMINAL CONSPIRACY; WITHDRAWAL); and NJI2d Crim. 3.5 (1992) (ELEMENTS OF FELONY MURDER; EFFECT OF FINDINGS); and NJI2d Crim. 3.6 (1992) (ELEMENTS OF THEFT; EFFECT OF FINDINGS; VALUE DECLARED). Attempt and Conspiracy are included in NJI2d Crim. (1992) because they generally are applicable to any criminal prosecution. Theft and Felony Murder are included because they involve both an unusual and a difficult drafting problem.

B. COMPARISON WITH NJI (1969).

In form, NJI2d Crim. (1992) is both an expansion of and departure from the earlier treatment of criminal instructions in

COVERAGE: DESCRIPTION AND EXPLANATION

NJI (1969): NJI (1969) devoted only a chapter, Chapter 14, to instructions applicable in criminal trials and that chapter did not contain a comprehensive list of criminal instructions. As a result of the different and comprehensive treatment of criminal instructions in NJI2d Crim. (1992), and by contrast to NJI2d Civil (1989), NJI2d Crim. (1992) necessarily required abandoning the numbering scheme of NJI (1969). A comparison of the coverage of NJI2d Crim. (1992) with NJI (1969) will demonstrate that (1) NJI2d Crim. (1992) contains many instructions not contained in NJI (1969); (2) NJI2d Crim. (1992) omits some instructions contained in NJI (1969); and (3) of those instructions that appear in both volumes, most are changed substantially from their form in NJI (1969). In part, the NJI2d Crim. (1992) coverage is a natural result of a drafting project that focused on criminal instructions as a separate entity. In part, the NJI2d Crim. (1992) coverage is the result of a drafting effort to have NJI2d Crim. (1992) parallel NJI2d Civil (1989) where parallels were possible. The major reason for the NJI2d Crim. (1992) coverage, however, is that the criminal law and its constitutional underpinnings have changed substantially since the drafting of Chapter 14 of NJI (1969).

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NEBRASKA JURY INSTRUCTIONS

SECOND CRIMINAL

CHAPTER 1

PRELIMINARY INSTRUCTIONS; INSTRUCTION AT RECESS

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Subject Matter

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- | | |
|-----|---|
| 1.0 | Function of Judge, Jury, Counsel; Evidence |
| 1.1 | Note Taking |
| 1.2 | Nature of Case; Presumption of Innocence; Charge Not Evidence |
| 1.3 | Admonition at Recess |
-

COMMENT

Chapter 1 contains preliminary instructions and an instruction to be given at recesses. Although preliminary instructions are not required by Nebraska law, the Committee recommends giving them as they provide a framework by which the jury may better do its job. However, if preliminary instructions are given they must strictly state the law. Judicial comment about, or explanation of, given instructions that creates potential juror confusion regarding the meaning of the instructions themselves may constitute reversible error. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992).

NJI2d Crim. 9.1 (FUNCTION OF JUDGE, JURY, COUNSEL; EVIDENCE) is the closing instruction that parallels NJI2d Crim. 1.0. Similarly, NJI2d Crim. 9.2 (NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE) is the closing instruction that parallels NJI2d Crim. 1.2.

NJI2d Crim. 1.0**FUNCTION OF JUDGE, JURY, COUNSEL;
EVIDENCE**

Members of the jury, before we go any further, I would like to make a few remarks about what we are going to do.

Near the end of the trial, I will give you detailed instructions explaining the rules of law that apply to this case. What I say now is not a substitute for those more detailed instructions, but only an introduction to this trial.

(1) It is my duty to see that this trial is conducted fairly and efficiently and in a manner consistent with Nebraska law. As part of that duty, I will rule upon objections and other legal questions that come up during the trial.

(2) It is the duty of the attorneys for the state and the defendant to use all honorable means to protect the interests of the state and defendant respectively.

(3) It is your duty to determine what the facts are. You, and you alone, are the judges of the facts.

(4) In determining what the facts are, you must rely solely upon the evidence that is presented here within the four walls of this courtroom and that general knowledge that everyone has. Other than that general knowledge that everyone has, you must disregard any other personal knowledge you may have of any of the facts in this case.

Do not use any electronic device in any way to discover or share any information about this case. This includes cell phones, Blackberries, computers, and other electronic devices. This includes searching, blogging, emailing, texting, using Facebook, Twitter, My Space, LinkedIn, or any similar social network.

Do not conduct any of your own independent research about this case. Do not consult dictionaries, other reference materials, or electronic devices to obtain any information about this case—about the parties, the issues, the locations, or any thing else that has to do with this case. [Do not go near any of the places discussed in this case.]

Do not pay any attention to any news reports regarding this case.

Any information obtained outside of this courtroom, whether

through reference materials, newspapers, television, [or] computers or other electronic devices, [or visits to the places involved in this case,] could be misleading, inaccurate, or incomplete. For example, information found in newspapers or books, or on the Internet, may be wrong. [The places involved in this case may have changed.] In addition, relying on any of this information would be unfair because the parties would not have the opportunity to refute, explain, or correct it.

(5) You are not allowed to use a computer, cell phone, or other electronic device at all while you are in the courtroom and during your deliberations near the end of the trial. You may use such devices during breaks or recesses, but you may not use them to obtain or disclose information about this case or any of the people involved in this case.

(6) The evidence in this trial will consist of exhibits and the testimony of witnesses; any facts that have been stipulated—that is, formally agreed to by the parties—and any facts that I say you may accept but are not required to accept.

Statements and arguments by the lawyers for the state and for the defendant are not evidence. Objections to questions are not evidence. Do not be influenced by any objection. If I sustain an objection, disregard the question and do not speculate as to what the answer might have been. Testimony that I tell you to disregard is not evidence and you must not consider it.

(7) Do not take anything I say or do as expressing my opinion as to how this case should come out or how you should resolve any issue of fact.

Do not allow sympathy or prejudice to influence you. Do not indulge in any speculation, guess, or conjecture. Do not make any inferences that are not supported by the evidence.

Do not make up your minds in this case until it is submitted to you for your verdict.

(8) You alone will decide the credibility, that is, the believability, of the witnesses. You alone will decide how much weight to give each piece of evidence and how to resolve any conflicts in the evidence.

In determining all of this, you may consider: the sources of the witness's testimony, including the witness's ability to have seen, or heard, or known the things about which he or she testifies; the witness's ability to remember and to communicate accurately; the conduct and demeanor of the witness while testifying; whether the witness has an interest in the outcome of this case, a relationship to the parties, or any bias or prejudice; any previous statement or

conduct of the witness that tends to support or to contradict the witness's testimony at this trial; the reasonableness of the testimony of the witness; and any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

(9) (At this point, it is recommended that the jury be instructed as to whether they will be allowed to take notes; NJI2d Crim. 1.1A or B.) [A transcript of the testimony at this trial will not be provided at the close of the evidence.]

(10) You shall not discuss this case with anyone, including the other members of the jury, until the case is submitted to you for your verdict. After that, and until the court has accepted your verdict, you may only discuss the case with other members of the jury during deliberations [in the jury room] [with all members present]. Do not let others talk to you about this case, and do not listen to any conversations on the subject.

If anyone speaks to you about this case, tell that person that you are on the jury and that you are not allowed to talk about the case. If anyone keeps trying to talk to you about this case, you must let me know.

During this trial, you must not talk with the lawyers, witnesses, or parties in this case. If you see any of them and they do not speak to you, do not think they are being rude.

Again, I admonish you not to discuss this case, even with each other, until such time as I instruct you to do so, and not to make up your minds regarding this case until it is submitted to you for your verdict.

[(11) And finally, . . . (if it has not already been done, introduce members of the court staff and describe briefly the function each performs.)]

COMMENT

NJI2d Crim. 1.0 was drafted for use in criminal trials. A parallel instruction for civil trials may be found in NJI2d Civ. 1.00.

A judge must instruct the jury after closing arguments of counsel (or after the conclusion of the evidence if there are no closing arguments). Neb. Rev. Stat. § 29-2016 (Reissue 2008). There is no obligation to provide an opening instruction comparable to NJI2d Crim. 1.0. *See id.*

Although not required, NJI2d Crim. 1.0 *is* recommended. Its

purpose is to put the jurors in the best possible position to perform the tasks assigned to them. It makes little sense to have jurors listen to days of testimony only then to be told, for example, that they are the sole judges of the facts.

The practice of charging the entire jury panel varies from district to district. Some districts provide jurors printed handbooks. Others use a videotape to explain the trial process and the jury's role. Whatever else is done, it is felt that there is no substitute for the live, face-to-face instruction and explanation from the judge on the bench.

As drafted, NJI2d Crim. 1.0 is to be given immediately after the jury is sworn and in the presence of a court reporter. Instructing the entire jury panel at some previous time may be acceptable or even preferred. Alternatively, it may be that parts of this instruction will be given to the entire panel and other parts to individual juries.

Some of the subparagraphs of NJI2d Crim. 1.0 contain shortened versions of instructions to be given after the close of the evidence and before the jury retires to consider the verdict. Ordinarily, NJI2d Crim. 1.0 will be given in addition to and not as a substitute for those closing instructions.

The parenthetical in paragraph (9) of this instruction directs an instruction to the jury as to whether the jury will be permitted to take notes. If NJI Crim. 1.1A or B is given, then the final, bracketed sentence of paragraph (6) should be omitted. Otherwise, the bracketed sentence always should be given.

Regarding paragraph (9) of the instruction, the Supreme Court addressed juror note taking in the appeal of the conviction in *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

We... rule that henceforth, jurors shall be permitted to take notes if, and only if, the parties agree, outside the jury's presence, (1) that jurors may, but need not, take notes and (2) that such notes as are taken may be used during the jury's deliberations but not preserved for review on appeal; rather, the notes shall be treated as confidential between the juror making them and the other jurors. In the event the parties so agree, the trial judge shall ensure the confidentiality of the notes during the course of trial and the jury's deliberations, and shall cause the notes to be destroyed immediately upon return of the verdict.

Id. at 254, 450 N.W.2d at 415.

While paragraph (9) specifies that the jury will not receive a transcript at the close of the evidence, the jury may, nevertheless, under certain circumstances be permitted access to particular witness testimony during its deliberations. As a general rule a jury should not be allowed to rehear any portion of the evidence once deliberations have

commenced, but exceptions can be made within the discretion of the trial court. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000). If the jury requests to rehear certain evidence, the court must discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger that its rehearing might cause the jury to place undue emphasis on the reheard evidence. *Id.* If after this analysis the court finds it permissible for the jury to rehear the requested evidence, the rehearing should take place in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified. *Id.* The heightened procedures set forth in *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), for recorded testimonial evidence do not apply to recorded nontestimonial evidence. *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

II. THE PROBLEM OF ELECTRONIC DEVICES

A. THE 2010 AMENDMENTS

In 2010 the Committee added admonitions to this pattern instruction regarding juror use of electronic devices. The problems include jurors using such devices to do independent research and to communicate with others, outside the courtroom or in, about the trial. A large part of the Committee's approach to this problem is an attempt to educate jurors about the problem and how seriously the court takes the problem.

The Committee recommends that this education begin immediately.

■ **Juror handbooks or videos:** If your district provides potential jurors with a handbook or shows them video regarding jury service, the Committee suggests that the handbook or video explain that neither prospective nor selected jurors will be able to use electronic devices to discover, discuss, or share any information about the case for which they are called or selected.

■ **Pre-voir dire instruction:** As highlighted again below, the Committee recommends that before the voir dire the judge admonish the entire jury panel against the use of such devices.

■ **Preliminary instruction once the jury is empanelled:** The education of the jury continues with this instruction, NJI2d Crim. 1.0, the preliminary instruction to the jury before a criminal trial.

■ **Admonition before and after recess:** Before breaks in the courtroom proceedings, the court will again instruct the jurors on inappropriate uses of electronic devices. NJI2d Crim. 1.3 covers recess admonitions.

■ **Instruction preceding submission of the case to the jury:** The

instruction upon submission of the case to the jury, NJ12d, Crim. 9.0 continues this education.

As noted above, the admonitions regarding electronic devices attempt to educate jurors to the problem. There may be more that individual judges can do in this regard and the Committee suggests that judges consider and try whatever they think is necessary to accomplish this goal.

One thing that judges might consider is instructing jurors on the consequences of violating these electronic-device admonitions: mistrials, new trials, waste of time, money, and resources.

B INSTRUCTION OF THE PANEL BEFORE VOIR DIRE

The Committee believes that juror education regarding electronic devices must start early—with the entire jury panel. Use of electronic devices during voir dire can taint a juror just as easily as use during the trial. The Committee recommends that the judge give electronic-device admonitions to the entire panel, before the start of the questioning of the potential jurors.

C BE ALERT TO NEW DEVICES AND NEW PROBLEMS

The world of electronic devices is particularly fast moving. Please be alert to new devices and new problems (such as the at-one-time new problems of jurors reading news reports off of small, handheld devices, jurors taking in-court photographs with their phones, and intimidating text messages being sent to jurors).

AUTHORITIES

NJI2d Civ. 1.00; Neb.Rev.Stat. § 29-2016 (Reissue 2008); State v. Gutierrez, 260 Neb. 1008, 620 N.W.2d 738 (2001); State v. Dixon, 259 Neb. 976, 614 N.W.2d 288 (2000); Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, (1979); Schluter v. State, 151 Neb. 284, 37 N.W.2d 396 (1949); Behrens v. State, 140 Neb. 671, 676, 1 N.W.2d 289, 292 (1941). Authority for each subparagraph of NJI2d Crim. 1.0 that is a shortened version of another instruction may be found under the Authorities listed for each of these separate instructions.

Research References

West's Key Number Digest
Criminal Law ⇨ 768, 777, 790, 852

Legal Encyclopedias
C.J.S., Criminal Law §§ 1303, 1308, 1346, 1350, 1371, 1499, 1540

NJI2d Crim. 1.1**NOTE TAKING****A. NOTE TAKING PERMITTED**

[At the end of the trial you will have to make your decision based on what you remember of the evidence. You will not have a written transcript to consult and it will not be possible for the court (reporter, stenographer) to (read, play) back (lengthy, any) testimony.]

You may take notes if you wish.

You must leave your notes in the jury room whenever you leave the courtroom. After the verdict has been received your notes will be destroyed.]

B. NOTE TAKING PROHIBITED

[At the end of the trial you will have to make your decision based on what you remember of the evidence. You will not be allowed to take notes. You will not have a written transcript to consult and it will not be possible for the court (reporter, stenographer) to (read, play) back (lengthy, any) testimony.]

COMMENT

Juror note taking is permitted in Nebraska only on consent of prosecution and defense. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990); *Paro v. Farm & Ranch Fertilizer, Inc.*, 243 Neb. 390, 499 N.W.2d 535 (1993). See *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991) (prohibition against juror questions). Where note taking is permitted, notes must be left in the jury room during breaks and must be destroyed at the end of the trial. *Id.*

In NJI2d Crim. 1.1 the Committee has provided alternative instructions to address trials in which note taking is permitted and those in which it is not. While a judge could elect to say nothing in the latter situation, the Committee believes that it is preferable to alert jurors that they may not take notes.

There is variance among Nebraska judges regarding whether testimony is ever read back to the jury. The parenthetical, "(lengthy, any)" is designed to cover both situations.

AUTHORITIES

Paro v. Farm & Ranch Fertilizer, Inc., 243 Neb. 390, 499 N.W.2d 535 (1993); *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

Research References

West's Key Number Digest
Criminal Law ¶852

Legal Encyclopedias
C.J.S., Criminal Law § 1371

NJI2d Crim. 1.2**NATURE OF CASE; PRESUMPTION OF
INNOCENCE; CHARGE NOT EVIDENCE**

This is a criminal case in which the State of Nebraska charges the defendant with

Alternative A—Use When Not Providing Elements of Crimes.

(here insert crimes with particulars of time, place, victim).

Alternative B—Use When Providing Elements.

(here insert crimes). In order to help you follow the evidence I will now give you a brief summary of these crimes. (Here provide elements of crimes charged.) At the end of the trial I will give you a final instruction on these things. If there is any difference between what I just told you and what I tell you at the end of the trial, the instructions I give at the end of the trial must control.

Body of Instruction—Use With Either Alternative A or B.

The fact that the state brings these charges is not evidence of anything. The charges are simply an accusation, nothing more.

The defendant has pleaded not guilty. (He, She) is presumed to be innocent. That means you must find (him, her) not guilty unless and until you decide that the state has proved (him, her) guilty beyond a reasonable doubt.

COMMENT

NJI2d Crim. 1.2 combines NJI 14.02 (1969) (Issues in Criminal Case); 14.03 (1969) (More Than One Count); 14.04 (1969) (Information or Complaint Not Evidence); and 14.07 (1969) (Presumption of Innocence). *The Committee strongly recommends that NJI2d Crim. 1.2 substitute for any reading to the jury of the information or complaint. See Comment to NJI 14.09 (1969) (Statutes and Ordinances)C at the end of Chapter 3 of NJI2d Crim.*

NJI2d Crim. 1.2 is to be used only as an opening instruction. (NJI2d

Crim. 9.2 is the instruction parallel to NJI2d Crim. 1.2 that is to be used at closing.) On occasion it may be appropriate to follow NJI2d Crim. 1.2 with NJI2d Crim. 2.0 (PROOF BEYOND REASONABLE DOUBT).

NJI2d Crim. 1.2 is drafted for a trial in which more than one crime is charged. If only one crime is charged, the use of the singular should be substituted for the plural use in the instruction.

Alternatives A and B of NJI2d Crim. 1.2 provide two approaches to giving the jury information about the crime charged. Alternative A anticipates a brief description of the crime charged and nothing more. For robbery, as an example, this alternative might read, "This is a criminal case in which the State of Nebraska charges the defendant with the robbery of _____ Liquor Store located at _____ Street in Lincoln on August 1, 1988." Alternative B anticipates instructing the jury on the elements of the crime; for the organization and wording of the elements, NJI2d Crim. 3.0, Part A (elements), should be consulted.

The advantage to instructing on the elements is that the jury has advance notice of the particulars of the case that the state must prove. On occasion, however, Alternative B may raise potential difficulties concerning, for example, affirmative defenses and lesser included crimes, because the information or indictment included neither. The Committee therefore recommends consultation with counsel before use of Alternative B.

For a discussion of the wording of the presumption of innocence part of NJI2d Crim. 1.2, see Comment to NJI2d Crim. 9.2 (NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE).

AUTHORITIES

State v. Hai Dang, 220 Neb. 120, 368 N.W.2d 486 (1985); State v. Bazer, 189 Neb. 711, 204 N.W.2d 799 (1973); State v. Leary, 185 Neb. 76, 173 N.W.2d 520 (1970); Behrens v. State, 140 Neb. 671, 1 N.W.2d 289 (1941); Brown v. State, 107 Neb. 120, 185 N.W. 344 (1921); Goff v. State, 89 Neb. 287, 131 N.W. 213 (1911); Johns v. State, 88 Neb. 145, 129 N.W. 247 (1910); Reno v. State, 69 Neb. 391, 95 N.W. 1042 (1903); Gravely v. State, 38 Neb. 871, 57 N.W. 751 (1894).

Research References

West's Key Number Digest
Criminal Law $\S\S$ 777, 778(3), 778(4)

Legal Encyclopedias
C.J.S., Criminal Law $\S\S$ 1325 to 1327

NJI2d Crim. 1.3**ADMONITION AT RECESS**

Members of the jury, we will now (insert phrase describing the recess, e.g., recess for the day, recess for lunch, take a brief recess, etc.). During recesses, there are certain things you are not allowed to do:

1. Do not talk about or discuss this case among yourselves, or with anyone else, either in person or through the use of an electronic device.
2. Do not to listen to any conversation about this case.
3. Do not do any of your own research into anything involved in this case. Do not consult any reference materials or use any electronic devices to obtain any information about anything involved in this case.
4. Do not read, watch, or listen to any reports about this case in the newspaper, on television, on the radio on your computer, or on any other electronic device.
- [5. You are not to go near any of the locations discussed in this case.]
6. And you must not form or express an opinion on the case.

Let me say one last thing. You must not do any research or investigation of any kind on your own. If you see or hear anything about this case during a recess, tell me about it. Do not mention it to other members of the jury or to anyone else.

COMMENT

NJI2d Crim. 1.3 parallels NJI2d Civ. 1.00A. For a general discussion of the role of juries and the responsibility of the trial judge, refer to the Comment to NJI2d Crim. 1.00. Regarding instructions to a jury in a criminal trial, see Neb.Rev.Stat. § 29-2022 (Reissue 2008); *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *Sundahl v. State*, 154 Neb. 550, 562, 48 N.W.2d 689, 698 (1951).

The Nebraska Supreme Court has held that the jury need not be instructed each time it separates: "It is not the number of admonitions but the fact of admonition that is important." *Id.* The Committee nonetheless believes that it is advisable to instruct each time.

The bracketed parts of NJI2d Crim. 1.3 should be included as

appropriate. Bracketed paragraph (4) ordinarily will be given. It should be omitted only if the jury was taken to view the scene of the crime. In the event of a jury view, the omission of paragraph (4) should be accompanied by giving NJI2d Crim. 5.9 (Jury View).

AUTHORITIES

Refer to authorities to NJI2d Crim. 1.00; NJI2d Civ. 1.00A; Neb.Rev.Stat. § 29-2022 (Reissue 2008); State v. Bautista, 193 Neb. 476, 227 N.W.2d 835 (1975); Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951).

Research References

West's Key Number Digest
Criminal Law ✎852

Legal Encyclopedias
C.J.S., Criminal Law § 1371

CHAPTER 2

BURDEN OF PROOF; PRESUMPTIONS; JUDICIAL NOTICE

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

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| 2.0 | Proof Beyond Reasonable Doubt |
| 2.1 | Presumption (Presumed Fact Element of Crime or Defense for Which State Has Burden) |
| 2.2 | Presumption (Presumed Fact Neither Element of Crime Nor of Defense for Which State Has Burden) |
| 2.3 | Judicial Notice |

COMMENT

Chapter 2 contains all the separate NJI2d Crim. instructions relating to burden of proof or matters for which the normal process for meeting proof burdens is adjusted (presumptions and judicial notice). There are two situations in Nebraska law where a preponderance burden (more likely true than not) is charged to the jury. These are with regard to the defendant's burden to prove insanity (NJI2d Crim. 7.0) and the defendant's burden to show that he was entrapped into joining a criminal conspiracy (NJI2d Crim. 3.4). Because the preponderance burden of proof has such limited applicability in a Nebraska criminal trial, the Committee elected to include the burden directly in the insanity defense and in the Comment to NJI2d Crim. 3.4 rather than to carry a preponderance instruction as a separate NJI2d Crim. instruction.

NJI2d Crim. 2.0

PROOF BEYOND REASONABLE DOUBT

A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

COMMENT

When given as a final instruction NJI2d Crim. 2.0 should be fol-

lowed by NJI2d Crim. 9.4 (Defendant's Failure to Testify), if applicable AND requested by the defendant.

Although the Nebraska Supreme Court several times approved the wording of NJI 14.08 (1969)(the former reasonable doubt instruction), it never tied itself to that wording as the only possible constitutional instruction. In fact, the Court at times approved variants, some substantially different from NJI 14.08. See *Hiller v. State*, 116 Neb. 582, 589, 218 N.W. 386, 388-89 (1928); *Savary v. State*, 62 Neb. 166, 174, 87 N.W. 34, 37 (1901); *McArthur v. State*, 60 Neb. 390, 392, 83 N.W. 196, 197 (1900). See also, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

In light of the difficulty of defining reasonable doubt, the modern posture of the reasonable doubt instruction in the United States, and the focus throughout NJI2d Crim. to achieve juror comprehension through instructions stated simply, directly, and in plain language, the Committee elected to provide the shortest and least complicated instruction not prohibited by Nebraska law. Such an approach has the approval of the United States Supreme Court. In *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) the Court criticized the use of the phrase "substantial doubt" used in earlier versions of reasonable doubt instructions in Nebraska. While the Court did not invalidate its usage, it did find the language "somewhat problematic," suggesting on the one hand an appropriate concern that the doubt not be "seeming or imaginary" but at the same time improperly implying on the other hand that the doubt must be "specified to a large degree," a doubt greater than that required for acquittal under existing Supreme Court case law. The only language clearly prohibited in Nebraska is language directing that a reasonable doubt requires that the jury be able to give a reason for its decision or, worse, that the jury be able to give a reason based on the testimony or evidence. *E.g.*, *Baker v. State*, 109 Neb. 558, 191 N.W. 666 (1922); *Cowan v. State*, 22 Neb. 519, 35 N.W. 405 (1887). See *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986).

AUTHORITIES

State v. Fischer, 272 Neb. 963, 726 N.W.2d 176 (2007); *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

NJI 14.08 (1969); *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986); *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985); *Hiller v. State*, 116 Neb. 582, 218 N.W. 386 (1928); *Baker v. State*, 109 Neb. 558, 191 N.W. 666 (1922); *Lamb v. State*, 69 Neb. 212, 95 N.W. 1050 (1903); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901); *McArthur v. State*, 60 Neb. 390, 83 N.W. 196 (1900); *Childs v. State*, 34 Neb. 236, 51 N.W. 837 (1892); *Carr v. State*, 23 Neb. 749, 37 N.W. 630 (1888); *Cowan v. State*, 22 Neb. 519, 35 N.W. 405 (1887).

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NJI2d Crim. 2.1**PRESUMPTION (PRESUMED FACT ELEMENT OF
CRIME OR DEFENSE FOR WHICH STATE HAS
BURDEN)**

If you find that the following facts are true:

- 1.
- 2.
- 3.

then you may regard them as sufficient evidence of (here insert phrase identifying presumed fact constituting element of crime charged) but you are not required to do so.

Remember, the state still must prove (here insert phrase identifying presumed fact constituting element of crime charged) beyond a reasonable doubt on the basis of all the evidence.

COMMENT

Refer to NJI2d Civ. 2.14 to 2.14D.

Under the due process clause of the Constitution of the United States, a state may not describe an element as material to a crime, presume the existence of the element, and shift to the defendant the burden to disprove it. *Compare* Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) with Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

By contrast, a defendant constitutionally may be required to prove an affirmative defense. *See, e.g.,* Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), *rehearing denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), *rehearing denied*, 344 U.S. 848, 73 S.Ct. 4, 97 L.Ed. 659 (1952). In most criminal trials, however, the state under state law has the burden of disproof of an affirmative defense. Whenever it is the state's burden to disprove an affirmative defense, the state must disprove that defense beyond a reasonable doubt.

A presumption substitutes for direct evidence regarding a particular fact. It is an inference of fact drawn from another fact in evidence. If the presumed fact may be but need not be found upon proof of the basic fact, the presumption is permissive. If the presumed fact must be found upon proof of the basic fact (unless answered or explained), the presumption is mandatory. A conclusive presumption is irrebuttable. Under Neb.Rev.Stat. § 27-303 (Reissue 2008) only permissive presumptions may be employed to the state's benefit in a criminal prosecution in Nebraska. See *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989), *rehearing denied*, 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989).

Neb.Rev.Stat. § 27-303 (Reissue 2008) governs presumptions in all criminal cases where (1) the presumption favors the state and (2) there is no specific statute (or common law principle) establishing and describing a particular treatment of a presumption. For an example of a specific statutory presumption under Nebraska law, see Neb.Rev.Stat. § 28-611(6) (Cum. Supp. 2014). For an interpretation of this presumption see *State v. Hruza*, 223 Neb. 837, 394 N.W.2d 643 (1986).

NJI2d Crim. 2.1 and 2.2 together cover all presumptions under Neb.Rev.Stat. § 27-303 (Reissue 2008). If a presumption or inference works in favor of a defendant then the instruction given should be patterned on one of the presumption instructions applicable in civil cases. See NJI2d Civ. 2.14 to 2.14D.

Unconstitutionality may arise if a statute speaks in terms of "prima facie" evidence regarding material elements and a jury is instructed in the language of the statute. See Neb.Rev.Stat. §§ 28-1228 and 28-1310 (Reissue 2008); *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); and *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). See also *State v. Stalder*, 231 Neb. 896, 906, 438 N.W.2d 498, 505 (1989). As the Nebraska Supreme Court has said repeatedly, the phrase "prima facie" refers to a judicial determination that there is sufficient evidence on the elements to warrant submission to the jury. *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990); *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Under Neb.Rev.Stat. § 27-303 "statutory provisions that certain facts are prima facie evidence of other facts of guilt" are to be treated as permissive presumptions. It is unconstitutional to instruct that a presumption is mandatory. Further, the jury should not be instructed in the language of the statute. See *Kipf*, *supra*.

For purposes both of the judge's preliminary determination to submit [paragraph (2) of § 27-303] and of the language of the jury instruction [paragraph (3)], the statute divides presumptions into two categories. The first category is a presumption that "establishes guilt or is an element of the offense or negatives a defense;" the second category is any presumption that has a "lesser effect." NJI2d Crim. 2.1 covers the first category; NJI2d Crim. 2.2 covers the latter category.

If the defense is not an affirmative defense then the defense simply is a negation of an element of the crime. Presumptions relating to an element of a crime require an NJI2d Crim. 2.1 instruction.

It is the Committee belief that the NJI2d Crim. 2.1 instruction always relates to a presumption regarding an element of the crime or affirmative defense for which the state has the burden of proof. Paragraph (2) of Neb.Rev.Stat. § 27-303 (Reissue 2008) permits the judge to submit the presumption only if the judge first decides that on the basis of the evidence as a whole (including the evidence of basic facts that underly the presumption) a reasonable juror could find the presumed fact beyond a reasonable doubt. Paragraph (3) of the statute requires that the jury be told that if it believes the underlying facts, it may, but is not required to, regard them as sufficient evidence of the presumed fact. The jury also must be told that it must decide that the presumed fact is proved beyond a reasonable doubt.

AUTHORITIES

Neb.Rev.Stat. § 27-303 (Reissue 2008); Neb.Rev.Stat. § 27-611(6) (Cum. Supp. 2014)); Neb.Rev.Stat. § 28-1228 (Reissue 2008); Neb.Rev.Stat. § 28-1310 (Reissue 2008); *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), *appeal after remand*, 431 F.2d 85 (5th Cir.1970); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990); *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Hruza*, 223 Neb. 837, 394 N.W.2d 643 (1986).

Research References

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NJI2d Crim. 2.2

PRESUMPTION (PRESUMED FACT NEITHER ELEMENT OF CRIME NOR OF DEFENSE FOR WHICH STATE HAS BURDEN)

If you find that the following facts are true:

1.

2.

3.

then you may regard these facts as sufficient evidence of (here insert presumed fact) but you are not required to do so.

COMMENT

Refer to the Comment to NJI2d Crim. 2.1.

Neb.Rev.Stat. § 27-303 (Reissue 2008) governs presumptions in all criminal cases where (1) the presumption favors the state and (2) there is no specific statute (or common law principle) establishing and describing a particular treatment of a presumption. The statute divides presumptions into two categories. The first category is a presumption that “establishes guilt or is an element of the offense or negatives a defense,” and is covered by NJI2d Crim. 2.1. The second category is any presumption that has a “lesser effect,” and is covered by NJI2d Crim. 2.2.

Paragraph (2) of Neb.Rev.Stat. § 27-303 (Reissue 2008) permits the judge to submit a presumption in the second category when the judge decides that the basic facts that underly the presumption are supported by substantial evidence or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

When instructing on this type of presumption, paragraph (3) of the statute requires that the jury be told that if it believes the underlying facts, it may, but is not required to, regard them as sufficient evidence of the presumed fact.

Both NJI2d Crim. 2.1 and 2.2 govern cases in which a statutory presumption works in favor of the state. If a presumption or inference works in favor of a defendant then the instruction given should be patterned on one of the presumption instructions applicable in civil cases. See NJI2d Civ. 2.14 to 2.14D.

AUTHORITIES

See authorities listed under NJI2d Crim. 2.1; *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *Mantell v. Jones*, 150 Neb. 785, 36 N.W.2d 115 (1949).

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NJI2d Crim. 2.3**JUDICIAL NOTICE**

During the trial I took judicial notice of the fact that (here insert fact judicially noticed). You may but are not required to accept that fact as true.

COMMENT

Nebraska provides by statute that in criminal prosecutions “the judge shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” Neb.Rev.Stat. § 27-201 (Reissue 2008). NJI2d Crim. 2.3 instructs the jury that it may accept a fact as “true” rather than “conclusive.” There is no change in meaning. The Committee selected this particular formulation to enhance jury comprehension.

A judicially noticed adjudicative fact is one known generally within the territorial jurisdiction of the trial court or one readily determined through sources “whose accuracy cannot reasonably be questioned.” Neb.Rev.Stat. § 27-201 (Reissue 2008). *See* State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989); State v. McKenna, 228 Neb. 29, 421 N.W.2d 19 (1988); State v. Barrett, 200 Neb. 553, 264 N.W.2d 434 (1978); State v. Kolosseus, 198 Neb. 404, 253 N.W.2d 157 (1977).

A jury may be instructed about a judicially noticed fact at the time during trial when judicial notice is taken or at the end of trial or both at the time notice is taken and at the end of trial. Whenever the jury instruction comes at the end of trial, whether only at that time or as a repeat admonition, then the Committee recommends that the judge refer specifically to the fact noticed. If judicial notice is taken only during the trial then a judge may want to consider putting what is said in writing. Nebraska by statute requires that, unless there is a waiver by counsel, all instructions must be in writing. Neb.Rev.Stat. § 25-1111 (Reissue 2008). Although the statute does not require that all cautionary statements made to a jury during a trial must be put in writing; *Grandsinger v. State*, 161 Neb. 419, 438–39, 73 N.W.2d 632, 646 (1955), *cert. denied*, 352 U.S. 880, 77 S.Ct. 104, 1 L.Ed.2d 81 (1956); the special nature of judicial notice may warrant additional care.

AUTHORITIES

Neb.Rev.Stat. § 27-201 (Reissue 2008); State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989); State v. McKenna, 228 Neb. 29, 421 N.W.2d 19 (1988); State v. Barrett, 200 Neb. 553, 264 N.W.2d 434 (1978); State v. Kolosseus, 198 Neb. 404, 253 N.W.2d 157 (1977).

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CHAPTER 3

GENERAL INSTRUCTIONS: ELEMENTS; MULTIPLE CRIMES; MULTIPLE PERPETRATORS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

A. ELEMENTS

- 3.0 Elements; Effect of Findings (No Insanity Defense)
- 3.1 Elements; Effect of Findings; Greater and Included Crimes (No Insanity Defense)
- 3.2 Elements; Effect of Findings (Insanity Defense)
- 3.3 Elements of Attempt
- 3.4 Elements of Criminal Conspiracy; Withdrawal
- 3.5 Elements of Felony Murder; Effect of Findings
- 3.5A Elements of Murder in the First Degree; Effect of Findings; Greater And Included Crimes (No Insanity Defense)
- 3.6 Elements of Theft; Effect of Findings; Value Declared

B. MULTIPLE CRIMES; MULTIPLE PERPETRATORS

- 3.7 Multiple Counts; Multiple Defendants
- 3.8 Aider (Same Crime as Principal)
- 3.9 Aider (Different Crime from Principal)

C. WITHDRAWN INSTRUCTION

- 14.09 (1969) Statutes and Ordinances

COMMENT

Chapter 3 contains all the elements instructions of NJI2d Crim. as well as instructions on multiple-defendant trials and on aiding and abetting.

NJI2d Crim. 3.0 and 3.1 together are the general elements instructions when no insanity defense is submitted—NJI2d Crim. 3.0 covers crimes for which there is no lesser included crime while NJI2d Crim. 3.1 covers crimes related as greater to lesser. When the insanity defense is submitted, NJI2d Crim. 3.2 is the appropriate elements instruction.

NJI2d Crim. 3.3 and NJI2d Crim. 3.4 respectively define the substantive elements of Attempt and Criminal Conspiracy. They substitute for Part A of NJI2d Crim. 3.0, 3.1, or 3.2, as appropriate. NJI2d Crim. 3.5 is the entire elements instruction for Felony Murder. NJI2d Crim. 3.6 is the entire elements instruction for the theft crimes.

A. ELEMENTS

NJI2d Crim. 3.0

ELEMENTS; EFFECT OF FINDINGS (NO INSANITY DEFENSE)

Alternative A—Use When There Is One Crime and There Are No Lesser Included Crimes.

A. ELEMENTS

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

B. EFFECT OF FINDINGS

If you decide that the state proved each element beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

Alternative B—Use When There Are Multiple, Separate Crimes Not Related As Greater and Lesser Included Crimes.

A. ELEMENTS

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

B. EFFECT OF FINDINGS

You must separately consider the (here insert number) crimes charged. For each crime your task is the same. If you decide that the state proved each element (of, regarding) that particular crime beyond a reasonable doubt, then you must find the defendant guilty of that crime. Otherwise, you must find the defendant not guilty of that crime.

COMMENT

NJI2d Crim. 3.0 (together with NJI2d Crim. 3.1 [ELEMENTS; EFFECT OF FINDINGS: GREATER AND INCLUDED CRIMES (No Insanity Defense)]) is the form instruction on the material elements to be proved by the state of any crime for which a specific elements instruction is not provided in NJI2d Crim. and for which the defense of insanity is not raised. All elements instructions are found in Chapter 3 of NJI2d Crim. NJI2d Crim. 3.2 is the elements instruction when the insanity defense is raised. Crimes for which a separate, specific elements instruction are provided are Attempt (NJI2d Crim. 3.3); Criminal Conspiracy (NJI2d Crim. 3.4); Felony Murder (NJI2d Crim. 3.5); and theft (NJI2d Crim. 3.6.)

Giving of the pertinent elements instruction(s) obviates any need to read to the jury the statute or ordinance under which a defendant is charged. The Committee therefore recommends against reading the statute or ordinance to the jury.

It is the duty of the trial judge to instruct the jury on the pertinent law of the case whether or not there is a particular request; failure to do so is prejudicial error. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965); *Jones v. State*, 147 Neb. 219, 22 N.W.2d 710 (1946); *Young v. State*, 74 Neb. 346, 104 N.W. 867 (1905); *Dolan v. State*, 44 Neb. 643, 62 N.W. 1090 (1895). If the instructions omit a material element prejudice results because the effect is to withdraw an element from jury determination for which the defendant is entitled to have a jury decision. *Id.*; *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987); *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986). *See Neb.Rev.Stat. §§ 28-518; 29-2026.01* (Reissue 1995). However, under the United States Constitution a court's failure to instruct the jury on a material element of the offense does not necessarily constitute reversible error if the evidence clearly establishes proof of the element beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (applying harmless error analysis where court improperly failed to instruct the jury on a material element of the offense but made

a judicial finding of the element under circumstances where the element was uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the error).

When an affirmative defense is at issue disproof of that defense constitutes the final element in the list of elements provided to the jury. Failure to include the negation of such affirmative defense as the final element in the list of elements may constitute reversible error. *State v. Warren*, 9 Neb.App. 60, 608 N.W.2d 617 (2000) (reversible error not to include instruction as an element of second degree murder requiring State to disprove that defendant killed in self-defense where defendant adequately raises the self-defense issue).

The insanity defense is an affirmative defense. It nonetheless is treated separately in NJI2d Crim. 3.2 [ELEMENTS; EFFECT OF FINDINGS (Insanity Defense)] because, unlike all other generally applicable affirmative defenses in Nebraska (where the burden remains on the state to disprove the defense beyond a reasonable doubt), for insanity the burden is on the defendant to prove insanity by the greater weight of the evidence. Neb.Rev.Stat. § 29-2203 (Reissue 1995). The only other time under Nebraska law when a defendant must prove her defense is when the defense of entrapment is raised in a conspiracy prosecution. See Comment to NJI2d Crim. 7.7 (ENTRAPMENT) and to NJI2d Crim. 3.4 (ELEMENTS OF CRIMINAL CONSPIRACY).

A defendant is not automatically entitled to inclusion of disproof of an affirmative defense as an element of the state's case. See, e.g., *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986); *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). There must be evidence to put the defense at issue. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *State v. Minor*, 188 Neb. 23, 195 N.W.2d 155 (1972); *State v. Krasne*, 103 Neb. 11, 170 N.W. 494 (1918).

Some defenses, such as intoxication and alibi, although denominated defenses, are not affirmative defenses because they raise no new element for consideration. (Instructions regarding defenses that are not affirmative defenses are found in Chapter 8 of NJI2d Crim.) Instead, they simply represent a defendant's claim that the state failed to prove a material element of the crime [state of mind for intoxication; that the defendant was the criminal actor for alibi; see Comments to NJI2d Crim. 8.0 (INTOXICATION) and 8.1 (ALIBI)] in a way that may call for an amplified instruction on the element. Such defenses are treated differently from affirmative defenses when instructing on the elements of the crime to be proved by the state. Disproof of such a defense is not included as the final element in the list of elements of the state's proof because the element at issue already appears in the list. If, for example, the jury is instructed that an element of First Degree Murder is premeditation, it is unnecessary also to include as an additional element "that the defendant was not so intoxicated as to be able to premeditate."

Alternative A of NJI2d Crim. 3.0 is drafted in terms of a prosecu-

tion for only one crime. If more than one crime is charged then the elements of each crime must be stated separately as set forth in Alternative B. When there are several counts of the same crime, as, for example, a robbery of several victims at the same time, the language of Alternative B might be adjusted to highlight the several counts ("In Count 1, the elements of robbery are" Etc.).

For an elements instruction when there is at least one included crime NJI2d Crim. 3.1 should be employed. The difference between the general elements instruction of NJI2d Crim. 3.0 and that of NJI2d Crim. 3.1 for greater and included crimes is in Part B, Effect of Findings. Where the crimes are not related as greater to lesser, a defendant may be found guilty of every crime with which he is charged. Thus the jury must continue to consider each crime even if it finds the defendant guilty of the first in the list. For crimes related as greater to lesser, however, guilt of the greater subsumes the lesser and, consequently, the jury should not proceed to consider the next lesser included crime. Rather, it should proceed to consider another, separate crime, or to consider a defense, or it should stop.

When no included crime is charged the sequence of instructions normally will be NJI2d Crim. 9.2 (NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE); 2.0 (REASONABLE DOUBT); 3.0; and any applicable instructions on defenses (except insanity). This order likely will need adjusting if a defense is available for some but not all crimes charged.

Care should be taken to distinguish cases where separate crimes are charged from cases where a single crime is charged for which guilt can be established by more than one theory. That distinction is important because while a jury must unanimously agree that the defendant committed each separate crime, they do not have to unanimously agree on the theory by which they find the defendant guilty of a single crime. *See, State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986) (jury must unanimously agree defendant committed crime of driving while intoxicated but does not have to unanimously agree whether defendant's guilt is established by theory that defendant operated a motor vehicle while under the influence of alcohol, operated a motor vehicle while under the influence of drugs, or operated a motor vehicle with more than .10 percent of alcohol in the blood); *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991) (jury must unanimously agree that defendant committed first degree murder but need not unanimously agree whether defendant committed offense under theory that defendant killed with premeditation and deliberation or under Felony Murder theory); *see also*, Neb.Rev.Stat. § 28-305 (Reissue 1995) (manslaughter conviction can be based either on theory that defendant killed another without malice on a sudden quarrel or on theory that defendant unintentionally caused the death of another while in the commission of an unlawful act); Neb.Rev.Stat. §§ 28-509 to 28-518 (Reissue 1995) (crime of theft embraces theories such as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiv-

ing stolen property, and the like); *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (upholding constitutionality of jury instruction requiring unanimous agreement that defendant committed first degree murder without requiring that jury agree on the specific theory, premeditation or Felony Murder). Thus, in cases where a crime is charged that can be established under more than one theory the instructions should inform the jury that they must unanimously agree that the crime charged was committed but need not unanimously agree on the theory by which guilt is established.

One way to address the unanimity requirements in single crime, multiple theory cases is to instruct only on the generic crime using Alternative A of NJI2d CRIM. 3.0. Under this approach, the theories by which the crime can be established are addressed as alternative ways of satisfying one or more elements of the generic crime in the “elements” section of Alternative A. *See, e.g., Parker and Buckman, supra*; Comment, NJI2d 3.5. A general approach to the “elements” section of NJI2d Crim. 3.0, Alternative A, in such situations is as follows:

(The elements of (here insert generic crime charged, for example Murder in the First Degree), Regarding (here insert generic crime charged, for example Murder in the First Degree), the elements of the state’s case) are:

1. That the defendant (here insert conduct on which the charge is based, for example killed the victim where the charge is Murder in the First Degree).
2. That the defendant did so (here insert first theory by which the generic crime can be established, for example Premeditated Murder), or that the defendant did so (here insert second theory by which the generic crime can be established, for example Felony Murder) [or that (here insert third theory by which crime can be established, if applicable), etc.].

You are not required to unanimously agree that the state proved any single theory of (here insert generic crime charged, for example Murder in the First Degree). Therefore, it is possible for you to find the defendant guilty of (here insert generic crime, for example Murder in the first Degree) even though some of you find that the state proved all the elements of (here insert first theory, for example Premeditated Murder, by which the crime may be established), and others of you find that the state proved all the elements of (here insert the second theory, for example Felony Murder, by which the crime may be established). If you are not satisfied beyond a reasonable doubt that the defendant committed (here insert generic crime) then you must find the defendant not guilty.

AUTHORITIES

Neb.Rev.Stat. § 28-305; Neb.Rev.Stat. §§ 28-509 to 28-518 (Reissue

1995); *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991); *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986); *NJI 14.05* (1969), *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986); *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986); *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986); *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Frandsen*, 199 Neb. 546, 260 N.W.2d 206 (1977); *State v. Minor*, 188 Neb. 23, 195 N.W.2d 155 (1972); *State v. Houpp*, 182 Neb. 298, 154 N.W.2d 465 (1967); *State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d 791 (1966); *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965); *Jones v. State*, 147 Neb. 219, 22 N.W.2d 710 (1946); *Hogoboom v. State*, 120 Neb. 525, 234 N.W. 422 (1931); *State v. Herman Krasne, The Novelty Skirt Co.*, 103 Neb. 11, 170 N.W. 494 (1918); *Hennig v. State*, 102 Neb. 271, 166 N.W. 617 (1918); *Gammel v. State*, 101 Neb. 532, 163 N.W. 854 (1917); *Gammel v. State*, 101 Neb. 532, 166 N.W. 250 (1917); *Goff v. Nebraska*, 89 Neb. 287, 131 N.W. 213 (1911). *Johns v. State*, 88 Neb. 145, 129 N.W. 247 (1910); *Young v. State*, 74 Neb. 346, 104 N.W. 867 (1905); *Reno v. State*, 69 Neb. 391, 95 N.W. 1042 (1903); *Dolan v. State*, 44 Neb. 643, 62 N.W. 1090 (1895); *Redding v. Benson*, 739 F.2d 1360 (8th Cir.1984), *cert. denied*, 469 U.S. 1222, 105 S.Ct. 1210, 84 L.Ed.2d 352 (1985); *United States v. Gomez*, 733 F.2d 69 (8th Cir.1984).

Research References

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Criminal Law ¶772, 798(0.5)

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C.J.S., Criminal Law §§ 1312 to 1319, 1343, 1347 to 1348, 1350, 1540

NJI2d Crim. 3.1**ELEMENTS; EFFECT OF FINDINGS; GREATER AND INCLUDED CRIMES (NO INSANITY DEFENSE)**

Depending on the evidence, you may return one of several possible verdicts. You may find the defendant:

- (1) Guilty of (here insert greatest crime); or
- (2) Guilty of (here insert first lesser included crime); or
- (3) [continue with list until all lesser included crimes are named in sequence; or]
- (4) Not guilty.

A. ELEMENTS

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

(The elements of the crime of (here insert crime), Regarding the crime of (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

B. EFFECT OF FINDINGS

You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must proceed in this fashion to consider each of the crimes in sequence until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.

COMMENT

Refer to the Comments to NJI2d Crim. 3.0 [ELEMENTS: EFFECT OF FINDINGS (No Insanity Defense)] and 3.2 [ELEMENTS: EFFECT OF FINDINGS (Insanity Defense)].

NJI2d Crim. 3.1 is a redrafted NJI 14.06 (1969). NJI2d Crim. 3.1 should be employed only after any NJI2d Crim. 3.0 instructions are given for separate crimes unrelated as greater to lesser. NJI2d Crim. 3.1 should be given separately for each class of greater to lesser crimes with which the defendant is charged. If there is more than one class of greater to lesser crimes then appropriate language should be substituted for "[stop]" in Part B, Effect of Findings.

Each theft crime under Neb.Rev.Stat. §§ 28-510 to 28-518 (Reissue 1995) may be a greater or lesser crime depending on the value of the item stolen. Theft by unlawful taking or disposition, Neb.Rev.Stat. § 28-511 (Reissue 1995), for example, is a Class III felony if the property taken is valued at more than \$1500.00; Neb.Rev.Stat. § 28-518 (Reissue 1995); and a Class II misdemeanor if the property taken is valued at \$200.00 or less. *Id.* Value is an element of theft in the sense that the prosecution must prove beyond a reasonable doubt the value of the

thing involved. *State v. Ybarra*, 9 Neb.App. 230, 609 N.W.2d 696 (2000). The value of the thing involved is a question for the jury. *Id.* However, value is also important only for purposes of penalty. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). NJI2d Crim., therefore does not treat the theft crimes as greater to lesser for purposes of a jury instruction. NJI2d Crim. 3.6 is the elements instruction to be employed when a class of theft is charged. For a full discussion, and sample instruction dealing with value in theft cases, see the Comment to NJI2d Crim. 3.6 (ELEMENTS OF THEFT; EFFECT OF FINDINGS; VALUE DECLARED).

There are several ways to define a lesser included crime. *See, e.g.*, *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Brown*, 163 Conn. 52, 61–63, 301 A.2d 547, 552–53 (1972). The test adopted by the Nebraska Supreme Court is the statutory-elements approach: “[t]o be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time committing the lesser.” *State v. Williams*, 243 Neb. 959, 965, 503 N.W.2d 561, 565 (1993) (citing *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982) and overruling cases applying the cognate-evidence approach). Thus in determining whether an offense is a lesser-included offense of another, a court looks to the statutory elements of the two offenses rather than to the evidence in the particular case. *Williams, id.* Once it is determined that an offense is a lesser-included offense, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged but convicting him of the lesser offense. *Id.* While prior case law held that there are no lesser included crimes of an attempted crime, *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990) Nebraska law now holds otherwise. *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997) (attempted second degree murder is a lesser included offense of attempted first degree murder).

If the evidence supports the giving of a lesser included instruction then it is error for the trial judge to fail so to instruct on request. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946). If, on the other hand, the evidence fails to support the existence of a lesser included crime then it is not error to fail to instruct. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Beasley*, 214 Neb. 918, 922–23, 336 N.W.2d 601, 604 (1983). Finally, where neither the defense nor the prosecution requests an instruction the trial judge may nonetheless give an included instruction if the instruction is warranted by the evidence. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986). The judge must do so in a homicide prosecution when murder is charged, the evidence supports different and reasonable inferences as to the degree of the homicide, and, as the Committee reads the cases, the statute of limitations

has not yet run on the included crimes. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Archbold*, 217 Neb. 345, 350, 350 N.W.2d 500, 504 (1984). The obligation to instruct on included crimes arises by statute in the homicide situation. *Id.* In capital cases it is mandated by the sixth amendment of the United States Constitution. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), *on remand*, 396 So.2d 645 (Ala.1980). However, under Nebraska law, upheld by the United States Supreme Court, there are no lesser included homicide offenses of Felony Murder. *State v. Price*, 252 Neb. 365, 372, 562 N.W.2d 340, 346 (1997); *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998). Thus, it is error for a court to instruct on second degree murder or manslaughter in a Felony Murder trial. Where lesser included crimes are present, however, if the statute of limitations has run on the included crimes then there is an obligation to instruct only if the defendant waives the bar of the statute. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

AUTHORITIES

NJI 14.06 (1969); Neb.Rev.Stat. § 29-2027 (Reissue 1995); Neb.Rev.Stat. § 29-2025 (Reissue 1995); *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990); *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986); *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986); *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984); *State v. Miller*, 215 Neb. 145, 337 N.W.2d 424 (1983); *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983); *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980); *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978); *State v. Colgrove*, 197 Neb. 375, 248 N.W.2d 780 (1977); *State v. Jacobs*, 192 Neb. 246, 219 N.W.2d 768 (1974); *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966); *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946); *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945); *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906); *Fager v. State*, 49 Neb. 439, 68 N.W. 611 (1896).

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Legal Encyclopedias
C.J.S., Criminal Law §§ 1312 to 1319, 1343, 1347 to 1348, 1350, 1540

NJI2d Crim. 3.2**ELEMENTS; EFFECT OF FINDINGS (INSANITY DEFENSE)**

Depending on the evidence, you may return one of several possible verdicts. You may find the defendant:

- (1) Guilty of (here insert crime or greatest crime if there are lesser included crimes); or
- [(2) Guilty of (here insert first lesser included crime); or
- (3) continue with list until all lesser included crimes are named in sequence; or]
- (4) Not guilty; or
- (5) Not responsible by reason of insanity.

A. ELEMENTS

(The elements of (here insert crime), Regarding (here insert crime), the elements of the state's case) are

- (1)
- (2)
- (3) (Etc.)

B. EFFECT OF FINDINGS

(If There Will Be No Instruction Regarding An Included Crime Then The Following Paragraphs Constitute Part B of This Instruction:)

You must decide whether the state proved each element beyond a reasonable doubt.

If the state did not so prove each element, then you must find the defendant not guilty. If the state did so prove, then you must go on to consider the defendant's defense that (he, she) was insane at the time (he, she) committed the (here insert crime).

(Here insert NJI2d Crim. 7.0 (INSANITY).)

(If There Will Be An Instruction Regarding An Included Crime Then The Following Paragraphs Constitute Part B of This Instruction:)

You must decide whether the state proved each element beyond a reasonable doubt.

If the state did so prove each element, then you must go on to consider the defendant's defense that (he, she) was insane at the time (he, she) committed the (here insert greatest crime).

If the state did not so prove, then you must proceed to consider the crime of (here insert included crime).

(The elements of the included crime of (here insert crime), Regarding the crime of (here insert crime), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

You must decide whether the state proved each element beyond a reasonable doubt.

If the state did so prove each element, then you must go on to consider the defendant's defense that (he, she) was insane at the time (he, she) committed the (here insert crime). If the state did not so prove, then you must find the defendant not guilty.

(Here insert NJI Crim. 7.0 (INSANITY).)

COMMENT

Refer to the Comments to NJI2d Crim. 3.0 [ELEMENTS; EFFECT OF FINDINGS (No Insanity Defense)] and 3.1 [ELEMENTS; EFFECT OF FINDINGS: GREATER AND INCLUDED CRIMES (No Insanity Defense)]. If several crimes unrelated as greater to lesser are charged, then NJI2d Crim. 3.2 should be adjusted to reflect that. NJI2d Crim. 3.0 (when the crimes are not related as greater to lesser) should be used as a guide.

Normally the order of instructions anticipates that the reasonable doubt instruction should come after NJI2d Crim. 9.2 (NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE) and before any of the elements instructions. If there are no other elements instructions outside of NJI2d Crim. 3.2 to be given, then it may be better to insert the reasonable doubt instruction immediately after Part A of NJI2d Crim. 3.2 to emphasize the difference between this burden and the defendant's burden to show insanity. If there are several elements instructions given and a considerable time has intervened since giving the reasonable doubt instruction after NJI2d Crim. 9.2, it might be appropriate to repeat the reasonable doubt instruction after Part A. In the event the reasonable doubt instruction is to be given after Part A, the following language should be used:

"As I said, it is up to the state to prove each of these es-

sentential elements beyond a reasonable doubt. (Here insert NJI2d Crim. 2.0, PROOF BEYOND REASONABLE DOUBT)."

NJI2d Crim. 3.2 also may need adjusting to reflect the fact that in a particular case the insanity defense may be interposed against some but not all crimes charged.

AUTHORITIES

Refer to Comments and Authorities to NJI2d Crim. 3.0 [ELEMENTS; EFFECT OF FINDINGS (No Insanity Defense)]; 3.1 [ELEMENTS; EFFECT OF FINDINGS: GREATER AND INCLUDED CRIMES (No Insanity Defense)]; and 7.0 (INSANITY).

Research References

West's Key Number Digest
Criminal Law ¶772, 773, 798(0.5)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1312 to 1319, 1321, 1343, 1347 to 1348, 1350, 1540

NJI2d Crim. 3.3

ELEMENTS OF ATTEMPT

(If The Completed, Substantive Crime Also Is Charged, Then Part A Follows The Elements Instruction For The Completed, Substantive Crime.)

A. ELEMENTS

(The elements of attempted (here insert crime), Regarding attempted (here insert crime), the elements of the state's case) are:

(1) That the defendant intended to commit (here insert crime attempted); and

(2) That on or about the _____ day of _____, 20____, in _____ County, Nebraska, the defendant intentionally engaged in conduct that [, under the circumstances as (he, she) believed them to be,] was a substantial step toward committing (here insert crime); and

(3) That the defendant's conduct strongly corroborated (his, her) intent to commit (here insert crime).

(If the Completed Substantive Crime Is Not Charged, Here Insert Elements of Completed, Substantive Crime Without Using the Word, "Element.")

B. EFFECT OF FINDINGS

(Here insert Part B of NJI2d Crim. 3.0, 3.1, or 3.2 as appropriate.)

COMMENT

NJI2d Crim. 3.3 is drafted as Part A of a standard elements instruction. If Attempt is the only crime charged (and no insanity defense is interposed), then NJI2d Crim. 3.3 substitutes for Part A of NJI2d Crim. 3.0 [ELEMENTS; EFFECT OF FINDINGS (No Insanity Defense)]. If Attempt is charged along with the completed substantive charge (and no insanity defense is interposed), then NJI2d Crim. 3.3 is included in sequence in Part A of NJI2d Crim. 3.1 [ELEMENTS; EFFECT OF FINDINGS; GREATER AND INCLUDED CRIMES (No Insanity Defense)]. In other words, the elements instruction on Attempt would come subsequent to the elements instruction on the completed substantive crime. If an insanity defense is raised, then NJI2d Crim. 3.3 fits into Part A of NJI2d Crim. 3.2 [ELEMENTS; EFFECT OF FINDINGS (Insanity Defense)].

The elements of the substantive crime whose commission the defendant is charged with attempting also must be set forth. If Attempt and the substantive crime both are charged, then the NJI2d Crim. 3.1 instruction for greater and lesser crimes will be used and the elements of the greater substantive crime already will have been given. If Attempt alone is charged then the elements of the substantive crime should be provided before proceeding to Part B of the elements instruction. In that event the elements should be provided without using the term "elements." Appropriate language (to follow NJI2d Crim. 3.3 and precede Part B of NJI2d Crim. 3.0 or 3.2) might be

"(Here insert crime attempted) is committed when:

"(1)

"(2)

"(3)"

As Neb.Rev.Stat. § 28-201 (Reissue 1995) defines attempt, there are three situations in which an attempt may occur. The body of NJI2d Crim. 3.3 is designed for the most likely attempt situation, one arising under subsection (1)(b) of the attempt statute, where the defendant intentionally attempts to commit a crime but is stopped before completion. The bracketed language in numbered paragraph (2) should be given only if there is an issue of impossibility.

Subsection (1)(a) of the attempt statute covers situations of impossibility where the defendant did everything he intended to do to commit the crime but he nonetheless did not commit it because it was impossible to commit it in the circumstances as they actually were (as compared to the circumstances as he mistakenly believed them to be). See *State v. Soddors*, 208 Neb. 504, 304 N.W.2d 62 (1981). Subsection (1)(b) of the statute also covers the situation in which the crime was impossible. In the situation covered by (1)(b), the defendant did not complete all acts necessary to commit the crime. Instead, the defendant

committed what would have been a substantial step toward completing the crime had the circumstances been as he believed.

The attempt statute makes a person culpable for engaging in "conduct" that constitutes the crime (but for impossibility) or that constitutes a substantial step in its commission. Neb.Rev.Stat. § 28-201 (Reissue 1995). In Nebraska "conduct" is defined by statute to mean "an action or omission" In some situations, then, a person's failure to act could make her guilty of an attempt. In a failure to act situation numbered paragraphs (2) and (3) of NJI2d Crim. 3.3 should be adjusted (and expanded). Appropriate language might be:

"(2) That on or about the _____ day of _____, 20____, in _____ County, Nebraska, the defendant (failed to engage in conduct; here insert phrase describing failure to act); and

"(3) That (this failure to act, here insert phrase describing failure to act) was intentional; and

"(4) That (this failure to act, here insert phrase describing failure to act) [under the circumstances as the defendant believed them to be,] was a substantial step toward committing the (here insert crime); and

"(5) That (this failure to act, here insert phrase describing failure to act) strongly corroborated (his, her) intent to commit (here insert crime); and

"(6) That the defendant (here insert phrase describing relationship or contractual obligation triggering duty of care) that required (him, her) to act."

The remaining statutory provision, section (2) of Neb.Rev.Stat. § 28-201 (Reissue 1995), has been called "inartfully drafted and unduly complex" by the Nebraska Supreme Court. *State v. Soddors*, 208 Neb. 504, 508, 304 N.W.2d 62, 65 (1981). The problem it addresses is the situation of a crime that carries a specific intent state of mind with regard to some but not all material elements. Section 2 covers the situation where one particular element of the crime (for example, that a particular result is caused) carries a lesser state of mind than specific intent.

One situation covered by section (2) was described by the Nebraska Supreme Court in *State v. Soddors*, 208 Neb. 504, 508, 304 N.W.2d 62, 65 (1981). This situation is one where a person intends to blow up an occupied building knowing that there are people inside yet he does not specifically intend to kill anyone. He blows up the building and several people are killed. In a state defining the state of mind for murder as specific intent to kill or reckless disregard for the known likely consequence that death will result, then a defendant may be guilty of murder if anyone is killed when the building blows up. Suppose, however, that no one is killed. Under Neb.Rev.Stat. § 28-201(2) the defendant may be convicted of attempted murder if he intentionally does something that

was a substantial step toward blowing up the building and he knows that under the circumstances killing someone is a likely consequence of blowing up the building.

Consider as a second situation under section (2) the crime of sexual assault of a child 14 or younger by one 19 or older. Neb.Rev.Stat. § 28-320.01 (Reissue 1995). The child's age is an element of the crime that the state must prove. But a defendant who actually has sexual contact with such a child is guilty regardless of whether he knew—or had reason to know—the victim's age. With regard to the element of the child's age, then, the associated state of mind is strict liability.

Suppose now that the defendant only attempts sexual contact. The purpose of section (2) is to hold him liable for the attempt in the same way he would have been liable for the completed crime. He is guilty under section (2) if (a) he intentionally does something that is a substantial step towards having sexual contact, and (b) he intends or knows that it will result in sexual contact, AND (c) the child actually is 14 or under. In other words, with respect to the element of the child's age the defendant is strictly liable in the same way he would have been strictly liable for the completed substantive offense: he neither need intend to have sexual contact with one 14 or under or know that the child is 14 or under.

If the crime charged falls under section (2) of Neb.Rev.Stat. § 28-201 then the following should be substituted for the three numbered paragraphs of NJI2d Crim. 3.3:

“(1) That the defendant intended to commit (here insert element of crime charged not associated with lesser mental state such as ‘sexual contact with (here insert victim's name)’); and

“(2) that (here insert element for which state of mind, if any is less than specific intent, such as ‘(here insert victim's name was 14 or younger)’); and

“[(3) that the defendant (here insert state of mind appropriate to element described in (2) above and repeat that element); and]

[“(4) That on or about _____ day of _____, 20__, in _____ County, Nebraska, the defendant intentionally engaged in conduct that [under the circumstances as (he, she) believed them to be,] was a substantial step toward (here insert element of crime charged not associated with lesser mental state such as ‘sexual contact with (here insert victim's name)’); and

[“(5) the defendant's conduct strongly corroborated (his, her) intent to (here again insert element of crime charged not associated with lesser mental state).”

The bracketed numbered paragraph (3) of the alternate instruction

should not be included if, as with the child's age in statutory rape, the defendant is strictly liable with regard to the element in question.

In a particular prosecution for attempt, it may be that impossibility or abandonment might be argued. Neither is a defense to attempt although either may be relevant to whether the defendant had the requisite intent. In Nebraska, abandonment of an attempt is not a defense. *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982). Where impossibility properly is argued, a judge may want to add the following paragraph after numbered paragraph (3) of NJI2d Crim. 3.3:

"A person may attempt to commit a crime even if it turns out that it was impossible under the circumstances to commit the crime that was the object of the attempt."

Where abandonment properly is argued a judge may want to add the following paragraph after numbered paragraph (3) of NJI2d Crim. 3.3:

"A person who intends to commit a crime and intentionally engages in conduct that is both a substantial step toward committing that crime and strongly corroborative of the intent to commit the crime has committed an attempt even though (he, she) later changes (his, her) mind and abandons the effort to commit the crime or does something to prevent its commission."

In *Manchester* the abandonment instruction challenged by the defendant apparently included language, as NJI2d Crim. 3.3 does not, that evidence of abandonment could be considered by the jury in deciding whether the defendant intended to commit the crime. The Committee believes that while evidence of abandonment may bear on intent, such information is properly left to argument of counsel and should not be part of a jury instruction.

AUTHORITIES

Neb.Rev.Stat. § 28-320.01 (Reissue 1995); *State v. Kowalski*, 214 Neb. 48, 332 N.W.2d 678 (1983); *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Hohnstein*, 213 Neb. 296, 328 N.W.2d 777 (1983); *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982); *State v. Meredith*, 208 Neb. 637, 304 N.W.2d 926 (1981); *State v. Soddors*, 208 Neb. 504, 304 N.W.2d 62 (1981).

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Criminal Law ¶44, 772

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C.J.S., Criminal Law §§ 114 to 123, 1312 to 1319

NJI2d Crim. 3.4**ELEMENTS OF CRIMINAL CONSPIRACY;
WITHDRAWAL****A. ELEMENTS**

The elements of criminal conspiracy are:

(1) that the defendant intended to promote or facilitate the commission of (here insert crime); and

(2) that on or about the (here insert day) day of (here insert month and year) in (here insert County), Nebraska, (he, she) agreed with at least one other person to cause the (here insert crime) to be committed; and

(3) that (one of them, the defendant or one of the others) intentionally did any one of the following with the intent to further the criminal purpose of the conspiracy:

(here insert in numerical order overt acts alleged) [; and

(4) that the defendant did not withdraw from the conspiracy.

B. WITHDRAWAL

A member of a criminal conspiracy can withdraw from it only if (he, she) had a voluntary and complete change of mind and either gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the crime from occurring].

When Applicable, The Following Paragraph Completes NJI2d Crim. 3.4.

When a person knows that (his, her) co-conspirator is conspiring with others to commit the same crime, then that person is part of a conspiracy with those others even if (he, she) does not know who they are.

COMMENT

As is NJI2d Crim. 3.3 (ELEMENTS OF ATTEMPT), NJI2d Crim. 3.4 is drafted to substitute for Part A of a standard elements instruction. The elements instruction into which NJI2d Crim. 3.4 will fit is either 3.0 (1989) or 3.2 (1989) (depending on whether an insanity defense is raised). Criminal Conspiracy is not a lesser included offense of a particular crime, except, perhaps, in the context of crimes such as incestuous marriage which necessarily entail concerted activity as an essential

element. *State v. Clason*, 3 Neb.App. 339, 351–52, 526 N.W.2d 673, 682 (1994). It also is very unlikely that it will or can be charged as the greater crime in a series of crimes. Thus NJI2d Crim. 3.1 (ELEMENTS; EFFECT OF FINDINGS: GREATER AND INCLUDED CRIMES (No Insanity Defense)) likely never will be the standard elements instruction to be used in conjunction with NJI2d Crim. 3.4.

The principal element of a criminal conspiracy is an agreement or understanding between two or more persons to commit a crime. Nebraska law provides that the gravamen of a conspiracy is that a person “agrees with one or more persons.” Neb.Rev.Stat. § 28-202(1)(a) (Reissue 1995); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982). The wording NJI2d Crim. 3.4 is intended expressly to permit conviction of one conspirator without regard to whether the other is convicted or acquitted or has some defense that justifies his acts and precludes prosecution.

A second element of criminal conspiracy is that there be an overt act in pursuance of the conspiracy committed by one of the conspirators. Neb. Rev. Stat. § 28-202(1)(b) (Reissue 1995). An overt act is something done in pursuance of the conspiracy that tends to show a preexisting conspiracy and manifests the intent to commit the crime that is the object of the conspiracy. *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987).

NJI2d Crim. 3.4 does not in express terms refer to an “overt act.” Nor does it define overt act. Instead, numbered paragraph (3) requires the judge simply to describe the activity alleged that she has decided constitutes an overt act. Thus, in NJI2d Crim. 3.4 (3) the jury directly is told that any of the overt acts described are sufficient to prove conspiracy against a defendant if the jury believes that one of them was committed and also finds that the defendant (1) intended and (2) conspired. The structure of the instruction thus obviates any need to use the term, “overt act,” or to define it. That the activity alleged constitutes an overt act is a matter of law to be resolved by the judge. The jury question is whether it believes that the overt act was committed. If in a particular case counsel feel more direct information is needed, counsel may accomplish that in argument.

A defendant may withdraw from a conspiracy. Neb.Rev.Stat. § 28-202 (Reissue 1995). If a defendant claims that he did withdraw, and only if a defendant makes such a claim, then bracketed element (4) should be given together with bracketed paragraph B. Otherwise, the basic instruction normally ends with element (3).

The bracketed final paragraph of NJI2d Crim. 3.4 should be given [only] if the defendant alleges that the other conspirators were unknown to him. In that event Neb.Rev.Stat. § 28-202 (Reissue 1995) provides that a person nonetheless may be convicted of a conspiracy with these others if he knows “that one with whom he conspires . . . has conspired with another person to commit such crime” See *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

It may be that a defendant claims that any alleged participation in a conspiracy resulted because she was entrapped. While entrapment is an available defense to Criminal Conspiracy, in Nebraska it must be proved by the defendant by the greater weight of the evidence. If evidence supports submission to the jury of an entrapment defense then the following language completes NJI2d Crim. 3.4:

“B. EFFECT OF FINDINGS

“You must decide whether the state proved each element beyond a reasonable doubt.

“If the state did not so prove each element then you must find the defendant not guilty. If the state did so prove, then you must go on to consider the defendant’s defense that (he, she) was entrapped.

“(Here Insert NJI2d Crim. 7.7 (Entrapment).)

“The defendant must prove by the greater weight of the evidence that (he, she) was entrapped. The greater weight of the evidence means evidence sufficient to make the claim of entrapment more likely true than not true. It does not necessarily mean a greater number of witnesses or exhibits.

“If you decide that the defendant proved (he, she) was entrapped by the greater weight of the evidence then you must find (him, her) not guilty. Otherwise, you must find (him, her) guilty.”

NJI2d Crim. expressly contains no instruction regarding co-conspirator acts and statements. See the Comment to Co-Conspirator Acts; Statements (Recommend No Instruction) in Chapter 5.

AUTHORITIES

Neb.Rev.Stat. §§ 28-109, 28-202, 28-203 (Reissue 1995); State v. Clason, 3 Neb.App. 339, 526 N.W.2d 673 (1994); State v. Anderson, 229 Neb. 427, 427 N.W.2d 764 (1988); State v. Lafler, 225 Neb. 362, 405 N.W.2d 576 (1987); State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987); State v. John, 213 Neb. 76, 328 N.W.2d 181 (1982); State v. Karsten, 194 Neb. 227, 231 N.W.2d 335 (1975).

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C.J.S., Rico (racketeer Influenced and Corrupt Organizations) § 12; Conspiracy §§ 96 to 98, 100 to 126, 130, 134, 137, 195 to 201, 204

NJI2d Crim. 3.5**ELEMENTS OF FELONY MURDER; EFFECT OF FINDINGS****A. ELEMENTS**

(The elements of Felony Murder, Regarding Felony Murder, the elements of the state's case) are:

(1) That the defendant intended to commit (here insert underlying felony charged such as sexual assault in the first degree, arson, robbery, kidnapping, or burglary) [of (here insert name of victim of underlying felony if that person is different from the person killed)]; and

(2) That on or about (here insert date) in the County of (here insert county) in the State of Nebraska the defendant was in the course of committing or attempting to commit that (here insert underlying felony charged such as sexual assault in the first degree, arson, robbery, kidnapping, hijacking of a (public, private) means of transportation, or burglary); and

(3) That (the defendant killed (here insert victim's name) during the course of committing or attempting to commit that (here insert underlying felony charged such as sexual assault in the first degree, arson, robbery, kidnapping, hijacking of a (public, private) means of transportation, or burglary).)

[The defendant killed (here insert victim's name) if death came in a natural and continuous sequence from the defendant's acts and if without those acts the death would not have occurred.]

[A death occurs while in the course of committing or attempting to commit a (here insert underlying felony) if the act that killed is closely connected in time and place with the (here insert underlying felony) so that the act and the (here insert underlying felony) may be considered one continuous occurrence.]

(Here insert underlying felony) means that (here insert definition of felony without using word, "elements" and by including only those elements relevant to the way the defendant allegedly committed the felony).

Attempted (here insert underlying felony) means

(1) that the defendant intended to commit (here insert underlying felony); and

(2) that (he, she) intentionally engaged in conduct that[, under the circumstances as (he, she) believed them to be,] was a substantial step toward committing (here insert crime); and

(3) the defendant's conduct strongly corroborated (his, her) intent to commit (here insert crime).

B. EFFECT OF FINDINGS

(If you decide that the state proved each element of Felony Murder, Regarding Felony Murder, if you decide that the state proved each element of its case) beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

COMMENT

NJI2d Crim. 3.5 is the elements instruction for Felony Murder. Consistent with the style use throughout the NJI2d drafting project, NJI2d Crim. 3.5 is drafted without language telling the jury that Felony Murder does not require the state of mind required for premeditated murder. Providing the elements of Felony Murder as affirmative statements is sufficient; there is no need to instruct the jury on what elements are NOT part of Felony Murder. Appropriate introductory language may be necessary when both Premeditated and Felony Murder are charged. The Committee recommends the following:

"There are two counts for you to consider separately and for which you must return verdicts. Count I covers Premeditated Murder in the first degree (here insert lesser included as appropriate). Count II covers Felony Murder."

Intent to kill is not an element of Felony Murder. *State v. Kauffman*, 183 Neb. 817, 164 N.W.2d 469 (1969). The intent required is the intent to commit the underlying felony. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Special care must be paid when co-defendants jointly are charged with Felony Murder to assure that the jury is told that the state of mind required of the aider—just like the state of mind required of the principal—is the intent to commit the underlying felony, not the intent to kill. For a fuller discussion, and the Committee's suggested language for combining an aider instruction with the Felony-Murder instruction, see the Comment to NJI2d Crim. 3.8 [AIDER (Same Crime As Principal)].

When Felony Murder is the only crime charged it is error to instruct on Second Degree Murder or Manslaughter even when requested by the

defendant. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Price*, 252 Neb. 365 562 N.W.2d 340 (1997); *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998) (due process not offended by Nebraska law finding no lesser included homicide offenses to Felony Murder); *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). If Unlawful Act-Manslaughter is submitted as a lesser included of Felony Murder (on the theory, for example, that the underlying felony may be theft, not robbery) then NJI2d Crim. 3.5 should be adjusted to accommodate the greater (Felony Murder) and lesser (Unlawful Act-Manslaughter) charges. A guide for appropriate language is NJI2d Crim. 3.1 (ELEMENTS; EFFECT OF FINDINGS: GREATER AND INCLUDED CRIMES (No Insanity Defense)).

The Nebraska statutory definition of Felony Murder describes it as applying to a killing that occurs during the perpetration of or attempt to perpetrate certain enumerated crimes. Neb.Rev.Stat. § 28-303(2) (Reissue 1995). The Committee substituted “commission of” and “attempt to commit” language as being consonant with “perpetrate” and easier for a jury to understand. The final paragraph under Part A regarding the definition of Attempt may be omitted if on the particular facts there is no claim that the underlying felony was not committed (even if there remains an issue whether the defendant was the person who committed the underlying felony). Because the Committee believed that the typical case will have an issue regarding whether the underlying felony was completed, the paragraph defining attempt was left unbracketed in NJI2d Crim. 3.5.

Felony Murder requires a causal relationship between the underlying felony committed or attempted and the resulting death. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986); *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985). In the normal case there will be no issue regarding causation and no instruction on proximate cause need be given. *See, e.g. State v. Quintana* 261 Neb. 38, 621 N.W.2d 121 (2001). On occasion, however, causation may be at issue. *See, e.g., State v. Ruyle*, 234 Neb. 760, 779, 452 N.W.2d 734, 746 (1990) (where defendant’s act is a but for cause of victim’s death, defendant is proximate cause of the death even if the death was contributorily caused by the victim’s negligence); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975) (sufficient as matter of law for proximate cause if disease or infection directly resulted from injury inflicted by defendant even if improper medical treatment contributed).

For a discussion of the language employed to define proximate cause in NJI2d Crim. 3.5, see Comment to NJI2d Crim. 4.1 [DEFINITIONS (PROXIMATE CAUSE)]. The Committee elected against additional language specifying that the defendant’s act need only materially accelerate (not be the sole cause of) the death. This additional language

simply amplifies by further explanation the definition already provided in the proximate cause definition.

The date of a victim's actual death, even when clearly as a matter of law caused by the defendant, may nonetheless occur several days (or weeks or months) after commission of the underlying felony. It may therefore be necessary to adjust the language in numbered paragraph (2) to account for this possibility and, if the jury is instructed on proximate cause, to substitute "caused the death" for "killed" in the bracketed paragraph following numbered paragraph (3). Numbered paragraph (2) might then read:

"(2) That on or about (here insert date) in the County of (here insert county) in the State of Nebraska the defendant (committed an act, here insert phrase particularly describing act) that caused the death of (here insert victim's name) on or about (here insert actual date of victim's death)."

AUTHORITIES

Neb.Rev.Stat. § 28-303(2) (Reissue 1995); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997); *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1987, 95 L.Ed.2d 826 (1987); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986); *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985); *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974); *State v. Kauffman*, 183 Neb. 817, 164 N.W.2d 469 (1969).

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Homicide ¶580, 1408

NJI2d Crim. 3.5A

ELEMENTS OF MURDER IN THE FIRST DEGREE; EFFECT OF FINDINGS; GREATER AND INCLUDED CRIMES (NO INSANITY DEFENSE)

Depending on the evidence, you may return one of several possible verdicts. You may find the defendant:

- (1) Guilty of murder in the first degree; or

- (2) Guilty of murder in the second degree; or
- (3) Guilty of manslaughter; or
- (4) Not guilty.

A. ELEMENTS**1. Murder in the First Degree**

The elements which the State must prove beyond a reasonable doubt in order to convict the defendant of murder in the first degree are:

- (1) That the defendant killed (here insert victim's name); and
- (2) That the defendant did so purposely; and
- (3) That the defendant did so with deliberate and premeditated malice; and
- (4) That the defendant was not (here insert any affirmative defenses that the evidence would support); and
- (5) That the defendant did so on or about (here insert date) in (here insert name of county) County, Nebraska.

2. Murder in the Second Degree

The elements which the State must prove beyond a reasonable doubt in order to convict the defendant of murder in the second degree are:

- (1) That the defendant killed (here insert victim's name); and
- (2) That the defendant did so intentionally, but without premeditation; and
- (3) That the defendant did so without the provocation of a sudden quarrel (given only where evidence of provocation exists); and
- (4) That the defendant was not (here insert any affirmative defenses that the evidence would support); and
- (5) That the defendant did so on or about (here insert date) in (here insert name of county) County, Nebraska.

3. Manslaughter

The elements of manslaughter are:

(1) That the defendant killed (here insert victim's name); and

(2) That the defendant did so

i) intentionally without malice upon a sudden quarrel; or

ii) unintentionally while in the commission of an unlawful act, to wit: (here insert unlawful act);

(Here insert underlying unlawful act) means that (here insert definition of unlawful act without using word, "elements," and by including only those elements relevant to the way the defendant allegedly committed the unlawful act).

(3) That the defendant was not (here insert any affirmative defenses that the evidence would support); and

(4) That the defendant did so on or about (here insert date) in (here insert name of county) County, Nebraska.

Under the law, the elements described in (2)(i) and (2)(ii) constitute a single offense. As a result, you need not agree unanimously on whether the defendant killed (insert victim's name) intentionally without malice upon a sudden quarrel, or whether the defendant unintentionally caused the death of (insert victim's name) while in the commission of an unlawful act, so long as you agree unanimously that the State has established beyond a reasonable doubt that the defendant committed manslaughter on either of the theories described in (2)(i) or (2)(ii).

(In the event the court instructs using (2)(ii) above, the court should consider using one of the following depending on the evidence:)

[A death occurs while in commission of an unlawful act if death came in a natural and continuous sequence from the defendant's unlawful act and if without that act the death would not have occurred.]

[A death occurs while in commission of an unlawful act (here insert underlying unlawful act) if the act that killed is closely connected in time and place with the (here insert underlying unlawful act) so that the act that killed and the (here insert underlying unlawful act) may be considered one continuous occurrence.]

B. EFFECT OF FINDINGS

You must separately consider in the following order the crimes of murder in the first degree, murder in the second degree, and

manslaughter. For murder in the first degree, you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of murder in the first degree and stop. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, murder in the second degree. You must proceed in this fashion to consider each of the crimes in sequence until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.

COMMENT

Nebraska statutory law requires that in all trials for murder, the jury must ascertain in their verdict whether the defendant committed a degree of murder or the crime of manslaughter. Neb.Rev.Stat. § 29-2027 (Reissue 2008). See also § 29-2025 (when a defendant is charged with an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged but guilty of any degree inferior thereto). While the instruction provided in NJI2d Crim. 3.1 provides a constitutionally adequate basis for a step instruction when homicide is charged, *see, e.g.* State v. Nolan, 283 Neb 50, 71-72, 283 N.W.2d 520, 540 (2012), given the legislature's special attention to homicide, the Committee deemed it desirable to provide Instruction 3.5A to be applied only in homicide cases. The instruction is modeled on one noted by the Nebraska Supreme Court in State v. Abdulkadir, 286 Neb. 417, 421-22, 837 N.W.2d 510, 515-16 (2013).

NJI2d Crim. 3.5A revises the instruction in *Abdulkadir*. First, the instruction specifies that the state's burden to disprove provocation arises only when evidence of provocation has been introduced in the case. Trial courts are to give an instruction "where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder" but not where evidence of provocation is "not supported by evidence in the record." State v. Smith, 283 Neb. 720, 735, 806 N.W.2d 383, 394-95 (2011).

Moreover, the 3.5A instruction deviates from the *Abdulkadir* instruction by not requiring an instruction on the negative element of provocation by sudden quarrel in a first degree murder instruction following Nebraska Supreme Court case law. State v. Morgan, 286 Neb. 556, 561-62, 837 N.W. 2d 543, 549-50 (2013) (a jury instruction on the negative element of "sudden quarrel" has "no place in an instruction on first degree murder"). This is because a finding of "deliberate and premeditated malice" necessarily precludes a finding that the killing was a product of provocation upon a sudden quarrel, thus rendering no possibility of guilt for voluntary manslaughter. By definition, "deliberate" means "not suddenly" and "premeditated" means "to have formed a design to commit an act before it is done." State v. Lyle, 245 Neb. 354, 358-59, 513 N.W.2d 293, 299 (1994). However, the Nebraska Supreme Court has recommended in first degree murder cases where evidence of provocation has been adduced that the trial court should instruct the

jury that the term “deliberate” means: “not suddenly or rashly, but doing an act after first considering the probable consequences. An act is not deliberate if it is the result of sudden quarrel provocation.” *State v. Hinrichsen*, 292 Neb. 611, 636, 877 N.W.2d 211, 228 (2016). On the other hand, an instruction on the negative element of sudden quarrel is required in an instruction on second degree murder because a finding of “intent” to kill is not necessarily inconsistent with voluntary manslaughter, killing upon the provocation of a sudden quarrel. *State v. Smith*, 282 Neb. 720, 734, 806 N.W.2d 383, 394 (2011) (“an intentional killing committed. . . upon a ‘sudden quarrel’ . . . constitutes the offense of manslaughter”).

Finally, unlike the *Abdulkadir* instruction, N.JI2d Crim. 3.5A includes an instruction on unlawful act manslaughter, a form of involuntary manslaughter arising when one unintentionally kills without provocation while committing an unlawful act. An instruction on unlawful act manslaughter is required in a homicide step instruction because cases arise where second degree murder is charged and the jury finds that the defendant caused death but the evidence does not support a finding of intent to kill. In such situations an underlying unlawful act, e.g., assault under Neb. Rev. Stat. § 28-310 (Reissue 2008), will provide a possible basis for an involuntary manslaughter conviction. See *State v. Bachkora*, 229 Neb. 421, 424, 427 N.W.2d 71, 72 (1988) (absence of intent to kill does not preclude manslaughter liability predicated on the unlawful act of assault by use of a gun); *State v. Archbold*, 217 Neb. 345, 349, 350 N.W.2d 500, 504 (1984) (defendant charged with second degree murder convicted of manslaughter, possibly predicated on the unlawful act of assault by use of a knife); *Denison v. State*, 117 Neb. 601, 610, 221 N.W. 683, 686 (1928) (defendant charged with first degree murder convicted of manslaughter, possibly predicated on the shooting of the deceased during an unlawful assembly).

It is important to note, however, that the Supreme Court determined that a charge of manslaughter “cannot be supported when the predicate unlawful act is a public welfare offense which contains no mens rea.” See *State v. Carman*, 292 Neb. 207, 216, 872 N.W.2d 559, 565 (2015). “In order to sustain a conviction for involuntary manslaughter or unlawful act manslaughter under § 28-305, the State must prove beyond a reasonable doubt that the defendant acted with the requisite mens rea in committing the unlawful act.” *Id.*

As with felony murder, unlawful act manslaughter requires a causal connection between the underlying unlawful act committed and the resulting death. *State v. Hare*, 190 Neb. 339, 343, 208 N.W.2d 264, 267 (1973) (“[t]o sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a causal connection between the unlawful act and the death of the victim”); *McNamee v. State*, 34 Neb. 288, 51 N.W. 821 (1892) (defendant’s blows to victim’s face not the cause of a cerebral hemorrhage from which victim died); *Denman v. State*, 15 Neb. 138, 17 N.W. 347 (1883) (wounding victim with knife

causing victim to suffer fever and erysipelatous inflammation, which “immediately” resulted in victim’s death, was sufficient to render defendant guilty of manslaughter because knife wound constituted the “mediate” cause of victim’s death).

Although there appears to be little case law explaining the definition of the causation requirement for unlawful act manslaughter, the Committee believes it to be similar to that required in the felony murder context. Therefore, the causation requirements in NJI2d Crim. 3.5A are modeled on those articulated in the felony murder provisions of NJI2d Crim. 3.5. The commentary discussing the felony murder causal requirement is thus equally applicable to that entailed in unlawful act manslaughter.

Nebraska case law suggests that sudden quarrel and unlawful act manslaughter constitute a single offense thus permitting conviction where the jury unanimously agrees that the state has established that the defendant committed manslaughter without requiring unanimity on either the sudden quarrel or unlawful act theory. See *Denison v. State*, 117 Neb. 601, 608-09, 221 N.W. 683, 685-86 (1928) (defendant convicted of manslaughter after jury instructed on both sudden quarrel and unlawful act manslaughter without requiring unanimity on either theory).

In the context of murder, the Nebraska Supreme Court has made clear that first degree murder is a single offense that might be committed in several ways, *e.g.* premeditatively or by felony murder. The Court has held that when evidence supports both premeditated murder and felony murder, the jury need only be unanimous in finding that the defendant committed first degree murder but need not be unanimous in its conclusion as to which theory it believed resulted in the violation. *State v. Buckman*, 237 Neb. 936, 941, 468 N.W.2d 589, 592 (1991). The Committee believes that by analogy such reasoning applies equally to manslaughter with its alternative sudden quarrel and unlawful act theories.

See also the Comments to NJI2d Crim. 3.1.

AUTHORITIES

Neb.Rev.Stat. § 28-303 (Reissue 2008); Neb.Rev.Stat. § 28-304 (Reissue 2008); Neb.Rev.Stat. § 28-305 (Reissue 2008); Neb.Rev.Stat. § 29-2025 (Reissue 2008); Neb.Rev.Stat. § 29-2027 (Reissue 2008); *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016); *State v. Carman*, 292 Neb. 207, 872 N.W.2d 559; *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013); *State v. Morgan*, 286 Neb. 446, 837 N.W.2d 543 (2013); *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013); *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012) (holding that intentional killing committed without malice upon sudden quarrel constitutes manslaughter); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012)

(urging courts to use pattern step instruction which provides clearer and more concise explanation of process by which jury is to consider lesser-included offenses); State v. Smith, 282 Neb. 720, 806 N.W.2d 383 (2011) (step instruction which required jury to convict on second degree murder if it found defendant killed victim intentionally was not correct statement of law, because it did not permit jury to consider alternative possibility that killing was intentional but provoked by sudden quarrel, therefore constituting manslaughter); State v. Lyle, 245 Neb. 354, 513 N.W.2d 293 (1994); State v. Buckman, 237 Neb. 936, 468 N.W.2d 589 (1991); State v. Archbold, 217 Neb. 345, 350 N.W.2d 500 (1984); State v. Hare, 190 Neb. 339, 208 N.W.2d 264 (1973); Denison v. State, 117 Neb. 601, 221 N.W. 683 (1928); McNamee v. State, 34 Neb. 288, 51 N.W. 821 (1892); Denman v. State, 15 Neb. 138, 17 N.W. 347 (1883).

NJI2d Crim. 3.6

ELEMENTS OF THEFT; EFFECT OF FINDINGS; VALUE DECLARED

Alternative A—Use When There Is One Statutory Class of Theft Crime Charged.

A. ELEMENTS

(The elements of (here insert theft crime charged), Regarding (here insert theft crime charged), the elements of the state's case) are:

(1)

(2)

(3) (Etc.)

() The value of the property involved. Once you have so decided the value, simply record the amount on the appropriate place on the verdict form. If you decide that the (property involved, here insert item taken) had no value, then say so on the verdict form.

B. EFFECT OF FINDINGS

If you decide that the state proved each element beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

COMMENT

Punishment for theft may be greater or lesser depending on the value of the item stolen. See Neb.Rev.Stat. § 28-518 (Reissue 1995).

Value is an “element” of theft only in the sense that the prosecution must prove it beyond a reasonable doubt. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002) (§ 28-518(8) making value an “element” of theft intended simply to require the state in theft prosecutions to prove value beyond a reasonable doubt). *Cf. State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) (value not an element of criminal mischief).

Determinations of value are a matter for jury determination. Neb.Rev.Stat. § 29-2026.01 (Reissue 1995); *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983). *See State v. Wright*, 231 Neb. 410, 436 N.W.2d 205 (1989). The jury must be instructed that it must find value beyond a reasonable doubt. *Id.* As with all jury determinations, there must be evidence in the record from which the jury may determine value. *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987).

When a theft crime is charged, NJI2d Crim. 3.6 is the elements instruction to be employed. In instructing on the elements of theft a judge should set forth the elements without referring to the necessity of finding the value of the property taken. The jury’s declaration of value determines the grade of theft committed by the defendant.

NJI2d Crim. 3.6 is consistent with the statutory scheme in consolidating the theft crimes. *See Neb.Rev.Stat. § 28-518* (Reissue 1995). NJI2d Crim. 3.6 also is consistent with treatment of value by the Nebraska Supreme Court. *State v. Wright*, 231 Neb. 410, 436 N.W.2d 205 (1989).

“Market value” at the time and place where the property was criminally appropriated determines the value of property in a theft charge. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Ybarra*, 9 Neb.App. 230, 609 N.W.2d 696 (2000); *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987); *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971). Only when there is no market value may replacement or other value be used. *Hayes*, 187 Neb. at 326; 190 N.W.2d at 623. NJI2d Crim. 3.6 simply directs the jury to declare “value” as the Committee expects that, whatever the judge’s decision as to admissibility of evidence regarding value, the jury does not need to be told what type of value it has heard evidence on.

Although proof of a specific value of property taken is essential in a variety of contexts where punishment for theft is greater or lesser depending on the precise value of the item stolen, some offenses such as theft of merchandise of \$200 or less, Neb.Rev.Stat. § 28-518(3) and (4) (Reissue 1995), merely require proof of “some” value or “intrinsic value.” *State v. Mohr*, 10 Neb.App. 442, 632 N.W.2d 382 (2001). A finding that the property involved had no value thus precludes theft liability.

NJI2d Crim. 3.6 requires that the jury state in the verdict form the precise value of the property taken. The Committee decision to require a specific jury statement as to value is a decision both as to what clearly

is permissible under Nebraska law and to provide assistance to a judge making a restitution decision under the Restitution Sentencing Act. Neb.Rev.Stat. §§ 29-2280 to 29-2289 (Reissue 1995).

The Committee expects that a prosecutor will charge theft and elect the particular theft the prosecutor believes was committed; NJI2d Crim. 3.6 is drafted consistent with that expectation. If, for the same criminal transaction, a prosecutor elects to charge two different classes of theft crime, then NJI2d Crim. 3.6 must be adjusted. Suggested language for this situation is:

“Depending on the evidence, you may return one of several possible verdicts. You may find the defendant:

“(1) Guilty of (here insert first statutory theft crime such as Theft By Unlawful Taking); or

“(2) Guilty of (here insert second statutory theft crime such as Theft By Deception); or

[“(3) continue with all statutory theft crimes charged; or]

[“(4) Not guilty.

“A. ELEMENTS

“(The elements of (here insert first statutory theft crime such as Theft By Unlawful Taking), Regarding (here insert first statutory theft crime such as Theft By Unlawful Taking), the elements of the state’s case) are:

“(1)

“(2)

“(3) (Etc.)

“(The elements of (here insert second statutory theft crime such as Theft By Deception), Regarding (here insert second statutory theft crime such as Theft By Deception), the elements of the state’s case) are:

“(1)

“(2)

“(3) (Etc.)

“() The value of the property involved. Once you have so decided the value, simply record the amount on the appropriate place on the verdict form. If you decide that the (property involved, here insert item taken) had no value, then say so on the verdict form.”

"B. EFFECT OF FINDINGS

"You must separately consider the crimes of (here insert all statutory theft crimes charged such as Theft By Unlawful Taking; Theft By Deception). For (here insert first statutory theft crime charged such as Theft By Unlawful Taking) you must decide if the state proved each element beyond a reasonable doubt. If you decide that the state did not prove each element (of, regarding) (here insert first statutory theft crime charged such as Theft By Unlawful Taking) beyond a reasonable doubt, then you must find the defendant not guilty of that crime and go on to consider (here insert second statutory theft crime charged). If you find that the state did so prove, then you must find the defendant guilty of (here insert first statutory crime charged and go on to declare the value of the (property involved, here insert item taken). You must proceed in this fashion to consider all of the theft crimes charged until you find the defendant guilty of one of them or not guilty of all of them."

If the above alternative instruction is used, the jury will be told that it must agree on one count for purposes of conviction. The jury therefore will convict, if at all, on one count only. It is possible, however, to permit the jury to find the defendant guilty on more than one count. In this latter event the counts would merge both for purposes of number of convictions entered against the defendant and for purposes of punishment.

AUTHORITIES

NJI 14.05 (1969); Neb.Rev.Stat. §§ 28-510 to 28-518 (Reissue 1995); Neb.Rev.Stat. § 29-2026.01 (Reissue 1995); Neb.Rev.Stat. §§ 29-2280 to 29-2289 (Reissue 1995); State v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989); State v. Culver, 233 Neb. 228, 444 N.W.2d 662 (1989); State v. Pierce, 231 Neb. 966, 439 N.W.2d 435 (1989); State v. Wright, 231 Neb. 410, 436 N.W.2d 205 (1989); State v. Scott, 225 Neb. 146, 403 N.W.2d 351 (1987); State v. Clancy, 224 Neb. 492, 398 N.W.2d 710 (1987); State v. Redding, 213 Neb. 887, 331 N.W.2d 811 (1983); State v. Holland, 213 Neb. 170, 328 N.W.2d 205 (1982); State v. Weik, 206 Neb. 217, 292 N.W.2d 289 (1980); State v. Frandsen, 199 Neb. 546, 260 N.W.2d 206 (1977); State v. Stowell, 190 Neb. 615, 211 N.W.2d 130 (1973); State v. Hayes, 187 Neb. 325, 190 N.W.2d 621 (1971); State v. McKee, 183 Neb. 754, 164 N.W.2d 434 (1969), *cert. denied*, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969); McCormick v. State, 42 Neb. 866, 61 N.W. 99 (1894).

Research References

West's Key Number Digest
Larceny ⇨70, 72

Legal Encyclopedias
C.J.S., Larceny § 142

B. MULTIPLE CRIMES; MULTIPLE PERPETRATORS

NJI2d Crim. 3.7

MULTIPLE COUNTS; MULTIPLE DEFENDANTS

Alternative A—Use When There Is One Defendant But Multiple Counts.

The defendant has been charged with (here insert number) crimes. You must come to a separate decision regarding each crime.

Alternative B—Use When There Are Multiple Defendants But One Count as to Each.

(Here insert number) defendants have been charged with (here insert crime). You must come to a separate decision regarding each defendant.

Alternative C—Use When There Are Both Multiple Defendants and Multiple Counts.

(Here insert number) defendants are on trial here, each charged with more than one crime. You must come to a separate decision regarding each crime. In the same manner, you must come to a separate decision regarding each defendant.

COMMENT

Often a trial involving multiple defendants will include evidence admissible against one or more but not all defendants. In such a case, NJI2d Crim. 5.7 and 5.8 also should be given as appropriate.

NJI2d Crim. 3.7 is applicable only so long as the crimes charged ARE separate crimes. *If the crimes are related, as, for example, greater to lesser, or as the underlying felony to Felony Murder, or because they are charged as part of a conspiracy, then this instruction should not be given.* Similarly, if the defendants are related in a way that makes evidence introduced against one also admissible against other defendants (e.g., because they are co-conspirators) then again NJI2d Crim. 3.7 should not be given.

AUTHORITIES

NJI 14.54 (1969); Neb.Rev.Stat. § 29-2002 (Reissue 1995); State v. Vrtiska, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied*, 484 U.S. 863, 108 S.Ct. 180, 98 L.Ed.2d 133 (1987); State v. McGuire, 218 Neb. 511, 357 N.W.2d 192 (1984); State v. Hochstein, 207 Neb. 51, 296

N.W.2d 440 (1980); *State v. Turner*, 190 Neb. 261, 207 N.W.2d 382 (1973).

Research References

West's Key Number Digest
Criminal Law §792, 793, 798(0.5)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1343, 1347 to 1350, 1540

NJI2d Crim. 3.8**AIDER (SAME CRIME AS PRINCIPAL)**

The defendant can be guilty of (here insert crime) even though (he, she) personally did not commit (every, any) act involved in the crime so long as (he, she) aided someone else to commit it. The defendant aided someone else if:

(1) the defendant intentionally encouraged or intentionally helped [hired] another person to commit the (here insert crime); and

(2) the defendant intended that (here insert crime) be committed; or the defendant (knew that the other person intended to commit, expected the other person to commit) the (here insert crime); and

(3) the (here insert crime) in fact was committed by that other person.

COMMENT

The Nebraska statute on aiding and abetting describes a person "who aids, abets, procures, or causes another to commit any offense" as one who may be prosecuted and punished as if he were the principal offender. Neb.Rev.Stat. § 28-206 (Reissue 1995). In the typical case NJI2d Crim. 3.8, and not NJI2d Crim. 3.9 [AIDER (Different Crime From Principal)], will be employed. As drafted, NJI2d Crim. 3.8 applies only to aiding cases in which the aider owed no duty of care to the victim. Where a duty of care is involved, an omission to act is culpable. In that case, NJI2d Crim. 3.8 must be adjusted by eliminating numbered paragraph (1) and by both adding the concept of failure to act where a duty of care is involved and defining what constitutes a duty of care.

A defendant may aid and abet an attempt in the same manner as he may aid and abet a completed substantive crime. When a defendant is charged with aiding an attempted crime, the attempted crime should be described in the instruction as "attempted;" otherwise the language in the instruction referring to commission of the crime will be ambiguous.

The Nebraska Supreme Court has made clear that aiding and abetting involves some participation by the alleged aider and abettor in the criminal act of the principal and must be evidenced by some word, act, or deed. *State v. Lotter*, 255 Neb. 456, 500, 586 N.W.2d 591, 624 (1998). No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. *Id.* Mere encouragement or assistance is sufficient. On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving the defendant guilty. *Id.* While the court has not explicitly specified that the required aid or encouragement be intended by the aider, the Committee elected in paragraph (1) to be explicit about the intentional nature of the aid in order to avoid culpability for a person who inadvertently encourages or helps another under circumstances where either paragraph (2) or (3) and paragraph (4) apply.

Paragraphs (2) and (3) of NJI2d Crim. 3.8 and 3.9 are drafted for what the Committee believes to be the typical aiding and abetting situation—a specific intent crime. When a crime requires the existence of a particular intent, the Nebraska Supreme Court has specified that an alleged aider and abettor can be held criminally liable as a principal if it is shown that the aider and abettor either personally intended that the underlying crime be committed or knew that the perpetrator of the crime possessed the required intent. *Id.*; *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

There are at least two situations, Felony Murder and Unlawful Act Manslaughter, where the language of NJI2d Crim. 3.8 will need to be adjusted. To illustrate the use of NJI2d Crim. 3.8 in a Felony Murder prosecution, assume a bank robbery is committed by two defendants, one of whom kills a bank teller during the course of the robbery. If both defendants are tried jointly (so that NJI2d Crim. 3.5, the Felony Murder instruction, will be given with respect to the killer's acts), then in that situation the Committee suggests the following language:

"The defendant can be guilty of robbery even though she personally did not commit every act involved in the robbery so long as she aided someone else to commit it. The defendant aided someone else if:

"(1) the defendant intentionally encouraged or intentionally helped another person to commit the robbery; and

"(2) the defendant intended that the robbery be committed; or the defendant knew that the other person intended to commit the robbery; and

"(3) the robbery in fact was committed by that other person.

"The defendant can be guilty of Felony Murder if she is guilty of robbery as an aider and a death resulted during the course of committing the robbery."

Similarly, in the context of Unlawful Act Manslaughter the jury should be instructed in terms of the unlawful act leading to the death rather than to manslaughter specifically. To illustrate, assume that Jane intends to commit an assault on Sue. Jill knows this and agrees to help Jane commit the assault by driving Jane around until she finds Sue, acting as look-out during the fight, and driving Jane away after the fight. Jane and Jill find Sue. Jane hits Sue. Sue falls, hits her head, and is killed. On these facts, Jane may be prosecuted for manslaughter. If, on the facts, Sue's death may be characterized as a natural and foreseeable consequence of the assault, then Jill also may be prosecuted for manslaughter because an aider is responsible for the natural and foreseeable consequences of the crime whose commission was aided. In these circumstances, the jury should be instructed as to whether Jill aided Jane in the assault. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999); *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990).

NJI Crim. 3.8 is drafted to accommodate the typical aiding case. NJI2d Crim. 3.8 thus should be used in a situation such as just described *ONLY IF* a judge first decides that, as a matter of Nebraska law, Jill may not on her own be prosecuted for manslaughter. Otherwise, a judge must adjust the basic instruction.

NJI2d Crim. 3.8 by its terms may apply to situations where the aider intends for the crime to be committed even though the principal does not intend to commit the crime but commits it anyway. In that event, the aider by definition has a more culpable state of mind than the principal and, if there is a more serious crime involving the aider's state of mind, then the appropriate aider instruction is NJI2d Crim. 3.9, not 3.8.

The Nebraska Supreme Court has articulated the principles of NJI2d Crim. 3.8 in the context of cases involving intent crimes. It is thus unclear whether or not accomplice liability may extend to crimes of recklessness or negligence. In the context of Unlawful Act Manslaughter the court has opined that one cannot be an aider and abettor in the context of a crime not requiring intent (manslaughter) even if one intentionally provides aid in hopes that the crime is committed. *State v. Jackson*, 258 Neb. 24, 37, 601 N.W.2d 741, 752 (1999). It should be noted, however, that the court in *Jackson* upheld the defendant's manslaughter conviction for aiding another's act of manslaughter on the theory that the defendant aided the unlawful act of assault which led to the victim's death. It thus may remain an open question whether one might, in a different context, be liable for intentionally assisting another who negligently or recklessly commits an offense. (*E.g.* Jones gives drunken Smith car keys hoping Smith will drive carelessly. Is Jones an aider and abettor when Smith commits a negligent driving offense?)

NJI2d Crim. 3.8 provides "[hired]" in numbered paragraph (1) and a choice of language in numbered paragraph (3) between "knew that the

other person intended to commit” and “expected the other person to commit.” The Committee expects that it will be the unusual situation in which the theory of aiding is that the aider hired someone to commit the crime. When those are the facts alleged, however, then the language in numbered paragraph (3) that corresponds is the second option—“expected the other person to commit.” Otherwise, the Committee expects the first language option to be employed—“knew that the other person intended to commit.”

AUTHORITIES

NJI 14.12 (1969); Neb.Rev.Stat. § 28-206 (Reissue 1995); State v. Jackson, 258 Neb. 24, 601 N.W.2d 741 (1999); State v. Tucker, 257 Neb. 496, 598 N.W.2d 742 (1999); State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998); State v. Glantz, 251 Neb. 947, 560 N.W.2d 783 (1997); State v. Mantich, 249 Neb. 311, 543 N.W.2d 181 (1996); State v. Brunzo, 248 Neb. 176, 532 N.W.2d 296 (1995); State v. Trackwell, 235 Neb. 845, 458 N.W.2d 181 (1990); State v. Smith, 219 Neb. 176, 361 N.W.2d 532 (1985); State v. Thomas, 210 Neb. 298, 314 N.W.2d 15 (1981); State v. Matthews, 205 Neb. 709, 289 N.W.2d 542 (1980); State v. Davis, 198 Neb. 823, 255 N.W.2d 434 (1977); State v. Morrow, 197 Neb. 627, 250 N.W.2d 247 (1977); State v. Dirgo, 196 Neb. 36, 241 N.W.2d 351 (1976); State v. Foster, 196 Neb. 332, 242 N.W.2d 876 (1976); State v. Spidell, 194 Neb. 494, 233 N.W.2d 900 (1975); State v. Garza, 193 Neb. 283, 226 N.W.2d 768 (1975); State v. Dittrich, 191 Neb. 475, 215 N.W.2d 637 (1974); State v. Kennedy, 189 Neb. 423, 203 N.W.2d 106 (1972); State v. Alvarez, 189 Neb. 276, 202 N.W.2d 600 (1972); State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972); State v. Alcorn, 187 Neb. 854, 194 N.W.2d 798 (1972); State v. Cook, 187 Neb. 788, 194 N.W.2d 218 (1972); State v. Davis, 185 Neb. 433, 176 N.W.2d 657 (1970); State v. Redden, 181 Neb. 423, 149 N.W.2d 98 (1967); State v. Knecht, 181 Neb. 149, 147 N.W.2d 167 (1966); State v. Swiney, 179 Neb. 230, 137 N.W.2d 808 (1965); State v. Breaker, 178 Neb. 887, 136 N.W.2d 161 (1965); Scharman v. State, 115 Neb. 109, 211 N.W. 613 (1926).

Research References

West's Key Number Digest
Criminal Law ¶59(5), 792

Legal Encyclopedias
C.J.S., Criminal Law §§ 127, 132, 998 to 999

NJI2d Crim. 3.9

AIDER (DIFFERENT CRIME FROM PRINCIPAL)

The defendant can be guilty of (here insert crime) even though (he, she) personally did not commit (every, any) act involved in the crime so long as (he, she) aided someone else to commit it. The defendant aided someone else if:

(1) the defendant knew [expected] that the acts involved in the (here insert crime for which defendant is charged) would be committed by another person; or

(2) the defendant personally intended that the acts involved in the (here insert crime for which defendant is charged) be committed; or the defendant intentionally encouraged or intentionally helped [hired] that other person to commit one or more of these acts.

Alternative A—If the Crimes Are Related as Greater to Lesser and the Principal May Be Convicted of a Lesser Crime Than That for Which the Aider May Be Convicted, Then the Following Paragraphs Complete This Instruction.

Crimes may be related to each other as (here insert greater and lesser crimes involved) are here. They differ in the element relating to the state of mind necessary to commit them. If you decide beyond a reasonable doubt:

(1) that someone (here give all elements of crime charged (except state of mind element) such as “killed (here insert victim’s name) on or about _____ in _____ County, Nebraska;” and

(2) that the defendant aided that person to (do one or more of these acts, here insert particulars such as “kill”); and

(3) that the defendant had the (here insert state of mind element necessary to commit the crime with which defendant is charged) necessary to commit (here insert crime charged) then you may find the defendant guilty of (here insert greatest crime) even if that other person is guilty of some lesser crime involving the same acts.

Alternative B—If the Principal Has a Defense Unavailable to the Defendant Then the Following Paragraphs Complete This Instruction.

Two people may be involved in a crime. One may have a defense that the other does not. If you decide beyond a reasonable doubt:

(1) that someone (here give all elements of crime charged except state of mind element) such as “killed (here insert victim’s name) on or about _____ in _____ County, Nebraska;” and

(2) that the defendant aided that person to do one or more of these acts; and

(3) that the defendant had the (here insert state of mind element necessary to convict for crime with which defendant is charged) to commit the (here insert crime charged) then you may find the defendant guilty of (here insert crime) even if that other person is guilty of a different crime or not guilty of any crime.

COMMENT

Refer to Comment to NJI2d Crim. 3.8. As with NJI2d Crim. 3.8, NJI2d Crim. 3.9 applies only to aiding cases in which the aider owed no duty of care to the victim. Where a duty of care is involved, NJI2d Crim. 3.9 must be adjusted.

Nebraska law focuses on defendant's acts and state of mind regardless of the culpability of others involved in the crime. *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). As an aider and abettor a defendant therefore may be convicted of a crime higher in degree than that of the perpetrator aided. *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). Similarly, a defendant may be convicted where the perpetrator is acquitted or unknown or has a defense unavailable to the defendant. *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976); *State v. Alcorn*, 187 Neb. 854, 194 N.W.2d 798 (1972). As an aider and abettor a defendant even may be convicted of a crime that the defendant could not have committed as a principal. *State v. Norman*, 193 Neb. 719, 229 N.W.2d 55 (1975) (as aider and abettor woman may be convicted of rape).

AUTHORITIES

Refer to Authorities listed in NJI2d Crim. 3.7; Neb.Rev.Stat. § 28-206 (Reissue 1995); *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972); *State v. Alcorn*, 187 Neb. 854, 194 N.W.2d 798 (1972).

Research References

West's Key Number Digest
Criminal Law ¶59(5), 792

Legal Encyclopedias
C.J.S., Criminal Law §§ 127, 132, 998 to 999

C. WITHDRAWN INSTRUCTION

NJI 14.09

(1969) STATUTES AND ORDINANCES

Recommend No Instruction.

Under NJI2d Crim. there is no reason to read a criminal statute or local ordinance to a jury. Such a reading simply repeats information provided in the elements instruction in language less likely to be comprehensible.

CHAPTER 4

DEFINITIONS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- 4.0 Definitions (States of Mind)
- 4.1 Definitions (Proximate Cause)
- 4.2 Definitions (Possession; Constructive Possession)
- 4.3 Definitions (Weapons)
- 4.4 Definitions (Terms for Crimes Against Property)
- 4.5 Definitions (Robbery Terms)
- 4.6 Definitions (Penetration)

COMMENT

The definitions provided in Chapter 4 are a general guide for how to employ a definition, and what language to employ, in instructing a jury. In a given instruction a definition may have to be further adjusted to fit within the structure and flow of that instruction.

There are three ways to treat a definition. First, a jury could be instructed on the definition of a term in the elements instruction without also providing the term. Second, the jury could both be provided a term in the elements instruction and instructed on its definition. Third, the jury could be provided the term in the elements instruction and instructed on its definition immediately following the elements instruction. As a general rule, providing a term is necessary only if use of the term has occurred with some frequency during the trial or if the defining phrase is lengthy and reuse of the term or its definition is necessary in the course of the instructions. Some terms in law, like "malice," have definitions different from their general-use definitions. For these terms, it is quite important, if possible, to avoid their use in an instruction.

For an example of defining a term without using it, see the treatment of "malice" in NJI2d Crim. 4.0. For an example of both using a term and defining in the elements instruction, see the treatments of "deadly weapon" in NJI2d Crim. 4.3. For an example of using a term in the elements instruction and defining it separate from the elements instruction, see the treatment of "possession" in NJI2d Crim. 4.2. The

difference between defining the term at the time it is used in the elements instruction; see NJI2d Crim. 4.3; and providing a separate definition; see NJI2d Crim. 4.2; relates simply to a Committee decision whether the definition is so lengthy that it would disrupt the flow of the elements instruction.

The definitions provided in Chapter 4 are not an exhaustive rendition of all terms that might be employed in a criminal case. If a term is neither defined in Chapter 4 nor included in the body of an NJI2d Crim. instruction, then any definition provided should be in plain language that is consistent with the language contained in the applicable substantive criminal statute and any amplifying language provided by the Nebraska Supreme Court. The basic format of the Chapter 4 definitions should inform decisions whether to employ a term at all as well as whether to define a term in or subsequent to the elements instruction.

When employing a definition, whether alone, with the term defined, or as a separate definition, a judge should provide only that portion of the definition relevant to the facts of the particular case. For example, suppose a male defendant is charged with First Degree Sexual Assault of a female victim and the facts supporting the charge are that the defendant had vaginal intercourse with her. In such a case, a judge should employ only the relevant portion of the definition of “penetration.” In other words, all that she should say is, “penetration—that is, any intrusion, however slight, into the genital opening of the victim by any part of the defendant’s body.”

NJI2d Crim. 4.0

DEFINITIONS (STATES OF MIND)

A. “DELIBERATE”

Insert the Following Where Applicable in an Elements Instruction:

Deliberate—that is, not suddenly or rashly but (doing an act) after first considering the probable consequences.

*Insert the Following When Evidence of Provocation has been Ad-
duced in First Degree Murder Cases:*

[Deliberate—that is, not suddenly or rashly but (doing an act) after first considering the probable consequences. An act is not deliberate if it is the result of sudden quarrel provocation.]

B. “MALICE”

*Insert the Following Definition Where Applicable in an Elements
Instruction Without Using the Term Defined:*

Intentionally doing a wrongful act without just cause or excuse.

C. "PREMEDITATION"

Insert the Following Where Applicable in an Elements Instruction:

Premeditation—that is, forming the intent to (act) before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to (act) is formed before the act and not simultaneously with the act.

D. "PURPOSEFUL"

Substitute the Word "Intentional" For the Word "Purposeful."

E. "RECKLESS"

Insert the Following Where Applicable in an Elements Instruction:

Reckless—that is, disregarding a substantial and unjustifiable risk that (here insert particulars) in circumstances in which disregarding this risk was a gross deviation from what a reasonable, law-abiding person would have done.

F. "WILLFUL"

Substitute the Word "Intentional" For the Word "Willful."

COMMENT

I. "Deliberate," "Malice," "Premeditation"

The definition of "premeditation" in NJI2d Crim. 4.0 conforms to the definition provided in Neb.Rev.Stat. § 28-302 (Reissue 2008) ("Premeditation shall mean a design formed to do something before it is done"). *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). The definition of "deliberate" comes from the Nebraska Supreme Court cases on homicide. *E.g.*, *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

With regard to the definition of malice, the Committee expressly eliminated the language that malice means any "willful or corrupt intention of mind." That language runs the risk that a jury will think it is entitled to decide that because the act was bad, it was committed with malice. The Committee also recommends strongly that the word "malice" not be used in giving an instruction but that simply the definition be given.

In the context of the NJI2d Crim. 4.0 definitions, the Committee elected separately to define "deliberate," "premeditation," and "malice" even though the terms are described as "deliberate malice" and "pre-

meditated malice” by the Nebraska Supreme Court. *See State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). Separating the terms is not a change in meaning; it simply avoids the need to define “malice” repeatedly during instruction of a jury.

In first degree murder cases charging “deliberate and premeditated malice” where evidence of provocation has been adduced, the Nebraska Supreme Court has recommended that the trial court should instruct the jury that the term “deliberate” means: “not suddenly or rashly, but doing an act after first considering the probable consequences. An act is not deliberate if it is the result of sudden quarrel provocation.” *State v. Hinrichsen*, 292 Neb. 611, 636, 877 N.W.2d 211, 228 (2016).

In Nebraska, Second-Degree Murder is defined as causing a death “intentionally but without premeditation.” Neb.Rev.Stat. § 28-304 (Reissue 2008). In a recent review of the homicide crimes, the Nebraska Supreme Court distinguished between second degree murder and voluntary manslaughter by focusing on the presence or absence of provocation. Both second degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

Malice is not an element of Second-Degree Murder. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998) (overruling cases holding to the contrary). *State v. Trice*, 286 Neb 183, 835 N.W.2d 667 (2013). To the extent that malice in First Degree Murder is *coupled* with a purpose or intent to kill (and not, as with depraved heart malice, provided as an *alternative* to intent or purpose), then the common law reckless indifference notion appears to be missing from the Nebraska criminal law.

In Nebraska the intent required for Second-Degree Murder is the intent to kill and not, as in many jurisdictions, the intent to kill or to inflict serious bodily injury. Neb.Rev.Stat. § 28-304 (Reissue 2008); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

II. “Intentional;” “Purposeful;” “Willful”

The Nebraska Supreme Court has said that “[i]ntentionally means ‘willfully’ or ‘purposely,’ and not accidentally or involuntarily.” *State v. Coca*, 216 Neb. 76, 81, 341 N.W.2d 606, 610 (1983). In Nebraska, descriptions of the mental state element of intentional crimes use language of intent, not language of purpose or willfulness. Since the meanings of “intentional,” “purposeful,” and “willful” are the same, the Committee recommends using intent language whenever purpose or willful language appears in a statute. For an example of an instruction in which language of intent simply was substituted for language of purpose, see NJ12d Crim. 7.2 (Self Defense (Issue As To Deadly Force)). The statutory definition of deadly force is taken from the Model Penal Code and describes force used “With the purpose of causing death or serious bodily injury.” The Committee substituted “with the intent to cause.”

III. “Reckless”

The definition of “reckless” is derived from Neb.Rev.Stat. § 28-109(19) (Reissue 2008): “Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

The Nebraska criminal code contains no general statutory definition of negligence; therefore, “negligence” is not defined in NJI2d Crim. 4.0. However, the legislature has defined negligence for the particular purposes of child abuse as follows:

For purposes of this section, negligently refers to criminal negligence and means that a person knew or should have known of the danger involved and acted recklessly, as defined in section 28-109, with respect to the safety or health of the minor child. Neb.Rev.Stat. § 28-707(9) (Cum. Supp. 2014).

IV. “Knowledge”

The state of mind definitions of NJI2d Crim. 4.0 exclude a definition of “knowledge” or “knowingly.” The Committee considered providing a definition but ultimately decided that there were too many variables for which the Nebraska Supreme Court has not provided a conclusive answer. Most particularly, the Committee was unable to resolve how the Nebraska Supreme Court would handle a case in which a defendant in an absolute sense did not “know” but in which his lack of knowledge resulted from his active efforts to avoid knowledge. Similarly, the Nebraska Supreme Court, never has addressed the question of what “knowingly” means in the context of a crime for which an element is causing a particular result. The Court simply has said that the meaning of “knowledge” varies with the context. 185 Neb. at 682, 178 N.W.2d at 279. The Nebraska Supreme Court generally has said with respect to a knowledge state of mind that (knowledge means “import[ing] a perception of facts required to make up the crime.”). *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992); *State v. Mills*, 199 Neb. 295, 300, 258 N.W.2d 628, 632 (1977); *R.D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 682, 178 N.W.2d 277, 279 (1970).

AUTHORITIES

Neb.Rev.Stat. § 28-109 (Reissue 2008); Neb.Rev.Stat. § 28-302 (Reissue 2008); Neb.Rev.Stat. § 28-304 (Reissue 2008); Neb.Rev.Stat. § 28-305 (Reissue 2008); Neb.Rev.Stat. § 28-707(9) (Cum. Supp. 2014); *State v. Hinrichsen*, 292 Neb. 611, 636, 877 N.W.2d 211 (2016); *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013); *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012); *State v. Taylor*, 282 Neb. 297, 803 N.W.2d

746 (2011); State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989); State v. Batiste, 231 Neb. 481, 437 N.W.2d 125 (1989); State v. Roth, 222 Neb. 119, 382 N.W.2d 348 (1986); State v. Rowe, 214 Neb. 685, 335 N.W.2d 309 (1983); State v. Kelley, 211 Neb. 770, 320 N.W.2d 455 (1982); State v. Clermont, 204 Neb. 611, 284 N.W.2d 412 (1979); State v. Mills, 199 Neb. 295, 258 N.W.2d 628 (1977); R.D. Lowrance, Inc. v. Peterson, 185 Neb. 679, 178 N.W.2d 277 (1970); State v. Walle, 182 Neb. 642, 156 N.W.2d 810 (1968), *cert. denied*, 393 U.S. 880, 89 S.Ct. 182, 21 L.Ed.2d 153 (1968); Sall v. State, 157 Neb. 688, 61 N.W.2d 256 (1953); Childs v. State, 120 Neb. 310, 232 N.W. 575 (1930); Pembroke v. State, 117 Neb. 759, 222 N.W. 956 (1928); Sharp v. State, 117 Neb. 304, 220 N.W. 292 (1928); Housh v. State, 43 Neb. 163, 61 N.W. 571 (1895).

Research References

West's Key Number Digest
Criminal Law ⇨772(2), 772(5)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1312 to 1313

NJI2d Crim. 4.1

DEFINITIONS (PROXIMATE CAUSE)

Insert the Following Definition Where Applicable in an Elements Instruction Without Using the Term Defined:

A. "PROXIMATE CAUSE":

(Here insert defendant's conduct that allegedly caused the result, such as "The defendant killed") if (here insert result allegedly caused, such as "death") occurred in a natural and continuous sequence, and without the defendant's act the (here insert result, such as "death") would not have occurred.

B. "PROXIMATE AND CONCURRING CAUSE":

Insert the Following Where Applicable in an Elements Instruction:

Proximate cause—that is, a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. Where the independent acts of more than one person combine to proximately cause the same injury, each such act is a proximate cause, and each such person may be held responsible for causing the result.

COMMENT

NJI2d Crim. 4.1 (1992) is the criminal law analogue to NJI2d Civ.

3.41 to 3.44. An example of using a definition of “proximate cause” without also using the term defined is found in the first bracketed paragraph after numbered paragraph (3) in NJI2d Crim. 3.5 (ELEMENTS OF FELONY MURDER; EFFECT OF FINDINGS).

The Nebraska Supreme Court subscribes to a “but-for” test of proximate cause in both civil and criminal cases, defining it as “a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred.” *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990); *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986); *Saporta v. State*, 220 Neb. 142, 149, 368 N.W.2d 783, 787 (1985); *State v. Sommers*, 201 Neb. 809, 811–12, 272 N.W.2d 367, 369 (1978).

With certain crimes, for example where a defendant is charged with causing the death of a victim, the negligent conduct of the victim may affect causation assessments. The negligence of a victim has causal effect, however, only where such negligence constitutes the sole proximate cause of the death. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

AUTHORITIES

NJI2d Civ. 3.41 to 3.44; *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990); *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986); *Saporta v. State*, 220 Neb. 142, 368 N.W.2d 783 (1985); *State v. Meints*, 212 Neb. 410, 322 N.W.2d 809 (1982); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975); *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

Research References

West's Key Number Digest
Criminal Law ¶26, 772(1)

Legal Encyclopedias
C.J.S., Criminal Law §§ 44, 1110, 1312, 1314

NJI2d Crim. 4.2

DEFINITIONS (POSSESSION; CONSTRUCTIVE POSSESSION)

Give as Definition Following Elements Instruction:

“Possession” of (here insert object allegedly possessed) means either knowingly having it on one’s person or knowing of the object’s presence and having control over the object.

COMMENT

Many of the Nebraska Supreme Court possession opinions deal with drugs. To be convicted of a possessory drug crime the state must prove that a defendant had physical or constructive possession of a drug with knowledge of its presence and its character. A defendant's mere presence is not enough. *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967); Neb.Rev.Stat. § 28-416 (Cum. Supp. 2014). Possession may be shown by the defendant's proximity to the substance or her dominion over it. *State v. Masur*, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

NJI2d Crim. 4.2 focuses on a defendant's dominion or control and not on proximity. Proximity, standing alone, is insufficient to prove possession. *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *State v. Lonacker*, 237 Neb. 207, 465 N.W.2d 737 (1991). *See also* County Court of Ulster County, N. Y. v. *Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

AUTHORITIES

State v. Masur, 230 Neb. 620, 432 N.W.2d 815 (1988); *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978); *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976); *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Rys*, 186 Neb. 341, 183 N.W.2d 253 (1971) (alcohol); *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967).

Research References

West's Key Number Digest

Controlled Substances ⇨25; Criminal Law ⇨772; Weapons ⇨4

Legal Encyclopedias

C.J.S., Criminal Law §§ 1312 to 1319; Weapons §§ 9 to 10

NJI2d Crim. 4.3

DEFINITIONS (WEAPONS)

A. DEADLY WEAPON

Insert the Following Where Applicable in an Elements Instruction:

Deadly weapon—that is, anything that is used or intended to be used in a way that could produce death or serious bodily injury.

B. DANGEROUS WEAPON

Insert the Following Where Applicable in an Elements Instruction:

Dangerous weapon—that is, anything that is used or intended to be used in a way that could produce bodily injury.

COMMENT

The Committee recommends that neither “deadly weapon” nor “dangerous weapon” be defined by use of a separate definition following the elements instruction but instead that each definition be incorporated into the elements instruction. In other words, the instruction regarding the element concerning use of a “deadly weapon” would be given, in pertinent part, as “deadly weapon—that is, anything that is used or intended to be used in a way that could produce death or serious bodily injury.” Similarly, the instruction regarding the element concerning use of a dangerous weapon would be given, in pertinent part, as “dangerous weapon—that is, anything that is, used or intended to be used in a way that could produce bodily injury.”

Neb.Rev.Stat. § 28-109(7) (Reissue 2008) defines a “deadly weapon” as “any . . . device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.” Neb.Rev.Stat. § 28-1205 (Cum. Supp. 2014) describes as a separate crime the commission of a felony by the use of a deadly weapon. Section 1205 makes it a separate crime to use or possess a “firearm, knife, brass or iron knuckles or *any other deadly weapon* to commit or during the commission of a felony”

The NJI2d Crim. 4.3A definition of deadly weapon pertains only when the instrument is *NOT* a firearm, knife, brass or iron knuckles, since these weapons expressly are named either in Neb.Rev.Stat. § 28-109(7) (Reissue 2008) or in Neb.Rev.Stat. § 28-1205 (Cum. Supp. 2014). For a weapon not specifically named the jury must decide, by contrast, not only whether the defendant possessed or used such a weapon but whether it is a deadly weapon under the § 28-109(7) definition. Since another instrument—a baseball bat, for example—may be a deadly weapon or not depending on its use, the NJI2d Crim. 4.3 definition must be given in such cases.

AUTHORITIES

Neb.Rev.Stat. § 28-109(7) (Reissue 2008); Neb.Rev.Stat. § 28-1205 (Cum. Supp. 2014); *State v. Jackson*, 217 Neb. 332, 348 N.W.2d 866 (1984); *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981).

Research References

West's Key Number Digest
Criminal Law ⇨772; Weapons ⇨8

Legal Encyclopedias
C.J.S., Criminal Law §§ 1312 to 1319; Weapons §§ 9 to 10, 13 to 15

NJI2d Crim. 4.4**DEFINITIONS (TERMS FOR CRIMES AGAINST PROPERTY)**

Insert the Following Where Applicable in an Elements Instruction:

A. "BREAK AND ENTER":

Break and Enter—that is, entered a building by any act of physical force, however slight, including opening a door or window.

B. "TO STEAL"

To steal means to take the property of another with the intent to deprive (him, her) of it (permanently, here insert appropriate language from Neb. Rev. Stat. § 28-509).

COMMENT

The elements of burglary include a breaking and entering of "any real estate or any improvements erected thereon." Neb.Rev.Stat. § 28-507 (Reissue 2008). Obviously, then, the definition of "break and enter" will need adjusting in a case where, for example, the burglary charged is of a car dealer's new car lot.

Value of property taken must be proved by the state beyond a reasonable doubt and included in a jury verdict. Neb.Rev.Stat. § 29-2026.01 (Reissue 2008). An instruction on "value" is provided in NJI2d Crim. 3.6 (1992) (Elements of Theft; Effect of Findings; Value Declared).

AUTHORITIES

Neb.Rev.Stat. § 28-507 (Reissue 2008); Neb.Rev.Stat. § 29-2026.01 (Reissue 2008); State v. Classen, 216 Neb. 323, 343 N.W.2d 749 (1984); State v. Sedlacek, 178 Neb. 322, 133 N.W.2d 380 (1965).

Research References

West's Key Number Digest

Burglary ☞9; Criminal Law ☞772; Larceny ☞11

Legal Encyclopedias

C.J.S., Burglary §§ 2 to 5, 11 to 22; Criminal Law §§ 1312 to 1319; Larceny §§ 4, 20 to 21, 30 to 36, 43, 45 to 50, 1(1)

NJI2d Crim. 4.5**DEFINITIONS (ROBBERY TERMS)****A. "FORCIBLY AND BY VIOLENCE":**

Give as Definition Following the Elements Instruction:

“Forcibly and by violence” means by using any force that is enough to obtain property from an unwilling person.

B. “FROM THE PERSON”:

Insert the Following Definition Where Applicable in an Elements Instruction Without Using the Term Defined:

from (here insert victim’s name) or from (his, her) protection or control.

COMMENT

Neb.Rev.Stat. § 28-324(1) (Reissue 2008) describes robbery as occurring when “a person . . . forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.” Thus, a robbery may be accomplished either “forcibly and by violence” or by putting in fear. *The Committee cautions that the above definition only relates to “forcibly and by violence;” the “putting in fear” element also must be charged.*

The NJI2d Crim. 4.5 definition of “forcibly and by violence” comes from, e.g., *State v. Blunt*, 187 Neb. 631, 193 N.W.2d 434 (1972). The NJI2d Crim. 4.5 definition of “from the person” comes from, e.g., *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980).

The Committee recommendation that the term “forcibly and by violence” be used in the elements instruction along with the definition departs from a general Committee recommendation to avoid use of a term when its meaning in law is different from its ordinary meaning.

Robbery, unlike theft, does not require a jury declaration of particular value. Neb.Rev.Stat. § 29-2026.01 (Reissue 2008). If, however, a theft crime is charged to the jury as a lesser included offense of robbery, then the jury must find value. *See* NJI2d Crim. 3.6 (1992) (Elements of Theft; Effect of Findings; Value Declared) for the instruction to be used.

AUTHORITIES

NJI 14.10 (1969); Neb.Rev.Stat. § 28-324 (Reissue 2008); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980); *State v. Blunt*, 187 Neb. 631, 193 N.W.2d 434 (1972).

Research References

West’s Key Number Digest
Criminal Law ☞772; Robbery ☞1

Legal Encyclopedias
C.J.S., Criminal Law §§ 1312 to 1319; Robbery §§ 2, 4, 12, 90 to 91

NJI2d Crim. 4.6

DEFINITIONS (PENETRATION)

Give Applicable Parts of the Following Definition Following the Elements Instruction or, if the Applicable Part of the Definition Is Short, Insert the Definition Immediately Following the Use of the Term in an Elements Instruction:

Penetration is (1) any intrusion, however slight, into the genital or anal openings of a victim by any part of a defendant's body or any object used by (him, her); (2) any contact, however slight, between the defendant's sex organ and the victim's mouth or tongue or between the victim's sex organ and the defendant's mouth or tongue; and (3) any intrusion, however slight, of the victim's sex organ into the genital opening of the defendant.

COMMENT

Neb.Rev.Stat. § 28-318 (Cum. Supp. 2014) contains a number of terms relevant to sexual assault. Except for "penetration," the terms already are defined in clear and plain language.

The statutory definition of penetration; Neb.Rev.Stat. § 28-318(6) (Cum. Supp. 2014); uses several terms—sexual intercourse, cunnilingus, fellatio, anal intercourse—as well as a general definition. The definition in NJI2d Crim. 4.6 (1992) covers all the activity statutorily defined as penetration but without using the statutory terms. The terms were avoided either because they merely repeat the definition (and sometimes more narrowly than the more inclusive definition) or because they are unlikely to be familiar to many jurors and thus in any event require definition. The definition of "penetration" in NJI2d Crim. 4.6 thus contains the full spectrum of possibilities in which statutory penetration may be achieved. An instruction in a particular case, however, should only include that part of the definition pertinent to the alleged conduct of the defendant.

The Committee recognizes that the various definitions of "penetration" provided in NJI2d Crim. 4.6 to some degree may blur the distinction between "sexual contact" and "sexual penetration" under Neb.Rev.Stat. § 28-318 (Cum. Supp. 2014). The definitions provided, however, track the definitions of "penetration" either that already are provided by statute or that were provided by the Nebraska Supreme Court in interpreting the reach of "penetration." The Nebraska Supreme Court and Unicameral appear to leave the decision between "penetration" and "contact" on a fact situation to jury determination. NJI2d Crim. 4.6 does likewise.

The statutory definition of penetration excludes penetration done for a medical or health reason. Neb.Rev.Stat. § 28-318(6) (Cum. Supp.

2014). In the routine sexual assault case a medical excuse for the penetration is not an issue and need not be charged as part of the definition. If a particular case involves a medical excuse by the defendant then additional language will need to be added to the definition.

The statutory definition of penetration also contains an express statement that penetration does not require emission of semen. Neb.Rev.Stat. § 28-318(6) (Cum. Supp. 2014). It is the view of the Committee that, since in NJI2d Crim. 4.6 penetration is defined to include intrusion by any part of the body or by any object, the express statement is not needed in the definition given to the jury.

AUTHORITIES

Neb.Rev.Stat. § 28-318(6) (Cum. Supp. 2014); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976).

Research References

West's Key Number Digest

Criminal Law ☞772(2); Rape ☞7; Sodomy ☞1

Legal Encyclopedias

C.J.S., Criminal Law §§ 1312 to 1313; Rape §§ 1, 17; Sodomy §§ 2 to 4

CHAPTER 5

EVIDENCE AND CREDIBILITY

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
|------|--|
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| 5.1 | States of Mind Proved Inferentially |
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| 5.4 | Expert Testimony |
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| 5.6 | Accomplice Testimony |
| 5.7 | Multiple Defendants; Evidence Admissible Against One or More but Not All |
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| 5.9 | Jury View |
| 5.10 | Limited Use—Other Similar Acts |
| 5.11 | Limited Use—Impeachment—Prior Conviction |
| 5.12 | Limited Use—Impeachment—Opinion or Reputation Evidence |

COMMENT

Chapter 5 contains instructions on evidence and credibility. NJI2d Crim. 5.10 to 5.12 should be given only in unusual fact circumstances requiring a particularized limiting instruction.

NJI2d Crim. 5.0

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence, direct and circumstantial.

Direct evidence is either physical evidence of a fact or testimony by someone who has first-hand knowledge of a fact by means of his or her senses. Circumstantial evidence is evidence of a fact from which another fact logically can be inferred.

A fact may be proved by direct evidence alone; by circumstantial evidence alone; or by a combination of the two.

COMMENT

NJI2d Crim. 5.0 is similar to NJI2d Civ. 1.31. If the evidence warrants then, upon request, NJI2d Crim. 5.0 (1992) must be given. *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983); *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610 (1964).

In a criminal case, evidence, whether solely direct, solely circumstantial, or a combination of the two, is sufficient to convict if, considered as a whole, the evidence proves guilt beyond a reasonable doubt. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Coleman*, 186 Neb. 571, 184 N.W.2d 732 (1971); *State v. Davis*, 185 Neb. 433, 176 N.W.2d 657 (1970). In a given case circumstantial evidence may be strong or weak: less, equal to, or more reliable than direct evidence. When a case is based solely on circumstantial evidence then, as in any other case, the judge must decide whether there is sufficient evidence to warrant submission. What is clear, however, is that circumstantial evidence is "entitled to be treated by the trier of facts in the same manner as direct evidence." *State v. Buchanan*, 210 Neb. 20, 26, 312 N.W.2d 684, 688 (1981). As with direct evidence, the state is not required to disprove every hypothesis except that of the defendant's guilt. *Id.*; *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

AUTHORITIES

Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), *rehearing denied*, 348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731 (1955); *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980); *State v. Lowrey*, 187 Neb. 451, 191 N.W.2d 600 (1971); *State v. Coleman*, 186 Neb. 571, 184 N.W.2d 732 (1971); *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610 (1964).

Research References

West's Key Number Digest
Criminal Law ¶784(2)

NJI2d Crim. 5.1**STATES OF MIND PROVED INFERENTIALLY**

Intent (purpose, knowledge, willfulness, premeditation, deliberation) is an element of (here insert crime). In deciding whether the defendant acted with intent (purpose, knowledge, willfulness, premeditation, deliberation) you should consider (his, her) words and acts and all the surrounding circumstances.

COMMENT

With regard to proving intent inferentially, the Nebraska Supreme

Court has said that "[T]he law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Costanzo*, 227 Neb. 616, 623, 419 N.W.2d 156, 162 (1988); *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983). *Accord*, *State v. Harton*, 230 Neb. 167, 430 N.W.2d 313 (1988).

NJI2d Crim. 5.1 includes other states of mind for two reasons. First, the need to emphasize that intent is proved inferentially is equally applicable to other states of mind. *See State v. Junglaus*, 176 Neb. 641, 126 N.W.2d 858 (1964) (knowledge, like intent, inferred from circumstances surrounding crime). Not only that, but the Committee thought it possible that focusing on intent to the exclusion of other states of mind might lead to jury confusion in a case involving a crime requiring intent and a crime requiring, for example, premeditation. An instruction like NJI2d Crim. 5.1 that focused only on intent might lead to a jury conclusion that only intent (and not premeditation) properly may be proved inferentially.

AUTHORITIES

State v. Buchanan, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972); *State v. Claire*, 188 Neb. 373, 196 N.W.2d 519 (1972); *State v. Walker*, 187 Neb. 482, 191 N.W.2d 817 (1971); *State v. Davis*, 186 Neb. 457, 183 N.W.2d 753 (1971); *State v. Junglaus*, 176 Neb. 641, 126 N.W.2d 858 (1964); *Young v. State*, 127 Neb. 719, 256 N.W. 908 (1934); *Ward v. State*, 58 Neb. 719, 79 N.W. 725 (1899); *Krchnavy v. State*, 43 Neb. 337, 61 N.W. 628 (1895).

Research References

West's Key Number Digest
Criminal Law ⇨772(5), 778(6)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1312, 1325 to 1326, 1329

NJI2d Crim. 5.2

EVALUATION OF TESTIMONY—CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this, you may consider the following:

1. The conduct and demeanor of the witness while testifying;
2. The sources of information, including the opportunity for seeing or knowing the things about which the witness testified;

3. The ability of the witness to remember and to communicate accurately;
4. The reasonableness or unreasonableness of the testimony of the witness;
5. The interest or lack of interest of the witness in the result of this case;
6. The apparent fairness or bias of the witness;
7. Any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial; and
8. Any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

COMMENT

NJI2d Crim. 5.2 corresponds to NJI2d Civ. 1.41.

Credibility of witnesses is a factfinding decision of the jury. It is prejudicial error to instruct the jury that (1) it may reject the testimony of a witness only for good reason or (2) it should reject such testimony only if irreconcilable with other testimony it believes to be true. *Schluter v. State*, 151 Neb. 284, 37 N.W.2d 396 (1949).

Included as "other evidence" under numbered paragraph 8 is evidence of conviction of a crime, evidence of reputation for truthfulness or untruthfulness, and other specific instances of possible bias (such as a grant of immunity to a testifying witness). The Committee believes that numbered paragraph (8) is sufficient as instruction to the jury and that a focus on particular instances regarding the possibility of bias more properly is left for highlighting by argument by counsel.

If evidence of conviction of a crime, reputation evidence, etc., is inadmissible as substantive evidence then a limited-use instruction should be given at attorney request at the time the evidence is admitted. For possible language for a limited-use instruction to be given when evidence is admitted, see NJI2d Crim. X5.11 (Impeachment—Prior Conviction) and NJI2d Crim. X5.12 (Impeachment—Opinion Or Reputation Evidence). When a limiting instruction is given at the time the evidence is admitted, then ordinarily NJI2d Crim. 5.3 (EVIDENCE ADMITTED FOR A LIMITED PURPOSE) will be given at closing. When a limiting instruction is not requested at the time the evidence is admitted then the Committee anticipates that in most cases no final instruction on limited use will be given. For a discussion of the framework of NJI2d Crim. regarding limited-use instructions given during trial and at closing, see the Comment to NJI2d Crim. 5.3.

Finally, non-expert witness opinion testimony is covered generally under NJI2d Crim. 5.2 (and particularly paragraph 2) as is any other testimony of a witness. No instruction comparable to NJI 14.56 (1969) (Opinion of Non-Expert Witness) is provided.

AUTHORITIES

NJI 14.81 (1969); NJI2d Civ. 1.41; Schluter v. State, 151 Neb. 284, 37 N.W.2d 396 (1949).

Research References

West's Key Number Digest
Criminal Law ¶785

NJI2d Crim. 5.3

EVIDENCE ADMITTED FOR A LIMITED PURPOSE

A.

[During this trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other.]

B.

[During this trial I called your attention to certain out-of-court statements that were received in evidence only to aid you in deciding the credibility of the witnesses. You must consider those statements only with regard to the credibility of the witnesses and for no other purpose.]

COMMENT

This instruction is analogous to NJI2d Civ. 1.72.

I. STRUCTURE OF NJI2d CRIM. REGARDING LIMITING INSTRUCTIONS

NJI2d Crim. 5.3 (as well as its companion instruction, NJI2d Civil 1.72) was drafted in the anticipation that a limiting instruction at closing ordinarily will be given only if a specific limiting instruction was given at the time the evidence was admitted for a limited purpose.

The Committee expects that in virtually all criminal trials the anticipated structure of NJI2d Crim. will be followed. [For illustrative language of a limited-use instruction to be given at the time evidence is introduced see NJI2d Crim. X5.3 in the appendix, (EVIDENCE ADMITTED FOR LIMITED PURPOSE).] In any situation in which a limiting

instruction was given at the time evidence was introduced, moreover, NJI2d Crim. 5.3 must be given at closing if requested. *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983). Instructing the jury on the limited use of evidence during trial does not eliminate the court's duty to give, if requested, a written instruction on the limited purpose of the evidence; it creates that duty. *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d (2012). The court should identify the evidence received and the limited purpose for which the jury may consider such evidence. *Id.*

In the event that a judge gives a limiting instruction only at the end of a trial, and not at the time that the limited purpose evidence is introduced, NJI2d Crim. 5.3 may be inadequate. In such case, the judge must specifically identify the evidence for which the limiting instruction is given. Appropriate language must call the jury's attention to the particular evidence being limited to a particular use. NJI2d Crim. 5.10, 5.11, and 5.12, although ordinarily not recommended, might then provide a useful starting point in drafting an instruction. A judge might also find useful as guides the instructions in Appendix A (Selected Instructions To Be Given At Appropriate Time During Trial).

II. USE OF NJI2d CRIM. 5.3 WITH 5.10, 5.11, AND 5.12

NJI2d Crim. 5.10 (LIMITED USE—OTHER SIMILAR ACTS), 5.11 (LIMITED USE—IMPEACHMENT—PRIOR CONVICTION) and 5.12 (1992) (LIMITED USE—IMPEACHMENT—OPINION OR REPUTATION EVIDENCE) are limited-use instructions which will probably be infrequently used. They should be given only in an unusual case where the facts and circumstances give rise to a particular problem that requires a particular focus at closing. Ordinarily only NJI2d Crim. 5.3 should be given at closing because the jury need only be reminded of earlier limited-use instructions that referred specifically to the evidence at issue.

III. USE OF NJI2d CRIM. 5.3 WITH 5.7 AND 5.8

NJI2d Crim. 5.7 (MULTIPLE DEFENDANTS: EVIDENCE ADMISSIBLE AGAINST ONE OR MORE BUT NOT ALL) and NJI2d Crim. 5.8 (MULTIPLE DEFENDANTS: STATEMENT ADMISSIBLE ONLY AGAINST DEFENDANT WHO MADE IT) are the other limited-use instructions included in NJI2d Crim. The Committee expects NJI2d Crim. 5.7 and 5.8 will be given routinely in multiple-defendant trials whenever the evidence makes either or both instructions applicable.

IV. SELECTION BETWEEN PARAGRAPHS A AND B OF NJI2d CRIM. 5.3

Bracketed paragraphs A and B of NJI2d Crim. 5.3 are alternative limited-use instructions. In no event should both paragraphs be given. The instruction covering all categories of limited-use evidence is contained in bracketed paragraph A of NJI2d Crim. 5.3. Bracketed paragraph B is a limited-use instruction solely covering prior inconsistent statements used to impeach credibility. In all situations in which

evidence was admitted for a limited purpose and that evidence is not exclusively prior inconsistent statements used to impeach, the more general and inclusive bracketed paragraph A should be given.

Whenever prior inconsistent statements are in evidence, one of the following three circumstances exists: (1) each statement is admissible both to impeach that evidence with which it is inconsistent and as substantive evidence of the facts declared; (2) each statement is admissible only to impeach and not as substantive evidence of the facts declared; or (3) some statements are admissible only as impeachment and some are admissible for both purposes.

Where, in situation (1), each prior inconsistent statement is also substantive evidence of the facts declared, then bracketed paragraph B never should be given (and bracketed paragraph A should be given only if there was limited-use evidence that was introduced at trial). Where the only limited-use evidence introduced is evidence of prior inconsistent statements whose use is limited to impeachment, then for both situation (2) and situation (3) bracketed paragraph B should be given.

AUTHORITIES

State v. Payne-McCoy, 284 Neb. 302, 818 N.W.2d 608 (2012); State v. Dush, 214 Neb. 51, 332 N.W.2d 679 (1983).

Research References

West's Key Number Digest
Criminal Law ¶673, 783

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. 5.4

EXPERT TESTIMONY

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

COMMENT

This instruction corresponds to NJI2d Civ. 1.42.

AUTHORITIES

NJI 14.55 (1969); NJI2d Civ. 1.42; Neb.Rev.Stat. § 27-702 (Reissue

2008) Neb.Evid.R. 702; State v. Schenck, 222 Neb. 523, 384 N.W.2d 642 (1986); State v. Mayfield, 212 Neb. 724, 325 N.W.2d 162 (1982); State v. Loveless, 209 Neb. 583, 308 N.W.2d 842 (1981); State v. Weik, 206 Neb. 217, 292 N.W.2d 289 (1980); State v. Gerber, 206 Neb. 75, 291 N.W.2d 403 (1980); State v. Briner, 198 Neb. 766, 255 N.W.2d 422 (1977); State v. Booth, 202 Neb. 692, 276 N.W.2d 673 (1979), *cert. denied*, 444 U.S. 982, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979); State v. Garza, 187 Neb. 407, 191 N.W.2d 454 (1971).

Research References

West's Key Number Digest
Criminal Law ☞785(7)

NJI2d Crim. 5.5

EVIDENCE OF DEFENDANT'S CHARACTER FOR PERTINENT TRAIT IN ISSUE

Evidence of the defendant's character for (here insert pertinent trait in issue) has been received to help you to decide whether (he, she) committed the crime charged. You may consider this evidence along with all the other evidence in making your decision.

COMMENT

The Nebraska Supreme Court repeatedly has held that evidence of a defendant's good character is admissible substantively when offered by a defendant as proof of the defendant's character trait pertinent to the crime charged. Wells v. State, 152 Neb. 668, 42 N.W.2d 363 (1950); McDougal v. State, 105 Neb. 553, 181 N.W. 519 (1921); Sweet v. State, 75 Neb. 263, 106 N.W. 31 (1905); Johnson v. State, 34 Neb. 257, 51 N.W. 835 (1892). See Neb.Rev.Stat. § 27-404 (Cum. Supp. 2014), Neb.Evid.R. 404 (defendant's use of character evidence permitted when relevant to a trait in issue). Once offered by the defendant, evidence of bad character offered by the prosecution is admissible substantively to rebut the good character evidence. *Id.*

In a particular case evidence of a defendant's character as a truthful person may be at issue. An example is a prosecution for perjury. In the event that character as a truthful person is at issue the evidence as to truthfulness by the defendant (and any rebuttal evidence by the state) is substantive evidence and not offered to impeach. In such a case, NJI2d Crim. 5.5 should be given at closing; a limited-use instruction should not be given at the time the evidence is introduced; NJI2d Crim. 5.12 (LIMITED USE—IMPEACHMENT—OPINION OR REPUTATION EVIDENCE) never should be given; and NJI2d Crim. 5.3 (EVIDENCE ADMITTED FOR A LIMITED PURPOSE) should be given only if there was limited-use evidence that was admitted during the trial.

The Nebraska Supreme Court has held that it is reversible error to refuse to give an instruction such as NJI2d Crim. 5.5 where appropriate and requested by the defendant. *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950); *McDougal v. State*, 105 Neb. 553, 181 N.W. 519 (1921); *Sweet v. State*, 75 Neb. 263, 106 N.W. 31 (1905); *Johnson v. State*, 34 Neb. 257, 51 N.W. 835 (1892).

AUTHORITIES

NJI 14.57 (1969); Neb.Rev.Stat. § 27-404 (Cum. Supp. 2014), Neb. Evid. R. 404; *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995); *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950); *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951); *Flannigan v. State*, 127 Neb. 640, 256 N.W. 321 (1934), *cert. denied*, *Flannigan v. State of Neb.*, 294 U.S. 725, 55 S.Ct. 640, 79 L.Ed. 1256 (1935); *McDougal v. State*, 105 Neb. 553, 181 N.W. 519 (1921); *Sweet v. State*, 75 Neb. 263, 106 N.W. 31 (1905).

Research References

West's Key Number Digest
Criminal Law ⇨783

NJI2d Crim. 5.6

ACCOMPLICE TESTIMONY

There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely. [You should hesitate to convict the defendant if you decide that (here insert name) testified falsely about an important matter and that there is no other evidence to support (his, her) testimony.]

In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of (his, her) guilt.]

COMMENT

Upon defense request, a defendant is entitled to a cautionary instruction on the credibility and weight of accomplice testimony. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985); *Jungclaus v. State*, 170 Neb. 704, 104 N.W.2d 327 (1960). It seems reasonable to the Committee that when the defense calls an accomplice as a witness, a judge, on the state's request, would give as an instruction the first two lines of NJI2d Crim. 5.6. Although it may be reversible error to refuse a requested instruction, it is not reversible error to fail to give the instruction in the absence of a request. *State v. Huffman*, 222 Neb. 512, 518-19, 385 N.W.2d 85, 90 (1986).

Whenever a judge decides that the evidence supports a conclusion

that a witness is an accomplice, then a cautionary instruction on the weight and credibility to be given to the testimony of the alleged accomplice is appropriate and should be given, because any alleged accomplice testimony should be examined more closely by the trier of fact for any possible motive that the accomplice might have to testify falsely. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

The uncorroborated testimony of an accomplice is sufficient to convict. *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985). The Nebraska Supreme Court has stated that a directed verdict is required only if the only evidence supporting conviction is an uncorroborated accomplice statement that on its face is "baldly perjurious or preposterous." *State v. Smith*, 219 Neb. 176, 183, 361 N.W.2d 532, 536 (1985). The Court further has stated that in all other cases, even that of an uncorroborated accomplice statement involving willful false swearing on a material matter, language equivalent to the cautionary instruction of NJI2d Crim. 5.6 suffices. *Id.*

The Court has not expressed what would be the minimally acceptable language to protect a defendant's interests. While it may be that a less detailed cautionary instruction will suffice, the Committee was reluctant to depart from language approved by the Court.

NJI2d Crim. 5.6 does not define "accomplice." The Committee concluded that whenever a judge decides that evidence supports the conclusion that a witness is an accomplice then the instruction is appropriate and should be given if requested. A court does not err in refusing to include witnesses in the accomplice testimony instruction where the evidence might support a finding that the witnesses were accessories after the fact, but the evidence does not show that they were accomplices. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). The use of the term "claimed accomplice" in the instruction does not create any type of presumption or a judicial finding that the person was an accomplice to the defendant. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

AUTHORITIES

NJI 14.58 (1969); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986); *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985); *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983); *State v. Temple*, 192 Neb. 442, 222 N.W.2d 356 (1974); *Jungclaus v. State*, 170 Neb. 704, 104 N.W.2d 327 (1960); *Cornell v. State*, 138 Neb. 708, 294 N.W. 851 (1940); *Nieden v. State*, 120 Neb. 619, 234 N.W. 563 (1931).

Research References

West's Key Number Digest
Criminal Law ☞780

Legal Encyclopedias
C.J.S., Criminal Law § 1334

NJI2d Crim. 5.7

MULTIPLE DEFENDANTS; EVIDENCE ADMISSIBLE AGAINST ONE OR MORE BUT NOT ALL

As I told you during the trial, you may consider (some of the evidence, the evidence of (here briefly insert particulars)) only with respect to defendant (here insert name). Do not consider that evidence with respect to (defendant (here insert name), any of the other defendants).

COMMENT

NJI2d Crim. 5.7 (evidence) and 5.8 (statement) relate to multiple-defendant trials where not all evidence is admissible against all defendants. Both complement and highlight the basic instruction in NJI2d Crim. 3.7.

If multiple defendants are co-conspirators, evidence admissible against one defendant may be admissible against all of them. Neb.Rev.Stat. § 27-104(1) (Reissue 2008), Neb. Evid. R. 104(1); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). *NJI2d Crim. 5.7 thus never should be given in a multiple-defendant trial when all defendants are co-conspirators and the evidence against one defendant involves statements or acts in furtherance of the conspiracy. See State v. Watson*, 182 Neb. 692, 157 N.W.2d 156 (1968). This is true for any situation involving co-conspirators without regard to whether a conspiracy has been charged. *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977).

The first paragraph of NJI2d Crim. 5.7 provides a parenthetical permitting a choice between saying "some of the evidence" and particularizing regarding the evidence. It is left to the trial judge to decide when particularizing is possible and appropriate.

The general rule is that, where defendants are not co-conspirators and no equivalent exception applies, evidence admissible only against some defendants may not be used by the jury to help establish guilt as to other defendants for whom the evidence is inadmissible. *See, e.g., State v. Moore*, 189 Neb. 380, 202 N.W.2d 747 (1972); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1584, 51 L.Ed.2d 795 (1977). For most situations of such selective admissibility NJI2d Crim. 3.7, 5.7, and 5.8 (plus a cautionary instruction given when the particular evidence is introduced) are sufficient to cure any prejudice. *Id.* Where joinder of crimes or defendants is prejudicial notwithstanding curative instructions, separate trials are required. Neb.Rev.Stat. § 29-2002 (Reissue 2008); *State v. Rice*, 188 Neb. 728, 199

N.W.2d 480 (1972), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1584; 51 L.Ed.2d 795 (1977); *State v. Rodgers*, 186 Neb. 633, 185 N.W.2d 448 (1971); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964). Normally it is the duty of the defendant claiming prejudice to show "how and in what manner he was prejudiced." *State v. Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). The burden and showing are the same whether the challenge to a joint trial is accomplished by a defendant's pretrial motion to sever, by the judge granting a prosecutor's motion to consolidate; *id.*; or by a defendant's post-evidence motion for mistrial based on a claim of improper joinder. *See State v. Dreifurst*, 204 Neb. 378, 282 N.W.2d 51 (1979).

One clear area where prejudice to a defendant is presumed—and thus separate trials are required—is where a confession is to be introduced against a non-testifying co-defendant and cannot successfully be redacted to eliminate all reference to that co-defendant or to his existence. NJI2d Crim. 5.8 deals specifically with the situation where a confession may successfully be redacted and is introduced against one but not all defendants.

AUTHORITIES

Neb.Rev.Stat. § 28-104(1) (Reissue 2008); Neb.Evid.R. 104(1); Neb.Rev.Stat. § 27-801(4)(b) (Reissue 2008); Neb.Evid.R. 801(4)(b); Neb.Rev.Stat. § 29-2002 (Reissue 2008); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984); *State v. Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Dreifurst*, 204 Neb. 378, 282 N.W.2d 51 (1979); *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977); *State v. Moore*, 189 Neb. 380, 202 N.W.2d 747 (1972); *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1584, 51 L.Ed.2d 795 (1977); *State v. Rodgers*, 186 Neb. 633, 185 N.W.2d 448 (1971); *State v. Watson*, 182 Neb. 692, 157 N.W.2d 156 (1968).

Research References

West's Key Number Digest
Criminal Law ¶673(4), 783

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. 5.8

MULTIPLE DEFENDANTS; STATEMENT ADMISSIBLE ONLY AGAINST DEFENDANT WHO MADE IT

There has been evidence that defendant, (here insert name), made a statement to (a law enforcement officer, here identify person to

whom statement was made). You may consider any such statement only with respect to defendant (here insert name). Do not consider that statement with respect to (defendant (here insert name), any of the other defendants).

COMMENT

NJI2d Crim. 5.7 (evidence) and 5.8 (statement) relate to multiple-defendant trials where not all evidence is admissible against all defendants. Both complement and highlight the basic instruction in NJI2d Crim. 3.7.

In any circumstance in which a statement made by one defendant properly is admissible against another defendant (e.g., co-conspirator statements) NJI2d Crim. 5.8 never should be given. See Comment to NJI2d Crim. 5.7 for a discussion of co-conspirators.

The only current applicability of NJI2d Crim. 5.8 is at a joint trial where a statement by a defendant is admitted as substantive evidence against him (whether or not he testifies) or where he testifies and the statement is admitted to impeach his credibility but where, in either event, the statement cannot be admitted as substantive evidence against the co-defendant who did not make it. Three separate situations are involved.

The first situation is where a statement may be admitted substantively against the defendant who made it and where that defendant does not testify. In that event NJI2d Crim. 5.8 makes clear that the statement may not be used substantively against the co-defendant.

The second situation is where the statement may be admitted substantively against the defendant who made it AND the defendant testifies. Here NJI2d Crim. 5.8 clarifies for the jury that the testifying defendant's statement (as distinct from his testimony) may not be used substantively to prove the co-defendant's guilt. *See State v. Saltzman*, 194 Neb. 525, 233 N.W.2d 914 (1975).

The third situation is when a defendant testifies and his statement is used to impeach his credibility. In this event a cautionary instruction should have been given regarding the statement's use only to impeach the credibility of the testifying defendant. NJI2d Crim. 5.8 tells the jury to disregard the statement entirely as to the co-defendant.

AUTHORITIES

Neb.Rev.Stat. §§ 27-801(4)(b)(v) (Reissue 2008), Neb.Evid.R. 801(4)(b)(v); *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), *on remand*, 70 N.Y.2d 733, 519 N.Y.S.2d 959, 514 N.E.2d 379 (1987); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90

L.Ed.2d 514 (1986), *on remand*, 164 Ill.App.3d 155, 115 Ill.Dec. 217, 517 N.E.2d 628 (1987); *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), *appeal after remand*, 416 F.2d 310 (8th Cir.1969), *cert. denied*, 397 U.S. 1014, 90 S.Ct. 1248, 25 L.Ed.2d 428 (1970); *State v. Edwards*, 197 Neb. 354, 248 N.W.2d 775 (1977); *State v. Saltzman*, 194 Neb. 525, 233 N.W.2d 914 (1975); *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied*, 430 U.S. 947, 97 S.Ct. 1584, 51 L.Ed.2d 795 (1977); *State v. Watson*, 182 Neb. 692, 157 N.W.2d 156 (1968).

Research References

West's Key Number Digest
Criminal Law ⇨673(4), 783

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. 5.9

JURY VIEW

What you saw while you were viewing the scene of (here identify scene) is evidence just as if it were given here in court. You determine what weight, if any, to give to the evidence obtained at the scene just as you do with any other evidence.

COMMENT

Whether a jury should view the scene of the crime is within the discretion of the trial judge. Neb.Rev.Stat. § 29-2017 (Reissue 2008); *State v. Glenn*, 193 Neb. 230, 226 N.W.2d 137 (1975); *State v. Craig*, 189 Neb. 461, 203 N.W.2d 158 (1973). The defendant must be present at the jury view unless she waives. *Carroll v. State*, 5 Neb. 31 (1876). She will be presumed present where the record is silent as to her actual presence at the jury view but shows that she was in court when the judge ordered the jury view. *Fillion v. State*, 5 Neb. 351 (1877).

Neb.Rev.Stat. § 29-2017 (Reissue 2008) directs that no one shall speak at the scene "on any subject connected with the trial." This language does not include a judge's at-the-scene taking of testimony. If testimony is taken or evidence introduced the "what you saw" language of NJI2d Crim. 5.9 must be expanded to include such testimony and evidence as well as any instructions to the jury given by the judge.

AUTHORITIES

Neb.Rev.Stat. § 29-2017 (Reissue 2008); *State v. Glenn*, 193 Neb. 230, 226 N.W.2d 137 (1975); *State v. Craig*, 189 Neb. 461, 203 N.W.2d 158 (1973); *Fillion v. State*, 5 Neb. 351 (1877); *Carroll v. State*, 5 Neb. 31 (1876).

Research References

West's Key Number Digest
Criminal Law ⌘783

NJI2d Crim. 5.10**LIMITED USE—OTHER SIMILAR ACTS*****Ordinarily Recommend No Instruction.***

During this trial I told you that certain evidence was received to help you decide whether the defendant had the (intent, motive, opportunity, etc.) to commit the (here insert crime) charged. You must consider the evidence for that limited purpose and for no other.

COMMENT

Unless the circumstances at trial present an unusual situation, the Committee recommends against the use of this instruction and recommends instead that NJI2d Crim. 5.3 be the only limited-use instruction given at closing. See Comment to NJI2d Crim. 5.3 and NJI2d Civ. 1.72 for a full discussion of why.

AUTHORITIES

NJI 14.11A (1969); Neb.Rev.Stat. § 27-404 (Cum. Supp. 2014), Neb. Evid. R. 404; State v. Trotter, 262 Neb. 443, 632 N.W.2d 325 (2001); State v. Powers, 10 Neb.App. 256, 634 N.W.2d 1 (2001); State v. Burdette, 259 Neb. 679, 611 N.W.2d 615 (2000); State v. Sanchez, 257 Neb. 291, 597 N.W.2d 361 (1999); State v. McManus, 257 Neb. 1, 594 N.W.2d 623 (1999); State v. Sherrod, 229 Neb. 128, 425 N.W.2d 616 (1988); State v. Katzman, 228 Neb. 851, 424 N.W.2d 852 (1988); State v. Rincker, 228 Neb. 522, 423 N.W.2d 434 (1988); State v. Methe, 228 Neb. 468, 422 N.W.2d 803 (1988); State v. Jacobs, 226 Neb. 184, 410 N.W.2d 468 (1987); State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987); State v. Kern, 224 Neb. 177, 397 N.W.2d 23 (1986); State v. Robb, 224 Neb. 14, 395 N.W.2d 534 (1986); State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985); State v. Craig, 219 Neb. 70, 361 N.W.2d 206 (1985); State v. Keithley, 218 Neb. 707, 358 N.W.2d 761 (1984); State v. Baker, 218 Neb. 207, 352 N.W.2d 894 (1984); State v. Evans, 212 Neb. 476, 323 N.W.2d 106 (1982); State v. Plymate, 216 Neb. 722, 345 N.W.2d 327 (1984); State v. Hitt, 207 Neb. 746, 301 N.W.2d 96 (1981); State v. Ellis, 208 Neb. 379, 303 N.W.2d 741 (1981).

Research References

West's Key Number Digest
Criminal Law ⌘673(5), 783(1)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. 5.11**LIMITED USE—IMPEACHMENT—PRIOR
CONVICTION**

Ordinarily Recommend No Instruction.

Evidence that a witness has been convicted of a crime has been received only to aid you in determining whether you believe the witness and, if so, the weight that you give to that witness's testimony. You may consider the evidence for that limited purpose only.

COMMENT

NJI2d Crim. 5.11 corresponds to NJI2d Civ. 1.70.

NJI2d Crim. 5.11 applies only when prior conviction evidence may be used solely for impeachment purposes. It should be given only when the particular circumstances pose a real danger of improper use of the evidence by the jury.

AUTHORITIES

NJI2d Civ. 1.70; Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Olsan, 231 Neb. 214, 436 N.W.2d 128 (1989); State v. Robertson, 219 Neb. 782, 366 N.W.2d 429 (1985), *appeal after remand*, 223 Neb. 825, 394 N.W.2d 635 (1986); State v. Daugherty, 215 Neb. 45, 337 N.W.2d 128 (1983); State v. Pitts, 212 Neb. 295, 322 N.W.2d 443 (1982); State v. Gore, 212 Neb. 287, 322 N.W.2d 438 (1982); State v. Kelly, 212 Neb. 45, 321 N.W.2d 80 (1982); State v. Lingle, 209 Neb. 492, 308 N.W.2d 531 (1981); State v. Ellis, 208 Neb. 379, 303 N.W.2d 741 (1981); State v. Caradori, 199 Neb. 691, 260 N.W.2d 617 (1977); State v. Reinert, 197 Neb. 379, 248 N.W.2d 782 (1977); State v. Fonville, 197 Neb. 220, 248 N.W.2d 27 (1976); State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975); Latham v. State, 152 Neb. 113, 40 N.W.2d 522 (1949); United States v. Burkhead, 646 F.2d 1283 (8th Cir.1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 399, 70 L.Ed.2d 214 (1981).

Research References

West's Key Number Digest
Criminal Law ⇨673(3), 783(2)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. 5.12**LIMITED USE—IMPEACHMENT—OPINION OR
REPUTATION EVIDENCE**

Ordinarily Recommend No Instruction.

During this trial you heard testimony from some witnesses as to [their opinions of the character] [and][the general reputation] of other witnesses regarding truthfulness. This testimony was received only to aid you in determining whether you believe the other witnesses and, if so, the weight that you give to their testimony. You may consider it for that limited purpose and for no other.

COMMENT

NJI2d Crim. 5.12 is analogous to NJI2d Civ. 1.71.

As with other specific limiting instructions in NJI2d Crim., NJI2d Crim. 5.12 should be given only when there is a real danger that the opinion or reputation evidence will be used improperly by the jury. The danger from an attack on credibility through opinion or reputation evidence is that the jury will take that evidence as proof or disproof of substantive issues in the case and thus will use this evidence as character evidence in ways forbidden by Neb.Rev.Stat. § 27-404 (Cum. Supp. 2014), Neb.Evid.R. 404.

AUTHORITIES

Neb.Rev.Stat. § 27-404 (Cum. Supp. 2014); Neb.Rev.Stat. § 27-608 (Reissue 2008); Neb.Evid.R. 404, 608; *United States v. Watson*, 669 F.2d 1374 (11th Cir.1982); *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980); *State v. King*, 197 Neb. 729, 250 N.W.2d 655 (1977); *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976).

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CHAPTER 6

STATEMENT BY DEFENDANT

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

6.0 Voluntary Statement

COMMENT

NJI instructions regarding *Miranda* warnings and corroboration of confessions are no longer recommended because they involve decisions of law by the judge, not jury factfindings. Except in the unusual circumstance covered by NJI2d Crim. 5.8 (MULTIPLE DEFENDANTS; STATEMENT ADMISSIBLE ONLY AGAINST DEFENDANT WHO MADE IT), NJI2d Crim. 6.0 is the only instruction dealing with defendant statements that continues current in NJI2d Crim.

NJI2d Crim. 6.0

VOLUNTARY STATEMENT

There has been evidence that defendant, (here insert name), made a statement to (a law enforcement officer, here identify person to whom statement was made). You may rely on any such statement only if you decide beyond a reasonable doubt [with regard to each statement]:

- (1) that the defendant made the statement; and
- (2) that the defendant understood what (he, she) was saying; and
- (3) that the statement was freely and voluntarily made under all the circumstances surrounding its making.

If you decide that the state did not prove these three things beyond a reasonable doubt then you must disregard (the, that particular) statement even if you think it is true.

COMMENT

It may be necessary in a particular case to supplement this instruc-

tion by adding a numbered paragraph (4) that provides more specific information regarding a particular case. Thus, when warranted by the evidence, it is advisable to instruct the jury that the statement was “not the product of threats, coercion, or inducements of leniency.” *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000). A more specific example of a situation in which fact-specific tailoring may be necessary, consider the case of a defendant who claims that he confessed only because of a police promise that all charges would be dropped if he talked.

What follows is an instruction tailored to this example; the language provided would substitute for everything following numbered paragraph (2) in NJI2d Crim. 6.0:

“(3) that the statement did not result from a clear promise by (a law enforcement officer, here identify person who made statement) that all charges would be dismissed if the defendant cooperated; and

“(4) that the statement otherwise was freely and voluntarily made under all the circumstances surrounding its making.

“If you decide that the state did not prove these four things beyond a reasonable doubt then you must disregard the statement even if you think it is true.”

If, in the example provided above, the promise allegedly was made by an employer to an employee then the following might substitute for everything following numbered paragraph (2) in NJI2d Crim. 6.0:

“(3) that the statement did not result from a clear promise from a person in authority to materially influence the prosecution or disposition of the criminal case against the defendant. A person in authority is someone that the defendant reasonably believed could exert such an influence on (his, her) criminal case; and

“(4) that the statement otherwise was freely and voluntarily made under all the circumstances surrounding its making.

“If you decide that the state did not prove these four things beyond a reasonable doubt, then you must disregard the statement even if you think it is true.”

NJI2d Crim. 6.0 avoids use of the word “confession” both because of its pejorative connotation and because the instruction must be given whether the statement technically is a confession or simply an admission. As the Nebraska Supreme Court described the difference, “[i]n a confession an accused admits guilt of every material element of the crime charged against him, whereas in an admission an accused acknowledges some fact or circumstance in itself insufficient to constitute an acknowledgement of guilt but tending to prove the ultimate fact of guilt.” *State v. Bodtke*, 219 Neb. at 508, 363 N.W.2d at 921 (1985).

Use of the word, "statement," rather than "admission" is preferred because the former likely will be more easily understood by a juror. Avoidance of "admission" or "confession," however, clearly represents no substantive change in terms of the circumstances in which NJI2d Crim. 6.0 must be given.

AUTHORITIES

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); Pinto v. Pierce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967); Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1357, 93 L.Ed. 1801 (1949); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); State v. Phelps, 235 Neb. 569, 456 N.W.2d 290 (1990); State v. Thomas, 232 Neb. 490, 441 N.W.2d 186 (1989); State v. Warren, 227 Neb. 160, 416 N.W.2d 249 (1987); State v. Bowersmith, 224 Neb. 6, 395 N.W.2d 527 (1986); State v. Norfolk, 221 Neb. 810, 381 N.W.2d 120 (1986); State v. Bodtke, 219 Neb. 504, 363 N.W.2d 917 (1985); State v. Crisp, 219 Neb. 265, 361 N.W.2d 544 (1985); State v. Robertson, 219 Neb. 782, 366 N.W.2d 429 (1985); State v. Mayhew, 216 Neb. 761, 346 N.W.2d 236 (1984); State v. Erks, 214 Neb. 302, 333 N.W.2d 776 (1983) (one judge); State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981); State v. Smith, 203 Neb. 64, 277 N.W.2d 441 (1979); State v. Scott, 200 Neb. 265, 263 N.W.2d 659 (1978); State v. Stevenson, 200 Neb. 624, 264 N.W.2d 848 (1978); State v. Irwin, 191 Neb. 169, 214 N.W.2d 595 (1974); State v. McDonald, 187 Neb. 752, 194 N.W.2d 183 (1972), *rehearing denied*, 188 Neb. 349, 196 N.W.2d 524 (1972); State v. Hatten, 187 Neb. 237, 188 N.W.2d 846 (1971); State v. Oliva, 183 Neb. 620, 163 N.W.2d 112 (1968), *cert. denied*, 395 U.S. 925, 89 S.Ct. 1780, 23 L.Ed.2d 242 (1969); State v. Long, 179 Neb. 606, 139 N.W.2d 813 (1966); State v. Breaker, 178 Neb. 887, 136 N.W.2d 161 (1965); State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965); Parker v. State, 164 Neb. 614, 83 N.W.2d 347 (1957), *cert. denied*, 356 U.S. 933, 78 S.Ct. 775, 2 L.Ed.2d 763 (1958); Gallegos v. State, 152 Neb. 831, 43 N.W.2d 1 (1950); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); McIntosh v. State, 105 Neb. 328, 180 N.W.

573 (1920); State v. Force, 69 Neb. 162, 95 N.W. 42 (1903); May v. State, 38 Neb. 211, 56 N.W. 804 (1893).

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CHAPTER 7

AFFIRMATIVE DEFENSES

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
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| 7.0 | Insanity Defense |
| 7.1 | Self Defense (No Deadly Force) |
| 7.2 | Self Defense (Issue as to Deadly Force) |
| 7.3 | Self Defense (Deadly Force) |
| 7.4 | Defense of Another |
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| 7.6 | Choice of Lesser Harm |
| 7.7 | Entrapment |
| 7.8 | Entrapment by Estoppel |

COMMENT

Chapter 7 contains all the generally applicable affirmative defenses in Nebraska that appear in NJI2d Crim. An affirmative defense raises an element different from the elements of the crime. While it is constitutional, therefore, to require that the defendant carry the burden of proof regarding an affirmative defense, the general rule in Nebraska, and generally in American jurisdictions, is to require that the state disprove an affirmative defense. The exceptions in Nebraska are insanity (NJI2d Crim. 7.0) and the entrapment defense *when raised in the context of a prosecution for criminal conspiracy*. See Comment to NJI2d Crim. 3.4 (ELEMENTS OF CRIMINAL CONSPIRACY; WITHDRAWAL). As a consequence, for all but these two affirmative defenses, disproof of an affirmative defense must be listed as the final element in an elements instruction when an affirmative defense is an issue.

NJI2d Crim. does not contain a pattern instruction for duress. The Committee found neither a Nebraska case nor an earlier pattern Nebraska jury instruction that defined the contours of the duress defense. With no guidance from the Nebraska Supreme Court on the modern scope of the duress defense, the Committee elected not to include a pattern instruction.

NJI2d Crim. 7.0

INSANITY DEFENSE

A. ELEMENTS

The defense of insanity has two elements. These are:

(1) that the defendant had a mental disease (defect, disorder) at the time of the acts charged; and

(2) that this mental disease (defect, disorder) impaired (his, her) mental capacity to such an extent that either:

(i) (he, she) did not understand the nature and consequences of what (he, she) was doing; or

(ii) (he, she) did not know the difference between right and wrong with respect to what (he, she) was doing.

B. BURDEN OF PROOF

The defendant must prove both elements of the insanity defense by the greater weight of the evidence. The greater weight of the evidence means evidence sufficient to make the claim of insanity more likely true than not true. It does not necessarily mean a greater number of witnesses or exhibits.

If you decide that the defendant proved both elements of the insanity defense by the greater weight of the evidence then you must find (him, her) not responsible by reason of insanity. Otherwise, you must find (him, her) guilty.

COMMENT

The test for insanity in Nebraska is the *McNaghten* test. See *State v. Hotz*, 281 Neb. 260, 795 N.W. 645 (2011); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977) *rehearing denied*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977); *State v. Jacobs*, 190 Neb. 4, 7, 205 N.W.2d 662, 664 (1973), *cert. denied*, 414 U.S. 860, 94 S.Ct. 75, 38 L.Ed.2d 111 (1973). As the Nebraska Supreme Court put it

Where a person is so diseased in mind, at the time the act is charged to have been committed, that he [is] incapable of comprehending the nature of the act and is unable to distinguish between right and wrong with respect to it, he is not accountable.

Thompson v. State, 159 Neb. 685, 691, 68 N.W.2d 267, 271 (1955).

To raise an insanity defense, therefore, a defendant must both suffer from a mental disease *and* because of the disease be unable to understand the nature and quality of his act or be unable to determine that his act is wrong. *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977) *rehearing denied*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977); *State v. Jacobs*, 190 Neb. 4, 7, 205 N.W.2d 662, 664 (1973), *cert. denied*, 414 U.S. 860, 94 S.Ct. 75, 38 L.Ed.2d 111 (1973); *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957); *Thompson v. State*, 159 Neb. 685, 68 N.W.2d 267 (1955). To constitute a defense the insanity must be shown to exist at the time the crime was committed. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Newson*, 183 Neb. 750, 164 N.W.2d 211 (1969).

The Nebraska cases almost uniformly focus on the second part of the test: the defendant's capacity. *E.g.*, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977), *rehearing denied* 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977); *State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662 (1973), *cert. denied*, 414 U.S. 860, 94 S.Ct. 75, 38 L.Ed.2d 111 (1973). Implicit in the cases, however, is the recognition that a mental disease must have caused the incapacity. Where defendant claims to be temporarily insane at the time of the crime based on voluntary use of drugs, the insanity defense instruction may not be given; the proper jury instruction is the voluntary intoxication instruction. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). Similarly, a voluntary drunk is not entitled to an insanity acquittal even if, as a result of his drunkenness, he either did not know what he was doing or did not know it was wrong. See NJI2d Crim. 8.0 and Comment; *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951). The Nebraska statute on insanity was amended to specifically provide that "insanity does not include any temporary condition that was proximately caused by the voluntary ingestion, inhalation, injection, or absorption of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof." Neb.Rev.Stat. § 29-2203 (Cum. Supp. 2014). Nor is a defendant entitled to an instruction that his "diminished capacity" might have prevented him from having the requisite intent. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

NJI2d Crim. 7.0 is phrased in terms of "mental disease (defect, disorder)" rather than simply as "mental disease." Mental "defect or disorder" encompasses the case of a person whose incapacity derives not from mental illness but from, for example, severe retardation. Such a person is covered by the insanity defense in Nebraska. See *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957). See generally Model Penal Code § 4.01 and Comment (Offic. Dr. and Rev. Comments 1985). Since, properly stated, retardation is a condition of the mind, not a mental disease, the Committee elected to provide the alternative terms, mental "defect or disorder," to cover retardation and like conditions that give rise to an insanity defense. Use of an alternative term simply character-

izes more accurately; it neither changes the Nebraska insanity defense nor covers anyone not already covered under Nebraska law. Choice between alternative terms is not substantive; the choice simply permits the instruction to track the term employed in testimony during the trial.

The Nebraska statute on insanity describes the plea as “not responsible by reason of insanity” and the verdict as an “acquittal.” Neb.Rev.Stat. § 29-2203 (Cum. Supp. 2014). It therefore seemed consistent with legislative intent to use either formulation to describe the jury verdict. NJI2d Crim. 7.0 employs “not responsible by reason of insanity” language because that language more accurately describes what the verdict actually means.

The insanity statute also directs that the verdict reflect whether the acquittal was solely by reason of insanity or on other grounds as well. *Id.* This requirement is accomplished by the structure of NJI2d Crim. 3.2 [ELEMENTS; EFFECT OF FINDINGS (Insanity Defense)]. The jury there is directed to consider the insanity defense only after considering the elements of the crime and concluding that the defendant is guilty. Thus any verdict of “not responsible” by definition is solely on that ground alone.

In Nebraska, insanity is an affirmative defense to be proved by the defendant by the greater weight of the evidence. Neb.Rev.Stat. § 29-2203 (Cum. Supp. 2014). *See* NJI2d Civil 2.12A (Burden of Proof—Greater Weight of the Evidence Defined) and Comment. *See* Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), *rehearing denied*, 344 U.S. 848, 73 S.Ct. 4, 97 L.Ed. 659 (1952) (constitutional to place burden on defendant to prove insanity beyond a reasonable doubt). As with all other elements of the state’s case-in-chief, proving state of mind remains the state’s burden to prove beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *Compare* Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) with Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

AUTHORITIES

NJI 14.30 (1969); Neb.Rev.Stat. § 29-2203 (Cum. Supp. 2014); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), *rehearing denied*, 344 U.S. 848, 73 S.Ct. 4, 97 L.Ed. 659 (1952); State v. Hotz, 281 Neb. 260, 795 N.W.2d 645 (2011); State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); State v. Vosler, 216 Neb. 461, 345 N.W.2d 806 (1984); State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983); State v. Rowe, 210 Neb. 419, 315 N.W.2d 250 (1982), *appeal after remand*, 214 Neb. 685,

335 N.W.2d 309 (1983); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977), *rehearing denied*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977); *State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662 (1973), *cert. denied*, 414 U.S. 860, 94 S.Ct. 75, 38 L.Ed.2d 111 (1973); *State v. Newson*, 183 Neb. 750, 164 N.W.2d 211 (1969); *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957); *Thompson v. State*, 159 Neb. 685, 68 N.W.2d 267 (1955); *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951); *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951); *Williams v. State*, 115 Neb. 277, 212 N.W. 606 (1927).

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NJI2d Crim. 7.1

SELF DEFENSE (NO DEADLY FORCE)

The defendant acted in self defense if:

(1) (here insert victim's name) ((used, threatened, used or threatened) force against the defendant); and

(2) under the circumstances as they existed at the time, the defendant reasonably believed that (the force (he, she) used against) (here insert victim's name) was immediately necessary to protect the defendant against (any such force (used, threatened, used or threatened)) by (here insert victim's name).

The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what (he, she) believed and (he, she) acted reasonably in response to that belief.

COMMENT

NJI2d Crim. 7.1 is derived from NJI 14.33 (Supp. 1975) and Neb. Rev. Stat. §§ 28-1408 to 28-1414 (Reissue 2008).

NJI2d Crim. 7.1 is limited to the defense of self defense when no deadly force is employed. NJI2d Crim. 7.2 [SELF DEFENSE (Issue As To Deadly Force)], 7.3 (1992)[SELF DEFENSE (Deadly Force)], 7.4 (DEFENSE OF ANOTHER), and 7.5 (DEFENSE OF PROPERTY) should be used when appropriate. It is anticipated that NJI2d Crim. 7.1 and 7.2 will be the most frequently used of the justification by force defenses.

NJI2d Crim. 7.1 (as are all the justification by force defenses) is drafted in the affirmative as a definition of the concept of self defense even though, whenever self defense is at issue, the last element of the elements instruction will be “that the defendant did not act in self defense.” *State v. Warren*, 9 Neb.App. 60, 608 N.W.2d 617 (2000). This formulation was used simply to aid jury comprehension: drafting for what is *not* self defense produced an instruction with so many negatives as to be incomprehensible.

In every case in which NJI2d Crim. 7.1 is given, the jury already will have been instructed that all elements (including negation of a self defense claim) are to be proved by the state; that admonition consequently is not repeated in NJI2d Crim. 7.1. In cases involving an insanity defense, however, there may at times be a concern that confusion could result unless the jury is reminded of the state’s burden. In an appropriate case, then, the following language might be added as the final paragraph of NJI2d Crim. 7.1:

“The defendant is not required to prove that (he, she) acted in self defense. It is up to the state to prove that (he, she) did not.”

A defense of self defense is available only if there is a reasonable ground for a defendant’s belief that force is necessary; a defendant therefore is not entitled to a self defense instruction unless there is “sufficient evidence” to support the defense. *See, e.g., State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009); *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986); *State v. Canby*, 217 Neb. 461, 348 N.W.2d 900 (1984); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979). Because, moreover, the defense requires a purposeful use of force by a defendant, the defense is unavailable where a defendant’s theory of the case (*e.g., denial that he used force or inflicted injury*) excludes a showing of purposeful use. *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985). The defense is unavailable even if purposeful use is in the case through the victim’s description of the crime. *Id.* To raise the defense of self defense a defendant cannot have been the aggressor in the unlawful use of force. *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The defense of self defense is available only when, among other requirements, the force employed by the defendant is in response to unlawful force employed against her. Unlawful force is defined by statute to mean:

[F]orce, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status; not amounting to a privilege to use the force.

Neb.Rev.Stat. § 28-1406(1) (Reissue 2008).

There are instances in law where the law permits a person to use force that otherwise would constitute unlawful force. These include the use of force by persons having a special responsibility for care or discipline; see Neb.Rev.Stat. § 28-1413 (Reissue 2008); and the use of force to resist an arrest; Neb.Rev.Stat. § 28-904 (Reissue 2008) (where officer does not identify herself). See also Neb.Rev.Stat. *e.g.*, § 28-1408 (Reissue 2008). For these and other such situations NJI2d Crim. 7.1 may not be employed. Instead, an instruction must be provided that is tailored to the particular facts of the case.

The brackets around the language regarding the victim's use or threat of force are intended to direct that, wherever possible, the judge substitute for this general language a particular description of just what force it is that the victim is alleged to have used. If the defendant claims that the victim threatened to hit her, and there is no contested issue regarding whether the victim made the threat, then the instruction might say

"The defendant acted in self defense if the defendant reasonably believed that the force (he, she) used against (here insert victim's name) was immediately necessary to protect the defendant against being struck by (here insert victim's name)."

If, on the other hand, there is a factual dispute regarding whether the victim made the threat, then the instruction might say

"The defendant acted in self defense if:

"(1) (here insert victim's name) threatened to strike the defendant; and

"(2) the defendant reasonably believed that the force (he, she) used against (here insert victim's name) was immediately necessary to protect the defendant against any such threat by (here insert victim's name)."

It is possible that the defendant's use of force may have been justifiable but the victim was someone other than the person who provoked the use of force. *See State v. Duis*, 207 Neb. 851, 855-56, 301 N.W.2d 587, 590 (1981). In this event, the following language may be appropriate:

"If you decide that the defendant acted in self defense in defending (himself, herself) from (here insert name of person using or threatening unlawful force) then you must next decide whether (he, she) should be excused from the injury (he, she) caused to (here insert name of third person injured). This depends on whether the defendant was reckless in injuring (here insert name of third person).

"Reckless means that the defendant disregarded a substan-

tial and unjustifiable risk that (here insert name of the third person) would be injured in circumstances in which disregarding the risk was a gross deviation from what a reasonable, law-abiding person would have done.

“If you decide that the defendant was reckless in (his, her) use of force, then you should find (him, her) guilty of (here insert crime for which injury caused recklessly is sufficient).”

In *Duis, supra*, the Court suggested that a jury should be told that “if the defendant was justified in using force toward (the person who used force or a threat of force), he was justified in the force employed, which mistakenly struck the actual victim.” 207 Neb. at 856, 301 N.W.2d at 590. The statute expressly provides that the jury be instructed that the defendant, although not guilty of a crime requiring intent, could be found guilty of a crime where recklessness (or negligence) is sufficient. Neb.Rev.Stat. § 28-1414(3) (Reissue 2008): “When the actor is justified under sections 28-1408 to 28-1413 [justification by force sections] in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.”

The definition of “reckless” in the above suggested instruction is taken from N.J.I2d Crim. 4.0: “Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” Neb.Rev.Stat. § 28-109(19) (Reissue 2008).

If the jury is to be instructed on whether the defendant was negligent in causing injury to a third person the above suggested instruction should serve as a guide. A judge will have to resolve what definition of negligence is appropriate.

The Nebraska statutory language for the justification defenses does not expressly require that a defendant’s belief that he was acting in defense of self (or another or property) must be a reasonable belief. The Nebraska Supreme Court has interpreted the statute to require a reasonable belief. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979); *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978); *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971), *cert. denied*, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 82 (1971).

In the routine case, where the victim was also the alleged aggressor and where the mental state element of the crime is specific intent,

Neb.Rev.Stat. § 28-1414 (Reissue 2008) will have no effect because self defense already requires that a defendant's belief in the use of force be honest *and* reasonable. That being true, a jury that finds a defendant's belief honest and reasonable necessarily would have to conclude that the defendant was not reckless or negligent in forming that belief. For crimes with a mental state element of recklessness or negligence then, it appears that self defense is not a defense.

AUTHORITIES

Neb.Rev.Stat. §§ 28-1408 to 28-1417 (Reissue 2008 and Cum. Supp. 2014); State v. France, 279 Neb. 49, 776 N.W.2d 510 (2009); State v. Menser, 222 Neb. 36, 382 N.W.2d 18 (1986); State v. Brown, 220 Neb. 849, 374 N.W.2d 28 (1985); State v. Canby, 217 Neb. 461, 348 N.W.2d 900 (1984); State v. Kuntzelman, 215 Neb. 115, 337 N.W.2d 414 (1983); State v. Duis, 207 Neb. 851, 301 N.W.2d 587 (1981); State v. Cowan, 204 Neb. 708, 285 N.W.2d 113 (1979); State v. Eagle Thunder, 201 Neb. 206, 266 N.W.2d 755 (1978); State v. Ralls, 192 Neb. 621, 223 N.W.2d 432 (1974); State v. Wingate, 191 Neb. 388, 215 N.W.2d 90 (1974); State v. Goodseal, 186 Neb. 359, 183 N.W.2d 258 (1971), *cert. denied*, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 82 (1971); Schluter v. State, 153 Neb. 317, 44 N.W.2d 588 (1950); Barr v. State, 45 Neb. 458, 63 N.W. 856 (1895); Housh v. State, 43 Neb. 163, 61 N.W. 571 (1895).

Research References

West's Key Number Digest
Assault and Battery ⇨96(3); Homicide ⇨1471

Legal Encyclopedias
C.J.S., Assault and Battery §§ 124, 126

NJI2d Crim. 7.2

SELF DEFENSE (ISSUE AS TO DEADLY FORCE)

If (the force used by the defendant) was not deadly force, then the defendant acted in self defense if:

(1) (here insert victim's name) ((used, threatened, used or threatened) force against the defendant); and

(2) under the circumstances as they existed at the time, the defendant reasonably believed that (the force used against) (here insert victim's name) was immediately necessary to protect the defendant against (any such force (used, threatened, used or threatened)) by (here insert victim's name).

If (the force used) was deadly force, then the defendant acted in self defense if:

(1) (here insert victim's name) (here insert appropriate language

such as threatened, attempted, caused, threatened or caused) (death, serious bodily harm, kidnapping, sexual intercourse compelled by force or threat of force); and

(2) the defendant did not provoke any such (use of force) against (him, her) with the intent of (using deadly force) in response; and

(3) under the circumstances as they existed at the time, the defendant reasonably believed that (his, her) (use of deadly force) was immediately necessary to protect (him, her) against (death, serious bodily harm, kidnapping, sexual intercourse compelled by force or threat of force) [; and

(4) before (using deadly force) the defendant either tried to get away or did not try because (he, she) reasonably did not believe (he, she) could do so in complete safety].

Deadly force means force used with the intent to cause death or serious bodily harm or force used with the knowledge that its use would create a substantial risk of death or serious bodily harm.

The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what (he, she) believed and (he, she) acted reasonably in response to that belief.

COMMENT

The defense of self defense in NJI2d Crim. 7.2 is to be employed in any case where there is an issue whether the defendant used deadly force. When self defense is at issue, the last element of the elements instruction will be "that the defendant did not act in self defense." State v. Warren, 9 Neb.App. 60, 608 N.W.2d 617 (2000).

Deadly force is defined by statute to be force used by a defendant "with the purpose" of causing death or serious bodily harm or with knowledge of the likelihood of such consequences. Neb.Rev.Stat. § 28-1406(3) (Reissue 2008).

A defendant may use deadly force to protect himself against death, serious bodily injury, kidnapping, or forced sexual intercourse. Neb.Rev.Stat. § 28-1409(4) (Reissue 2008). NJI2d Crim. 7.2 simply employs a parenthetical in paragraphs (1), (2), and (3) of that part of 7.2 in which are set forth the elements of the defense if deadly force was employed. If there is any doubt or ambiguity concerning use of any of these terms, then the judge may simply describe what the victim is alleged to have done. For example, numbered paragraph (1) might say:

"(1) Victim A threatened to forcibly make the defendant a prisoner; or"

If there is a fact question regarding the defendant's use of deadly force then the deadly force part of the instruction may not be given unless the judge decides that the defendant's rendition of the facts suggests that Neb.Rev.Stat. § 28-1409(4) (Reissue 2008) is met. If not met, then NJI2d Crim. 7.2 needs to be adjusted to reflect the fact that if the force used by the defendant was not deadly force, then she may have a self defense defense, but if she used deadly force, then she has no such defense. Appropriate language here might be:

"The defendant acted in self defense if:

"(1) (here insert victim's name) ((used, threatened, or used or threatened) force against the defendant); and

"(2) under the circumstances as they existed at the time, the defendant reasonably believed that the force used against (here insert victim's name) was immediately necessary to protect the defendant against (any such force (used, threatened)) by (here insert victim's name); and

"(3) the defendant did not use deadly force.

"Deadly force means force used with the intent to cause death or serious bodily harm or force used with the knowledge that its use creates a substantial risk of death or serious bodily harm.

"The fact that the defendant may have been wrong in estimating the danger does not matter so long as (1) the defendant did not use deadly force; and (2) there was a reasonable basis for what (he, she) believed; and (3) (he, she) acted reasonably in response to that belief."

The parentheses around "use of force" and "use of deadly force" throughout NJI2d Crim. 7.2 are intended to suggest that an actual description of the defendant's acts (plus language adjustment where necessary) may be preferred to the general phrase. *See* Comment to NJI2d Crim. 7.3 for an example of specific phrasing in a situation in which deadly force clearly was used.

The bracketed language of paragraph (4) of NJI2d Crim. 7.2 governing the duty to retreat before using deadly force should be given only when the defendant was not at home or work as there is no duty to retreat from home or work (unless the fight was with another employee). Neb.Rev.Stat. § 28-1409(4) (Reissue 2008); *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986). The privilege of nonretreat is applicable in situations involving altercations between cohabitants. *State v. White*, 20 Neb. App. 116, 819 N.W.2d 473 (2012), affirmed 285 Neb. 951, 830 N.W.2d 215 (2013).

AUTHORITIES

Neb.Rev.Stat. § 28-1409(4) (Reissue 2008); *State v. White*, 20

Neb.App. 116, 819 N.W.2d 473 (2012), affirmed 285 Neb. 951, 830 N.W.2d 215 (2013); State v. Menser, 222 Neb. 36, 382 N.W.2d 18 (1986).

Research References

West's Key Number Digest

Assault and Battery ⇨96(3); Homicide ⇨1471

Legal Encyclopedias

C.J.S., Assault and Battery §§ 124, 126

NJI2d Crim. 7.3

SELF DEFENSE (DEADLY FORCE)

The defendant acted in self defense if:

(1) (here insert victim's name) (here insert appropriate language such as threatened, attempted, caused, threatened or caused) (death, serious bodily harm, kidnapping, sexual intercourse compelled by force or threat of force); and

(2) the defendant did not provoke any such (use of force) against (him, her) with the intent of (using deadly force) in response; and

(3) under the circumstances as they existed at the time, the defendant reasonably believed that (his, her) (use of deadly force) was immediately necessary to protect (him, her) against (death, serious bodily harm, kidnapping, sexual intercourse compelled by force or threat of force)[; and

(4) before (using deadly force) the defendant either tried to get away or did not try because (he, she) reasonably did not believe (he, she) could do so in complete safety].

The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what (he, she) believed and (he, she) acted reasonably in response to that belief.

COMMENT

Use of deadly force is justifiable only if the defendant had no duty to retreat or knew he could not retreat in complete safety. Neb.Rev.Stat. § 28-1409(4) (Reissue 2008); State v. Moniz, 224 Neb. 198, 397 N.W.2d 37 (1986); State v. Kuntzelman, 215 Neb. 115, 337 N.W.2d 414 (1983). When self-defense is at issue, the last element of the elements instruction will be "that the defendant did not act in self-defense." State v. Warren, 9 Neb.App. 60, 608 N.W.2d 617 (2000).

The parentheses around "deadly force" throughout NJI2d Crim. 7.3

are intended to suggest that an actual description of the defendant's acts (plus language adjustments where necessary) may be preferred to the general phrase. If, for example, the defendant killed her victim, it would be clearer and simpler to say that throughout.

AUTHORITIES

State v. Moniz, 224 Neb. 198, 397 N.W.2d 37 (1986); State v. Kuntzelman, 215 Neb. 115, 337 N.W.2d 414 (1983).

Research References

West's Key Number Digest
Assault and Battery ⇨96(3); Homicide ⇨1471

Legal Encyclopedias
C.J.S., Assault and Battery §§ 124, 126

NJI2d Crim. 7.4

DEFENSE OF ANOTHER

The defendant acted in defense of another person if:

(1) the defendant reasonably believed that (here insert victim's name) ((used, threatened, used or threatened) force) against (here insert name of person the defendant claims to have protected); and

(2) under the circumstances as they existed at the time, the defendant reasonably believed that (the force the defendant used against) (here insert victim's name) was immediately necessary to protect (here insert name of person the defendant claims to have protected) against (any such force (used, threatened, used or threatened)) by (here insert victim's name).

The fact that the defendant may have been wrong in estimating the danger to (here insert name of person the defendant claims to have protected) does not matter so long as there was a reasonable basis for what the defendant believed and (he, she) acted reasonably in response to that belief.

COMMENT

Refer to Comments to NJI2d Crim. 7.1 [SELF DEFENSE (No Deadly Force)], 7.2 (1992)[SELF DEFENSE (Issue as to Deadly Force)], and 7.3 [SELF DEFENSE (Deadly Force)]. As with the other justification by force instructions, NJI2d Crim. 7.4 does not instruct the jury that the force defended against must be unlawful force. See the Comment to NJI2d Crim. 7.1. In claims of defense of another, a question as to the unlawfulness of the force used on the third person (and the

reasonableness of the defendant's belief that the force was unlawful) may be a more frequent question than in self-defense cases. When defense of another is at issue, the last element of the elements instruction will be "that the defendant did not act in defense of another." Cf., *State v. Warren*, 9 Neb.App. 60, 608 N.W.2d 617 (2000).

The language of NJI2d Crim. 7.4 accommodates the defense of another when there is no allegation that a defendant used deadly force. If the use of deadly force is alleged, then the instruction should track NJI2d Crim. 7.2 or 7.3 consistent with the language adjustments reflected in NJI2d Crim. 7.4.

AUTHORITIES

Refer to authorities listed for NJI2d Crim. 7.1 to 7.3.

Research References

West's Key Number Digest

Assault and Battery ⇨92(2); Homicide ⇨1489

Legal Encyclopedias

C.J.S., Assault and Battery § 122

NJI2d Crim. 7.5

DEFENSE OF PROPERTY

The defendant acted in defense of (his, her) property if: [(1) the defendant reasonably believed that (he, she) possessed the land; and]

[2] (he, she) reasonably believed that (the force used) against (here insert victim's name) was immediately necessary (to prevent (here insert appropriate pronoun of victim) from entering upon the land); and

[3] the defendant first asked (here insert victim's name) to stop or did not ask because of a reasonable belief that asking first would be useless, dangerous, or result in substantial property damage; and

[4] the defendant did not know that (using force) exposed (here insert victim's name) to a substantial danger of serious bodily harm.

The fact that a defendant may have been wrong in thinking that (he, she) (possessed the land) or wrong in estimating the danger does not matter so long as there was a reasonable basis for what (he, she) believed and (he, she) acted reasonably in response to those beliefs.

COMMENT

In most cases, questions of the lawfulness of a victim's allegedly

provoking actions normally is for judicial determination prior to submission. Taking the facts as presented by the defendant, the question is whether the victim's actions constitute, for example, unlawful entry. When defense of property is at issue, the last element of the elements instruction will be "that the defendant did not act in defense of his property." *Cf.*, *State v. Warren*, 9 Neb.App. 60, 608 N.W.2d 617 (2000).

Unlike the other justification by force defenses, NJI2d Crim. 7.5 requires that the defendant have a reasonable belief in his possession; Neb. Rev. Stat. § 28-1411(1)(a) (Reissue 2008); or his entitlement to possession; Neb.Rev.Stat. § 28-1411(1)(b) (Reissue 2008). Thus, "reasonable belief" questions are for the jury.

The bracketed language in NJI2d Crim. 7.5 highlights the fact that Neb. Rev. Stat. § 28-1411 (Reissue 2008) contains many different statutory situations where defense of property may be justified. The body of the instruction contains language for § 28-1411(1)(a) in what the Committee believes may be the most common instance of defense of property, a situation where a possessor of real property defends that property against a trespasser. Factor (2) (tailored to be fact specific in the final parentheses regarding what the defendant thought he was protecting against) and factors (3) and (4) always are applicable to a defense of property defense under § 28-1411(1)(a) and therefore always must be included in the body of any instruction given under § 28-1411(1)(a).

If the defense of property justification relied on is not the one described in the body of NJI2d Crim. 7.5, then appropriate language needs to be substituted. The following two suggested instructions cover other possible situations.

The first situation is one in which the defendant alleges that he was dispossessed of movable property under Neb.Rev.Stat. § 28-1411(1)(b) (Reissue 2008). In this situation the statute requires a reasonable belief in an entitlement to possession as compared to the requirement in (1)(a) that the defendant (or one for whom she acts) actually be in possession. Appropriate language might be:

"The defendant acted in defense of (his, her) property if:

"(1) the defendant reasonably believed that (he, she) was entitled to the (here insert movable property taken); and

"(2) (he, she) reasonably believed that (here insert victim's name) unlawfully obtained the (here insert movable property taken); and

"(3) the defendant first asked (here insert victim's name) to return the (here insert movable property taken) or did not ask because of a reasonable belief that asking first would be useless, dangerous, or result in substantial damage to the (here insert movable property taken); and

“(4) the defendant did not know that (using force) exposed (here insert victim’s name) to a substantial danger of serious bodily harm; and

“(5) either the defendant reasonably believed that (here insert victim’s name) had no right to the (here insert movable property taken) or the defendant (used the force, here insert particulars of what the defendant did) at the time the (here insert movable property taken) was taken or after a chase of (here insert victim’s name) that immediately followed the taking of the (here insert movable property taken).”

The second situation is one in which the defendant defends his land against a retaking by a victim who was dispossessed of the land. This situation, like the one in the basic instruction of NJI2d Crim. 7.5, occurs under § 28-1411(1)(a). The following language is suggested as a guide:

“(A) The defendant acted in defense of (his, her) property if:

“(1) the defendant reasonably believed that (he, she) possessed the land; and

“(2) (he, she) reasonably believed that (the force used) against (here insert victim’s name) was immediately necessary to prevent (here insert appropriate pronoun of victim) from entering upon the land; and

“(3) the defendant first asked (here insert victim’s name) to stop or did not ask because of a reasonable belief that asking first would be useless, dangerous, or result in substantial property damage; and

“(4) the defendant did not know that (using force) exposed (here insert victim’s name) to a substantial danger of serious bodily harm; and

“(5) the (here insert victim’s name) was not entitled to enter the land to gain possession.

“(B) (Here insert victim’s name) was be entitled to enter the land to gain possession if:

“(1) (he, she) previously was dispossessed of the land; and

“(2) (here insert victim’s name) reasonably believed that (he, she) was dispossessed of the land unlawfully; and

“(3) (here insert victim’s name) reasonably believed that the defendant had no right to be on the land; and

“(4) (here insert victim’s name) reacted to a situation that

was so urgent that waiting for a court order would have been an exceptional hardship.”

AUTHORITIES

Neb.Rev.Stat. §§ 28-1411 and 28-1415 (Reissue 2008).

Research References

West's Key Number Digest

Assault and Battery ⇨96(4); Homicide ⇨1490

Legal Encyclopedias

C.J.S., Assault and Battery §§ 124, 126

NJI2d Crim. 7.6

CHOICE OF LESSER HARM

The defendant acted to avoid a greater harm if:

(1) the harm (he, she) sought to avoid was greater than the harm sought to be prevented by the law defining (here insert crime); and

(2) the defendant reasonably believed that (his, her) conduct was necessary to avoid a specific and immediate threat of harm; and

(3) the defendant reasonably believed that acting as (he, she) did was the least harmful alternative to avoid this threatened harm.

The fact that the defendant may have been wrong in what (he, she) believed does not matter so long as there was a reasonable basis for what (he, she) believed and (he, she) acted reasonably in response to (his, her) beliefs.

COMMENT

The Nebraska choice of lesser harm defense is described by statute. Neb. Rev. Stat. § 28-1407 (Reissue 2008).

Although the Nebraska statute is silent as to the need for an imminent threat in order to raise the defense, the Nebraska Supreme Court has held that the defense is available only if it is first shown that the defendant's conduct was “necessitated by *specific and imminent threat* of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law.” *State v. Graham*, 201 Neb. 659, 662, 271 N.W.2d 456, 458 (1978) (emphasis added). General fears of future harm do not suffice because there remains adequate time to resort to a reasonable and viable alternative. *Id.*

With regard to the comparison of harms, NJI2d Crim. 7.6 (1992) employs a standard unrelated to the defendant's belief, reasonable or otherwise. The statutory language itself eliminates a belief requirement in the comparison of the harms. While the statute requires that the actor believe that his conduct was necessary, the comparison of harms is stated as an absolute that is unrelated to what the defendant reasonably believed.

In Nebraska the question of relative valuation of the harms typically will be a jury question rather than a judicial determination of the relative valuation based on the potential punishments prescribed for the two offenses. *State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978). As with all the other defenses in NJI2d Crim. (1992), the question whether a defendant produces sufficient evidence to put the defense at issue is a preliminary matter to be decided by the judge. *See State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978). When the choice of lesser harms defense is at issue, the last element of the elements instruction will be "that the defendant did not act to avoid a lesser harm." *Cf.*, *State v. Warren*, 9 Neb.App. 60, 608 N.W.2d 617 (2000).

Exceptions specific to other provisions in the justification provisions apply equally to the choice of lesser harm defense. *State v. Ralls*, 192 Neb. 621, 223 N.W.2d 432 (1974). That being true, NJI2d Crim. 7.6 may require adjustment to reflect circumstances not provided for in the basic instruction.

In the prisoner escape context, the Nebraska Supreme Court has neither recognized nor rejected the choice of lesser harm (or duress) defense. *State v. Reed*, 205 Neb. 45, 50, 286 N.W.2d 111, 114 (1979). For a defense to a prison escape, however, the requirement of least drastic alternative specifically means that:

- (1) there must be no time to make a complaint or a history of futile complaints;

- (2) there must be no time or opportunity to resort to the courts; and

- (3) there must be an immediate surrender to the proper authorities once a position of safety is reached.

Id. (citing *People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974)).

In addition to the above specifics, the Court also has made clear that there must be no force or violence inflicted on the innocent in making the escape. *Id.*

AUTHORITIES

Neb.Rev.Stat. § 28-1407 (Reissue 2008); *State v. Reed*, 205 Neb. 45,

286 N.W.2d 111 (1979); *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978); *State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978); *State v. Ralls*, 192 Neb. 621, 223 N.W.2d 432 (1974).

Research References

West's Key Number Digest
Criminal Law ⇨38, 772(6)

Legal Encyclopedias
C.J.S., Criminal Law §§ 49, 1312, 1315 to 1319

NJI2d Crim. 7.7**ENTRAPMENT**

The state must prove beyond a reasonable doubt that the defendant was not entrapped into committing the (here insert crime). Entrapment means that:

- (1) the idea for committing (here insert crime) came from (a law enforcement officer) [(and, or) (someone acting at the direction of a law enforcement officer)]; and
- (2) a (law enforcement officer) [(and, or) (someone acting at the direction of a law enforcement officer)] then talked or persuaded the defendant into committing (here insert crime). Simply giving the defendant the opportunity to commit (here insert crime) is not the same as persuading (him, her) to commit it; and
- (3) the defendant was not already willing to commit (here insert crime) before (a law enforcement officer) [(and, or) (someone acting at the direction of law enforcement officer)] talked to (him, her).

COMMENT

NJI2d Crim. 7.7 derives from the entrapment instruction recommended by the Federal Judicial Center. Pattern Crim. J.I. 54 (1988).

As the Nebraska Supreme Court describes it, entrapment occurs when there is police inducement *and* the defendant was not already willing to commit the crime. *State v. Byrd*, 231 Neb. 231, 435 N.W.2d 898 (1989); *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). For a successful defense of entrapment, the criminal design must originate with the police implanting in the mind of an innocent person the disposition to commit a crime. *State v. Swenson*, 217 Neb. 820, 822-23, 352 N.W.2d 149, 152 (1984). *See, e.g., State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. Gurule*, 194 Neb. 618, 234 N.W.2d 603 (1975).

The Nebraska law on entrapment follows the federal lead. *State v.*

Parks, 212 Neb. 635, 324 N.W.2d 673 (1982); State v. Ransburg, 181 Neb. 352, 148 N.W.2d 324 (1967). Thus, the critical issue is the predisposition of the defendant to commit the crime and not the activity of the police in encouraging its commission. Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). With the focus on predisposition the activity of the police is relevant only insofar as it assists in a factual determination of predisposition or, in the case of a defendant who is not predisposed, as a demonstration that the police did nothing that would constitute an inducement. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); State v. Gurule, 194 Neb. 618, 234 N.W.2d 603 (1975).

In Nebraska, it is only "improper" police inducement that constitutes entrapment if a defendant is predisposed to commit the crime. State v. Gurule, 194 Neb. 618, 234 N.W.2d 603 (1975). Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. State v. Kass, 281 Neb. 892, 799 N.W.2d 680 (2011). The fact that an undercover agent lies, at least "in some particulars," does not constitute improper inducement. State v. Gurule, 194 Neb. at 621, 234 N.W.2d at 606. On the other hand, if a defendant is not predisposed, then any inducement is too much. Having said that, however, it still is necessary to evaluate what constitutes an inducement. An offer to purchase a drug from a defendant who then prosecuted for the sale of that drug, for example, by itself is not an inducement sufficient to permit submission of the entrapment defense to the jury. State v. Swenson, 217 Neb. 820, 825, 352 N.W.2d 149, 153 (1984). Nor is an "inquiry alone" a "lure into criminal activity" sufficient to require submission. *Id.*

Entrapment is an affirmative defense. *Id.* The defendant therefore must raise the defense and provide "more than a scintilla" of evidence for the defense to be submitted to the jury. State v. Parks, 212 Neb. 635, 324 N.W.2d 673 (1982). Once the defendant carries his burden of moving forward, the burden is on the state to prove beyond a reasonable doubt the absence of entrapment. State v. Parks, 212 Neb. 635, 324 N.W.2d 673 (1982); State v. Smith, 187 Neb. 511, 192 N.W.2d 158 (1971). Proving the absence of entrapment however, does not mean that the state must separately prove that the defendant was predisposed. State v. Bocian, 226 Neb. 613, 413 N.W.2d 893 (1987).

Although predisposition is the critical element in entrapment, N.J.I2d Crim. 7.7 does not use the word "predisposition." Instead, "already willing" is the term employed because it is more comprehensible to a jury. There is no change in meaning. United States v. Russell, 411 U.S. 423, 427 n.4, 93 S.Ct. 1637, 1640, 36 L.Ed.2d 366, 370 (1973) (jury instruction on predisposition read "[w]here a person has the *willingness and the readiness* . . .") (emphasis added); State v. Cain, 223 Neb. 796,

800, 393 N.W.2d 727, 731 (1986) (predisposition defined as "otherwise ready and willing").

AUTHORITIES

Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), *on remand*, 848 F.2d 196 (7th Cir.1988); Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932); State v. Kass, 281 Neb. 892, 799 N.W.2d 680 (2011); State v. Byrd, 231 Neb. 231, 435 N.W.2d 898 (1989); State v. Jones, 231 Neb. 47, 435 N.W.2d 167 (1989); State v. Bocian, 226 Neb. 613, 413 N.W.2d 893 (1987); State v. Cain, 223 Neb. 796, 393 N.W.2d 727 (1986); State v. Pearson, 220 Neb. 183, 368 N.W.2d 804 (1985); State v. Swenson, 217 Neb. 820, 352 N.W.2d 149 (1984); State v. Parks, 212 Neb. 635, 324 N.W.2d 673 (1982); State v. Beckner, 211 Neb. 442, 318 N.W.2d 889 (1982); State v. Lampone, 205 Neb. 325, 287 N.W.2d 442 (1980); State v. Gurule, 194 Neb. 618, 234 N.W.2d 603 (1975); State v. Amen, 190 Neb. 362, 208 N.W.2d 279 (1973); State v. Young, 190 Neb. 325, 208 N.W.2d 267 (1973); State v. Smith, 187 Neb. 511, 192 N.W.2d 158 (1971); State v. Riley, 182 Neb. 300, 154 N.W.2d 741 (1967); State v. Ransburg, 181 Neb. 352, 148 N.W.2d 324 (1967).

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C.J.S., Criminal Law §§ 55, 57 to 63, 92, 1312, 1315 to 1319

NJI2d Crim. 7.8

ENTRAPMENT BY ESTOPPEL

The state must prove beyond a reasonable doubt that the defendant was not entrapped by estoppel into committing the (*here insert crime*). Entrapment by estoppel means that:

(1) the defendant acted in good faith before taking any action; and

(2) an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that (*here describe the conduct of defendant that is criminal*) was legal; and

(3) the defendant actually relied on the statements of the government official; and

(4) the defendant's reliance was reasonable.**COMMENT**

The entrapment by estoppel defense is rooted in the Due Process Clause of the Fifth Amendment. *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). The rationale for the defense is that a government should not be able to convict a citizen for engaging in conduct which a government official told the citizen he or she had the right to do. *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). The Nebraska Supreme Court recognized the entrapment by estoppel defense in *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). The language of elements (1)-(4) of N.JI2d Crim. 7.8 is drawn virtually verbatim from *Edwards*, 286 Neb. at 414, 837 N.W.2d at 89. An appellate court reviews the denial of the defense of entrapment by estoppel de novo because the defense raises a question of law. *State v. Planck*, 289 Neb. 510, 515, 856 N.W.2d 112, 116 (2014).

AUTHORITIES

Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013); *State v. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014).

CHAPTER 8

DEFENSES NOT AFFIRMATIVE DEFENSES

TABLE OF INSTRUCTIONS

Instruction Number	Subject Matter
8.0	Intoxication
8.1	Alibi

COMMENT

Some defenses that are not affirmative defenses simply provide further amplification of an element of the crime charged. As a result, in the elements instruction the jury already will have been instructed on the element amplified by a Chapter 8 defense. By contrast to affirmative defenses, *disproof of a Chapter 8 defense never should be listed as the final element of an elements instruction.*

NJI2d Crim. 8.0

INTOXICATION

(*See Comment below regarding enactment of Neb.Rev.Stat. § 29-122 (Cum. Supp. 2014) which statutorily abolished the common law defense for voluntary intoxication.)

There has been evidence that the defendant was intoxicated at the time that the (here insert crime) with which (he, she) is charged was committed.

Intoxication is a defense only when a person's mental abilities were so far overcome by the use of (alcohol, drugs) that (he, she) could not have had the required intent. You may consider evidence of (alcohol, drug) use along with all the other evidence in deciding whether the defendant had the required intent.

COMMENT

NJI2d Crim. 8.0 derives from NJI 14.31 (1969); Model Penal Code § 2.08 (Offic. Dr. and Rev. Comments 1985); and Eighth Cir. J.I. 4.06 (1984).

In Nebraska, as in most other states and at the common law, a vol-

untary intoxication defense is available only where a crime requires a state of mind of specific intent, purpose, deliberation, premeditation, or willfulness. When the defense is available, however, then, even over defense objection a trial judge must instruct on intoxication if there is substantial evidence supporting intoxication and intoxication is relevant to an element of the crime charged or an included crime. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

Most of the crimes in Nebraska for which an intoxication defense might be interposed are those requiring a specific intent state of mind. Thus the body of NJI2d Crim. 8.0 is drafted to conform to the most normal situation. Appropriate language should be substituted if the state of mind element of the crime charged is not specific intent but, instead, deliberation, premeditation, purpose, or willfulness. Because the state must prove the state of mind element beyond a reasonable doubt, the state must prove that the intoxication did not preclude the defendant from formulating the required state of mind.

NJI2d Crim. 8.0 is drafted for a prosecution in which only one crime is charged or in which the intoxication defense is pertinent to all crimes charged. It is possible that in a particular case where multiple crimes are charged, the intoxication defense will be available for some but not all of the crimes charged. In that event, NJI 2d Crim. 8.0 must be modified to specify those crimes for which the defense is pertinent.

The Supreme Court of the United States several times has considered the due process implications of a state's burden to prove all material elements of a crime beyond a reasonable doubt. *See, e.g., Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), *on remand*, 184 Mont. 391, 603 P.2d 244 (1979); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), *cert. denied*, 431 F.2d 85 (5th Cir.1970). These cases mandate that when an element such as state of mind is a material element of a crime, then a state may not shift to the defendant the burden to disprove it.

* NJI 2d Crim. 8.0 provides a common law defense for voluntary intoxication. The Nebraska Legislature has statutorily abolished such defense, substituting in its place a more limited defense for involuntary intoxication. Neb.Rev.Stat. § 29-122 (Cum. Supp. 2014) provides:

A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and

convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

While a plurality decision of the United States Supreme Court has upheld a Montana statute similar to § 29-122, *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), the Nebraska Supreme Court elected to avoid addressing the constitutionality of § 29-122 in the defendant's ineffective assistance of counsel claim on direct appeal in *State v. Dubray*, 289 Neb. 208, 238, 854 N.W.2d 584, 611 (2014). The *Dubray* court noted the defendant's argument that *Egelhoff* was questionable authority because without Justice Ginsburg's concurring opinion—premised on a presumed interpretation of the Montana Legislature's legislative intent—the *Egelhoff* Court would have split equally between the plurality and a dissenting opinion that would find the statute unconstitutional. *Id.* The *Dubray* court further noted the defendant's reliance on *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 993, 51 L.Ed.2d 260, 266 (1977) (internal citations omitted) in which the United States Supreme Court observed: “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’” See *Dubray*, 289 Neb. at 238, 584 N.W.2d at 611. The defendant in *Dubray* argues that § 29-122 is unconstitutional under the reasoning of Justice Ginsburg's concurring opinion because it limits the admissibility of relevant evidence instead of redefining the elements of the crime. *Id.* The *Dubray* court declined to address the constitutionality of the statute because it was unnecessary to decide the appeal. *Id.* at 239, 584 N.W.2d at 611.

In addition, the *Dubray* court determined that counsel was not ineffective for failing to request the intoxication instruction finding the evidence did not show defendant was “rendered wholly deprived of reason” due to intoxication even under Nebraska common law. *Id.* at 239-240, 584 N.W.2d at 611-12.

Until the Nebraska Supreme Court definitively determines the constitutionality of § 29-122, the Committee has elected to retain the current voluntary intoxication defense articulated in NCJI 2d 8.0.

AUTHORITIES

Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), *on remand*, 184 Mont. 391, 603 P.2d 244 (1979); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d

508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014); *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989). *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986); *State v. Grotzky*, 222 Neb. 39, 382 N.W.2d 20 (1986); *State v. Coleman*, 196 Neb. 721, 246 N.W.2d 61 (1976); *State v. Barnes*, 185 Neb. 384, 176 N.W.2d 18 (1970); *State v. Brown*, 174 Neb. 393, 118 N.W.2d 332 (1962); *TVRZ v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951); *Maynard v. State*, 81 Neb. 301, 116 N.W. 53 (1908); *Davis v. State*, 54 Neb. 177, 74 N.W. 599 (1898); *Ford v. State*, 46 Neb. 390, 64 N.W. 1082 (1895); *Head v. State*, 43 Neb. 30, 61 N.W. 494 (1894).

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C.J.S., Criminal Law § 1322

NJI2d Crim. 8.1

ALIBI

An issue in this case is whether the defendant was present (at the time and place of the crime, here insert particulars of crime). The state must prove that (he, she) was.

COMMENT

An alibi defense can only be pertinent when the state's theory of defendant culpability rests on physical presence. *If the state proceeds against the defendant on a theory of accomplice liability or conspirator liability, or on any other theory where guilt does not rest on physical presence, NJI2d Crim. 8.1 should not be given.* To establish an alibi defense, a defendant must show (1) he was at a place other than where the crime was committed, and (2) he was at such other place for such a length of time that it was impossible for him to have been at the place where and when the crime was committed. *State v. Moreno*, 228 Neb. 210, 422 N.W.2d 56 (1988).

An alibi instruction is *NOT* appropriate merely because some but not all defendants *claim* an alibi defense. It applies only where the defense is available because the theory of culpability requires physical presence.

There are two general situations in which NJI2d Crim. 8.1 may be given but where its language will need adjusting.

The first situation is where there are multiple defendants and, due

to the circumstances of the crime and to theories of culpability, some but not all of them may maintain an alibi defense. *See, e.g.*, Neb.Rev.Stat. § 28-206 (Reissue 2008) (Prosecuting for aiding and abetting). Appropriate language might be:

“As you know, there are (here insert number) defendants on trial who are charged with (here insert crime). If you decide beyond a reasonable doubt that defendant (here insert name) aided in committing the (here insert crime), then you may convict (him, her) even though (he, she) was not present at the time and place of the (here insert crime).

“What I want to talk to you about now is defendant, (here insert name). To convict defendant, (here insert name), of this crime, you must decide that (he, she) was present (at the time and place of the crime, here insert particulars of crime). It is up to the state to prove that (he, she) was.”

Another problem can arise in a single-defendant trial where the defendant is charged with two or more crimes if among the crimes is one where the theory of culpability does not require physical presence. In this situation, appropriate language might be:

“As you know, the defendant has been charged with several crimes. If you decide beyond a reasonable doubt that the defendant aided another person to commit the (crime(s) of (here insert crime(s))) then the defendant, (here insert name), may be convicted even though (he, she) was not present at the time and place of these (crimes).

“What I want to talk to you about now is the charge that defendant, (here insert name), committed (here insert crime). To convict defendant (here insert name) of this (crime), you must decide that (he, she) was present (at the time and place of the crime, here insert particulars of crime). It is up to the state to prove that (he, she) was.”

The alternatives in parentheses at the end of NJI2d Crim. 8.1 suggest that a brief statement as to the particulars of time and place of the crime might be preferable to a general reference to the crime. Such particulars no doubt *are* preferable if there is any possibility of confusion as to what constitutes physical presence at the crime.

AUTHORITIES

State v. Moreno, 228 Neb. 210, 422 N.W.2d 56 (1988); State v. El-Tabech, 225 Neb. 395, 405 N.W.2d 585 (1987); State v. Sutton, 220 Neb. 128, 368 N.W.2d 492 (1985); Mays v. State, 72 Neb. 723, 101 N.W. 979 (1904); Peyton v. State, 54 Neb. 188, 74 N.W. 597 (1898).

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C.J.S., Criminal Law § 1320

CHAPTER 9

GENERAL CLOSING INSTRUCTIONS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
|-----|---|
| 9.0 | Submission to the Jury |
| 9.1 | Function of Judge, Jury, and Counsel |
| 9.2 | Nature of Case; Presumption of Innocence; Charge Not Evidence |
| 9.3 | Evidence |
| 9.4 | Defendant's Failure to Testify |
| 9.5 | Jury Not to Consider Disposition |

COMMENT

Except for the instructions in Chapter 1 and the instructions in Appendix A, all the instructions in NJI2d Crim. are drafted as closing instructions. The Chapter 9 instructions best might be described as "boilerplate" closing instructions. All but one of them always will be given at closing.

The remaining instruction (NJI2d Crim. 9.4, DEFENDANT'S FAILURE TO TESTIFY) must be given whenever the defendant did not testify and defense counsel requests an instruction. While not a perfect "fit" anywhere, NJI2d Crim. 9.4 might have been placed either in Chapter 9 or in Chapter 5, EVIDENCE AND CREDIBILITY. It was placed in Chapter 9 on the assumption that a reader most likely would expect to find it here.

NJI2d Crim. 9.0

SUBMISSION TO THE JURY

This case is now ready to be submitted to you for your consideration. Any verdict you reach must be unanimous.

You must reach your verdict based only on the evidence presented to you during this trial, within the four walls of this courtroom, and that general knowledge that everyone has.

While you are in the jury room, you may not use any electronic devices at all.

No matter where you are—in the jury room, at home, or anywhere else—and until after you are discharged from this trial and I tell you that it is alright to do so, do not talk to anyone about this case except your fellow jurors. Do not use any reference materials [that are not in evidence] or any electronic devices to obtain information about this case. [Do not visit any of the places mentioned in this case.]

When you get to the jury room, the first thing you must do is to select one of you to be the presiding juror, the person who will preside over your deliberations. It is the job of the presiding juror to see that a verdict is fairly reached and that each juror has a chance to speak fully and freely on the issues in this case.

[As I said to you at the beginning of the trial,] (it, It) is your duty to determine what the facts are. You must approach this task with open minds—consulting with one another, freely and honestly exchanging your views concerning this case, and respectfully considering the views of the other jurors. Do not hesitate to reexamine your own views and to change your mind if you are persuaded that you should. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors or for the mere purpose of returning a verdict.

Alternative A—Use if the Jury May Separate Only at Specified Times.

If you do not agree on a verdict by ____ o'clock (this afternoon, this evening, __.m.), you may separate and return for further deliberation at (____ o'clock tomorrow morning, __.m. tomorrow, etc.).

If you do separate, then, during the time that you separate, you are not allowed to discuss this case with anyone, even another juror.

Alternative B—Use if the Jury May Separate at its Convenience.

You may separate for noon and evening meals whenever you choose and, if you do not reach a verdict today, you may separate at any time you choose and return for further deliberation at (____ o'clock tomorrow morning, __.m. tomorrow, etc.).

Alternative C—Use if the Jury Is Sequestered.

[(As I told you, I have decided that) (you, You) will stay together until you decide on a verdict. That means that you will be kept together at meal times and may not go home at night.]

You may discuss this case only when you are in the jury room. Otherwise, you may not discuss it with anyone, even another juror.

If the Jury May Stop Only at Specified Times for Meals and the Night Then the Following Paragraph Completes Alternative C.

If you do not reach a verdict by ____ o'clock (this afternoon, this evening, ____m.), you will stop for (lunch, dinner, the night). You will return for further deliberation at (____ o'clock tomorrow morning, ____m. tomorrow, etc.).

If the Jury May Stop at its Convenience for Meals and the Night Then the Following Paragraph Completes Alternative C.

You may stop for noon and evening meals whenever you choose. Just let the (here designate appropriate person) know when you are ready. If you do not reach a verdict today, you may stop at any time you choose. Again, just let the (here designate appropriate person) know when you are ready. You will return for further deliberation at (____ o'clock tomorrow morning, ____m. tomorrow, etc.).

Body of Instruction—Use With Alternatives A, B, or C.

(_____ verdict forms have been prepared for you, and you will have them in the jury room. You are to complete only one of them, but you are to return them all.)

[In the jury room, you will have these instructions and the exhibits in this case and forms on which you are to record your verdict (and here identify anything else the jury will take with them to the jury room).]

[If you have any questions, please write them out and give them to (here designate appropriate person), who will give them to me. I may need to assemble the attorneys and confer with them before I respond.]

[While you are in the jury room, do not attempt to contact anyone outside of the jury room on your own. Do not call anyone, text anyone, or use Facebook, Twitter, My Space, or any other social network to communicate with anyone. If you need to give a message to anyone outside of the jury room—for example, to tell a family member that you will be home late—let (here designate appropriate person) know (in writing).]

This case is submitted to you at _____ o'clock ____m., at which time your deliberations are deemed to commence.

Dated _____, 20__.

BY THE COURT:

Judge

COMMENT

NJI2d Crim. 9.0 corresponds to NJI2d Civ. 5.01. Any differences are those necessary to focus the jury's attention on the need for unanimity in a verdict in a criminal trial or otherwise to accommodate the fact that NJI2d Crim. 9.0 is to be used in criminal, not civil, trials.

The final bracketed paragraph of NJI2d Crim. 9.0 covers individual personal requests by jurors. It provides a judge an option whether to require that all such requests be made to the bailiff in writing. It leaves open how the request will be handled (for example, whether the juror may himself directly make a telephone call or whether instead have the bailiff make the call and orally or in writing tell the bailiff what to say).

The two bracketed paragraphs immediately preceding this final bracketed paragraph deal with what the jury may take into the jury room and jury questions. The paragraph in parentheses immediately preceding these paragraphs deals with verdict forms. Some instruction on verdict forms must be given. The verdict-form paragraph is in parentheses merely to highlight that its language may need adjusting to accommodate multi-defendant trials or multi-count informations.

Alternative A of NJI2d Crim. 9.0 should be employed when the jury is permitted to separate after submission but only at times designated by the judge.

Alternative B should be employed when the jury may separate at its convenience.

Alternative C covers the situation in which the jury is sequestered. The bracketed first paragraph normally will be given. The only exception is where the jury already had been sequestered during the trial.

AUTHORITIES

NJI2d Civ. 5.01; U.S. Const. amend. 6; *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), *on remand*, 371 So.2d 1165 (La.1979); *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978); *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), *rehearing denied*, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Neb. Const., art. I, § 6; Neb.Rev.Stat. § 25-2705(2) (Cum. Supp. 2014); Neb.Rev.Stat. § 29-2022 (Reissue 2008); *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986); *State v. Mangelsen*, 207 Neb. 213, 297 N.W.2d 765 (1980); *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980), *appeal after remand*, 207 Neb. 439, 299 N.W.2d 437 (1980); *State v. Young*, 194 Neb. 544, 234 N.W.2d 196 (1975); *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *State v.*

Garza, 185 Neb. 445, 176 N.W.2d 664 (1970); Brockman v. State, 163 Neb. 171, 79 N.W.2d 9 (1956); Sherrick v. State, 157 Neb. 623, 61 N.W.2d 358 (1953); Sharp v. State, 115 Neb. 737, 214 N.W. 643 (1927); ABA Project on Minimum Standards for Criminal Justice, Trial By Jury, § 5.4.

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C.J.S., Criminal Law §§ 1308, 1350, 1499, 1540

NJI2d Crim. 9.1**FUNCTION OF JUDGE, JURY, AND COUNSEL**

Members of the jury, now that you have heard all of the evidence [and the arguments of counsel] it is my duty to instruct you in the law.

(1) I am not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely.

You must not interpret any of my statements, actions, or rulings nor any of the inflections of my voice as reflecting an opinion as to how this case should be decided.

(2) It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.

In determining what the facts are you must rely solely upon the evidence in this trial and that general knowledge that everyone has. You must disregard anything else you know about the case.

(3) You must apply the law in these instructions, even if you believe that the law is or should be different.

No one of these instructions contains all of the law applicable to this case. You must consider each instruction in light of all of the others.

The law demands of you a just verdict. You must not indulge in any speculation, guess, or conjecture. You must not allow sympathy or prejudice to influence your verdict.

(4) The attorneys for the state and the defendant have a duty to

represent the interests of the state and defendant respectively. In arguing their case, attorneys may draw legitimate deductions and inferences from the evidence.

(5) During this trial I have ruled on objections to certain evidence. You must not concern yourselves with the reasons for such rulings since they are controlled by rules of law. You must not speculate as to possible answers to questions I did not permit to be answered; you must not consider the fact that objections to evidence were overruled. You must disregard all evidence ordered stricken.

COMMENT

NJI2d Crim. 9.1 was drafted for use in criminal trials. A parallel instruction for civil trials may be found in NJI2d Civ. 1.01.

The judge must charge the jury on the applicable law after closing arguments of counsel (or after the conclusion of the evidence if there are no closing arguments). Neb.Rev.Stat. § 29-2016 (Reissue 2008); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986); *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973); *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969). It is the role of the jury to judge the credibility of witnesses and to resolve conflicts in the evidence. *See, e.g., State v. Jackson*, 222 Neb. 384, 383 N.W.2d 794 (1986); *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979).

AUTHORITIES

NJI 14.01 (1969); NJI2d Civ. 1.01; Neb.Rev.Stat. § 29-2016 (Reissue 2008); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986); *State v. Jackson*, 222 Neb. 384, 383 N.W.2d 794 (1986); *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979); *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973); *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969).

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NJI2d Crim. 9.2

NATURE OF CASE; PRESUMPTION OF INNOCENCE; CHARGE NOT EVIDENCE

As I told you at the beginning of the trial, this is a criminal case in which the State of Nebraska has charged the defendant with (here

insert crimes). The fact that the state has brought these charges is not evidence of anything. The charges are simply an accusation, nothing more.

The defendant has pleaded not guilty. (He, She) is presumed to be innocent. That means you must find (him, her) not guilty unless and until you decide that the state has proved (him, her) guilty beyond a reasonable doubt.

COMMENT

Refer to NJI2d Crim. 1.1 (the equivalent to NJI2d Crim. 9.2 given as a preliminary instruction). Just as does NJI2d Crim. 1.1, NJI2d Crim. 9.2 combines NJI 14.02 (1969) (Issues in Criminal Case); 14.03 (1969) (More Than One Count); 14.04 (1969) (Information or Complaint Not Evidence); and 14.07 (1969) (Presumption of Innocence).

Immediately subsequent to this instruction NJI2d Crim. 2.0 (REASONABLE DOUBT) should be given. Then the elements instructions should be given as appropriate.

AUTHORITIES

NJI 14.07 (1969); *State v. Leary*, 185 Neb. 76, 173 N.W.2d 520 (1970); *Haswell v. State*, 167 Neb. 169, 92 N.W.2d 161 (1958); *Behrens v. State*, 140 Neb. 671, 1 N.W.2d 289 (1941); *Torske v. State*, 123 Neb. 161, 242 N.W. 408 (1932); *Baker v. State*, 109 Neb. 558, 191 N.W. 666 (1922); *Brown v. State*, 107 Neb. 120, 185 N.W. 344 (1921); *Goff v. State*, 89 Neb. 287, 131 N.W. 213 (1911); *Johns v. State*, 88 Neb. 145, 129 N.W. 247 (1910); *Yeoman v. State*, 81 Neb. 244, 115 N.W. 784 (1908); *Hamblin v. State*, 81 Neb. 148, 115 N.W. 850 (1908); *Reno v. State*, 69 Neb. 391, 95 N.W. 1042 (1903); *Peyton v. State*, 54 Neb. 188, 74 N.W. 597 (1898); *Davis v. State*, 54 Neb. 177, 74 N.W. 599 (1898); *Casey v. State*, 49 Neb. 403, 68 N.W. 643 (1896); *Gravely v. State*, 38 Neb. 871, 57 N.W. 751 (1894); *Nanfito v. United States*, 20 F.2d 376 (8th Cir. 1927).

Research References

West's Key Number Digest
Criminal Law §§770, 778(3), 778(4)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1304, 1325 to 1327

NJI2d Crim. 9.3

EVIDENCE

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. The exhibits received in evidence [;];
3. Any facts that have been stipulated—that is, formally agreed to by the parties—and
4. Any facts that I say you may accept but are not required to accept].

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the state and the defendant;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom.

COMMENT

NJI2d Crim. 9.3 is patterned on NJI2d Civ. 1.02.

Bracketed subparagraphs 3 and 4 of the first paragraph deal with stipulated facts and judicial notice. They should be given only if the evidence at trial included stipulated facts or evidence judicially noticed. NJI2d Crim. 2.3 provides specific language for an instruction regarding judicial notice.

If any evidence has been received outside of the courtroom, such as during a jury view, subparagraph 4 of the second paragraph should be adjusted, perhaps by adding the following: “except where I specifically told you otherwise (here briefly insert circumstances of where and when).” NJI2d Crim. 5.9 provides specific language for an instruction regarding jury view.

AUTHORITIES

Neb.Rev.Stat. § 29-2017 (Reissue 2008) codifies a court’s power to order a jury view in a criminal case. For authorities governing judicial notice, *see* NJI2d Crim. 2.3. For authorities governing jury view, *see* NJI2d Crim. 5.9.

Research References

West’s Key Number Digest
Criminal Law ¶782, 783, 784

Legal Encyclopedias
C.J.S., Criminal Law § 1335

NJI2d Crim. 9.4**DEFENDANT'S FAILURE TO TESTIFY**

The defendant has an absolute right not to testify. The fact that the defendant did not testify must not be considered by you as an admission of guilt and must not influence your verdict in any way.

COMMENT

NJI2d Crim. 9.4 must be given upon defense request. See *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), *on remand*, 620 S.W.2d 320 (Ky.1981). Although NJI2d Crim. 9.4 constitutionally may be given over defense objection; see *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); the Committee recommends giving the instruction *only* if requested or agreed to by the defendant.

NJI2d Crim. 9.4 describes the defendant's right as "absolute" but does not state that the Constitution is the source of that right. The Committee left mention of the Constitution to argument of counsel.

AUTHORITIES

United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988), *on remand*, 846 F.2d 1047 (6th Cir.1988); *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), *on remand*, 620 S.W.2d 320 (Ky.1981); *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), *on remand*, 536 F.2d 305 (9th Cir.1976); *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012); *State v. Donald*, 199 Neb. 70, 256 N.W.2d 107 (1977); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974); *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973).

Research References

West's Key Number Digest
Criminal Law ¶787

Legal Encyclopedias
C.J.S., Criminal Law § 1340

NJI2d Crim. 9.5**JURY NOT TO CONSIDER DISPOSITION**

Your duty is to decide whether the defendant is guilty or not guilty [or not responsible by reason of insanity] (of each of the crimes

charged). My duty is to decide what happens to the defendant if you decide that (he, she) is guilty [or not responsible by reason of insanity]. You must make your decision without considering what will happen to the defendant.

COMMENT

NJI2d Crim. 9.5 is the instruction to be used in all criminal cases other than death penalty cases. Nebraska law is clear that the jury should not be told the potential punishment for a crime because that information is not relevant to a decision to convict or acquit. *E.g.*, *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967); *Ford v. State*, 46 Neb. 390, 64 N.W. 1082 (1895). Nebraska law equally is clear that a jury need not be informed of the disposition of a case when a defendant is found not responsible by reason of insanity. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); *State v. Reitenbaugh*, 204 Neb. 583, 585, 284 N.W.2d 19, 20 (1979); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), *cert. denied*, 449 U.S. 891, 101 S.Ct. 255, 66 L.Ed.2d 120 (1980).

AUTHORITIES

State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 372 (1984); *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19 (1979); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), *cert. denied*, 449 U.S. 891, 101 S.Ct. 255, 66 L.Ed.2d 120 (1980); *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967); *Edwards v. State*, 69 Neb. 386, 95 N.W. 1038 (1903); *Ford v. State*, 46 Neb. 390, 64 N.W. 1082 (1895), *vacated*, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968); *Pope v. United States*, 372 F.2d 710 (8th Cir.1967).

Research References

West's Key Number Digest
Criminal Law ⇨790, 796

Legal Encyclopedias
C.J.S., Criminal Law §§ 1303, 1346, 1499, 1540, 1608

CHAPTER 10

DEATH PENALTY INSTRUCTIONS

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

- | | |
|------|---|
| 10.0 | Nature of Case; Capital Murder Aggravating Circumstances; Burden of Proof, Elements, and Effect of Findings |
| 10.1 | Murder by One Previously Convicted of Another Murder or Previously Convicted of a Crime Involving the Use or Threat of Violence to the Person or Substantial Prior History of Serious Assaultive or Terrorizing Criminal Activity |
| 10.2 | Murder to Conceal Commission of Another Crime or to Conceal the Identity of Its Perpetrator |
| 10.3 | Murder for Hire or Pecuniary Gain, or Hiring Another to Murder for the Defendant |
| 10.4 | Murder That Is Especially Heinous, Atrocious, or Cruel, or Murder Manifesting Exceptional Depravity |
| 10.5 | Murder Committed at the Time the Offender Also Committed Another Murder |
| 10.6 | Murder Committed While Knowingly Creating a Great Risk of Death to at Least Several Persons |
| 10.7 | Murder of a Public Servant Having Lawful Custody of Someone When the Offender Knew or Should Have Known the Victim Was a Public Servant Performing Official Duties |
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COMMENT

Chapter 10 contains instructions to be given in cases where the State is seeking to impose the death penalty against an offender convicted of a capital crime. Nebraska law designates “aggravating circumstances,” one or more of which must exist in order for the death penalty to be imposed. Neb.Rev.Stat. §§ 29-2521, 29-2521.05, 29-2522, and 29-2523 (Reissue 2008 and Cum. Supp. 2014). The United States Supreme Court has held that offenders convicted of capital crimes are entitled under the Sixth Amendment to a jury determination of aggravating circumstances necessary for imposition of the death penalty. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In response to the *Ring* case, the Nebraska legislature enacted LB1, 2002 Neb. Laws, p.1, which was designed to ensure the Sixth and Fourteenth Amendment rights of offenders against whom the state seeks the death penalty.

Neb. Rev. Stat. § 29-2520(4)(e) and (f) (Cum. Supp. 2014) requires the court in aggravation hearings to instruct the jurors as to their duty as jurors on the definition of the aggravating circumstances, (as defined by NJI2d Crim. 1.0 as relevant) and to specify that they must unanimously find alleged aggravating circumstances beyond a reasonable doubt (as defined by NJI2d Crim. 2.0). NJI2d Crim. 10.0—10.9 provide burden of proof instructions to be given in all cases and instructions defining the various statutory aggravating circumstances to be given when a particular aggravating circumstance is alleged.

The Committee recommends that a complete set of instructions should be used at the aggravation hearing separate from the set of instructions used at the guilt phase of the trial. This set of instructions should include the following adapted to the special nature of the proceeding:

1. An introductory instruction similar to NJI2d Crim. 9.1.
2. A statement of the case instruction including NJI2d Crim. 10.1 showing the nature of the case, the aggravating circumstances alleged by the state, burden of proof, essential elements of the aggravating circumstances having sufficient evidence to submit to the jury, and effect of findings.
3. Such evidence and credibility instructions as are necessary from NJI2d Crim. Chapters 2, 5, 6, and 9 which always includes the definition of reasonable doubt from NJI2d Crim. 2.0, but never includes NJI2d Crim. 9.5 B the duty not to consider disposition.
4. A concluding instruction similar to NJI2d Crim. 9.0.
5. A verdict form that will show the aggravating circumstances found beyond a reasonable doubt to exist.

Jury Unanimity and Aggravating Circumstances with Multiple Disjunctive Prongs

Several of the individual aggravating circumstances are defined with multiple disjunctive alternative prongs, see e.g. NJI2d Crim. 10.3, 10.8. While Nebraska statutory law requires that “[e]ach verdict with respect to each alleged aggravating circumstance shall be unanimous,” Neb.Rev.Stat. § 29-2520(4)(f) (Cum. Supp. 2014), the statute does not specify whether the jury must unanimously agree on a single prong within an alleged aggravating circumstance provision or whether it is sufficient that some jurors agree on one prong while the remainder of

the jury agrees on another prong(s). The same problem can arise within a single prong of a multiple disjunctive aggravating circumstance where that single prong may be proven by alternative acts. In *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008), the Nebraska Supreme Court determined that jurors were not required to unanimously agree on a single prong of an alleged aggravating circumstance.

The following is an example based of NJI2d Crim. § 10.1:

[If more than one subsection is alleged, then the following language should be added to the instruction]:

When this aggravating circumstance is alleged, it may be based on either proof that the defendant was previously convicted of another murder, or proof that the defendant was previously convicted of a substantial crime involving serious assaultive or terrorizing activity, or proof that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity, and it matters not if some jurors believe that this aggravating circumstance has been proven based on proof that that the defendant was previously convicted of another murder and some jurors believe that this aggravating circumstance has been proven based on proof that the defendant was previously convicted of a substantial crime involving serious assaultive or terrorizing activity, and some jurors believe that this aggravating circumstance has been proven based on proof that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity. Each juror need only be convinced beyond a reasonable doubt that this aggravating circumstance has been proven in one of the above ways as defined in these instructions.

If more than one of the numbered element is submitted, the Court must determine whether jury unanimity is required. See Jury Unanimity Note, Table of Instructions, *supra*.

NJI2d Crim. 10.0

NATURE OF CASE; CAPITAL MURDER AGGRAVATING CIRCUMSTANCES; BURDEN OF PROOF, ELEMENTS, AND EFFECT OF FINDINGS

A. BURDEN OF PROOF

Alternative A B Use when the jury serving at the aggravation hearing is the jury which determined the defendant's guilt.

You have found the defendant in this case guilty of murder in the

first degree. You must now determine if [one or more of] the following aggravating circumstance[s] [is] [are] true or not true: [insert the aggravating circumstance[s] alleged in the information].

Aggravating circumstances are reasons why the defendant may be sentenced to death. The state has the burden of proving the truth of an aggravating circumstance. If you have a reasonable doubt as to whether an aggravating circumstance is true, or you cannot unanimously agree beyond a reasonable doubt that an aggravating circumstance is true, you must find it to be not true.

In considering whether or not an aggravating circumstance is true, you may consider evidence received at the trial of guilt in addition to evidence received at the aggravation hearing.

If no aggravating circumstance is found to exist, the court shall enter a sentence of life imprisonment without parole. If one or more aggravating circumstances are found to exist, the court shall convene a panel of three judges to hold a hearing to receive and weigh evidence of mitigation and sentence excessiveness or disproportionality to determine whether the death penalty should be imposed.

Alternative B B Use when the jury serving at the aggravation hearing is not the jury which determined the defendant's guilt.

You must determine if [one or more of] the following aggravating circumstance[s] [is] [are] true or not true: [insert the aggravating circumstance[s] alleged in the information].

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences. Aggravating circumstances are reasons why the defendant should be sentenced to death. The state has the burden of proving the truth of an aggravating circumstance. If you have a reasonable doubt as to whether an aggravating circumstance is true, or you cannot unanimously agree beyond a reasonable doubt that an aggravating circumstance is true, you must find it to be not true.

If no aggravating circumstance is found to exist, the court shall enter a sentence of life imprisonment without parole. If one or more aggravating circumstances are found to exist, the court shall convene a panel of three judges to hold a hearing to receive and weigh evidence of mitigation and sentence excessiveness or disproportionality to determine whether the death penalty should be imposed.

B. ELEMENTS

The essential elements necessary to prove each aggravating circumstance listed above are:

(Here list the name and elements of each aggravating circumstance having sufficient evidence to submit taking the elements from NJI2d Crim. 10.1 — 10.9.)

C. EFFECT OF FINDINGS

If you decide unanimously that the state proved each essential element of an aggravating circumstance beyond a reasonable doubt, then you must find that the aggravating circumstance exists. Otherwise, you must find that it does not exist.

COMMENT

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court held that defendants convicted of capital murder are entitled under the Sixth Amendment's provision for trial by jury to a jury determination of any aggravating circumstance[s] necessary for imposition of the death penalty. *Ring* thus invalidated prior Nebraska practice that allowed sentencing judges, sitting without juries, to determine whether one or more aggravating circumstances existed in cases of defendants convicted of capital murder. The Nebraska Supreme Court subsequently held that the Sixth Amendment permits judges to determine whether aggravating circumstances found by the jury outweigh any mitigating circumstances. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

The Nebraska legislature responded to the *Ring* case by enacting LB1, 2002 Neb. Laws p.1, amending prior Nebraska law. This instruction informs the jury of its responsibilities under LB1 to find the presence or absence of alleged applicable aggravating circumstances in cases of defendants convicted of first degree murder.

Nebraska law does not require that the same jury that determines guilt also determine possible aggravating circumstances. Neb. Rev. Stat. § 29-2520(2) (Cum. Supp. 2014). The instructions, therefore, provide alternatives to be given, respectively, to juries determining both guilt and aggravating circumstances and those determining only aggravating circumstances.

The instructions inform the jury of the relevance of the aggravation hearing. While it is not clear under current state or constitutional law that the jury must specifically be informed of the reality that a finding of an aggravating circumstance is a necessary condition for imposition of the death penalty, the Committee believes it desirable that the jury be so informed so as to fully appreciate the gravity of its task. Suggesting support for the Committee's belief, the United States Supreme Court has held that it is constitutionally impermissible to impose a death sentence where a jury is led to believe that its determination of a death sentence is not final because a court might impose a lesser sentence on appeal. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d

231 (1985). *Caldwell* thus affords some basis for the view that the Constitution might require that juries be informed that a finding of aggravation is necessary for imposition of the death penalty.

The instructions reflect requirements that the state must prove aggravating circumstances beyond a reasonable doubt and that the jury find such circumstances unanimously. Neb.Rev.Stat. § 29-2520(4)(e), (f) (Cum. Supp. 2014). *Alternative A* also makes clear that Nebraska statutory law permits the jury to consider evidence presented at the guilt phase as well as that presented at the aggravation hearing in cases where the same jury makes both guilt and aggravation decisions. Neb.Rev.Stat. § 2520(4)(c) (Cum. Supp. 2014).

AUTHORITIES

Neb.Rev.Stat. § 29-2520 (Cum. Supp. 2014); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

Research References

West's Key Number Digest
Sentencing and Punishment ☞ 1780(3)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.1

MURDER BY ONE PREVIOUSLY CONVICTED OF ANOTHER MURDER OR PREVIOUSLY CONVICTED OF A CRIME INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OR SUBSTANTIAL PRIOR HISTORY OF SERIOUS ASSAULTIVE OR TERRORIZING CRIMINAL ACTIVITY

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

[Use only subsections 1, 2, or 3 for which sufficient evidence has been adduced]

1. The defendant was previously convicted of another murder;
or
2. The defendant was previously convicted of a substantial crime involving serious assaultive or terrorizing criminal activity; or
3. The defendant has a substantial prior history of serious assaultive or terrorizing criminal activity.

[Before evidence of conviction of another crime is admissible, the court must determine as a matter of law that the prior conviction was in accordance with constitutional requirements even if it is a conviction in a foreign country.]

[Use the following language for the appropriate subsection(s).]

[The State has alleged that the defendant has been convicted of another murder prior to the offense of murder in the first degree of which the defendant has been found guilty in this case.

It must be proven beyond a reasonable doubt that the defendant was in fact convicted of a prior murder.]

[The State has alleged that defendant has been convicted of a substantial crime involving serious assaultive or terrorizing criminal activity prior to the offense of murder in the first degree of which the defendant has been found guilty in this case.

It must be proven beyond a reasonable doubt that the defendant was in fact convicted of a prior substantial crime involving serious assaultive or terrorizing criminal activity.]

[The State has alleged that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity prior to the offense of murder in the first degree of which the defendant has been found guilty in this case.

It must be proven beyond a reasonable doubt that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity. Before you may consider whether the alleged crime (or crimes) prove(s) beyond a reasonable doubt that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity, it must be proven beyond a reasonable doubt that the defendant did in fact commit the offense (or offenses) alleged.]

[If evidence of a substantial prior history of serious assaultive or terrorizing criminal activity has been presented, then the following language should be included in the instruction:

A substantial prior history of serious assaultive or terrorizing criminal activity does not include events or occurrences which are a part of the circumstances surrounding the current murder, but refer solely to earlier acts.

Substantial refers to an actual, material, and important history of serious assaultive or terrorizing criminal activity.]

[The State should be required to specify in advance which crimes

it is alleging that the defendant committed to prove the existence of this aggravating circumstance, including specifying any convictions for a prior murder and any prior convictions for a substantial crime involving serious assaultive or terrorizing criminal activity. The State should also be required to specify in advance which crimes it is relying on to prove that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity.

The court should instruct the jury of the essential elements of any crime that the State has alleged to prove that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity. This does not include crimes for which the defendant has been convicted. The following language should be included:]

It is alleged that the defendant committed the offense of (insert the offense). Pursuant to Nebraska (or other jurisdiction, if appropriate) law, the essential elements that the state must prove beyond a reasonable doubt to convict a person of this offense, are as follows:

[Set forth the essential elements that must be proven beyond a reasonable doubt.]

COMMENT

I. INTRODUCTION

The statutory language to define this aggravating circumstance is found in Neb. Rev. Stat. § 29-2523 (1)(a) (Reissue 2008) as follows:

The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity.

In 1998, (LB 422) the Legislature amended subsection (1)(a) of 29-2523, substituting “a substantial prior history” for “a substantial history”. Prior to this amendment, the Nebraska Supreme Court had held that the phrase “substantial history of serious assaultive or terrorizing criminal activity” did not include events or occurrences which were a part of the circumstances surrounding the current murder charge, but referred solely to earlier acts. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, cert. denied, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876; *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

II. SPECIFYING ALLEGED CONVICTIONS AND CRIMINAL ACTIVITY

The State should specify in advance which crimes it is alleging that the defendant committed to prove the existence of this aggravating

circumstance, including specifying any convictions for a prior murder and any prior convictions for a substantial crime involving serious assaultive or terrorizing criminal activity. The State should also specify in advance which crimes it is relying on to prove that the defendant has a substantial prior history of serious assaultive or terrorizing criminal activity. While the Nebraska Supreme Court has stated that giving such advance notice may be viewed as good practice, it declined to hold that it was constitutionally required. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

The court should instruct the jury of the statutory elements of any crime that the State has alleged to prove a substantial prior history of serious assaulting or terrorizing criminal activity. This does not include crimes for which the defendant has been convicted.

Before evidence of conviction of another crime is admissible, the court must determine as a matter of law that the prior conviction was in accordance with constitutional requirements even if it is a conviction in a foreign country.

III. SERIOUS ASSAULTIVE OR TERRORIZING CRIMINAL ACTIVITY

Evidence that a defendant “has a substantial prior history of serious assaultive or terrorizing criminal activity” does not require proof of a prior conviction for those acts. Therefore, in cases where evidence of serious assaultive or terrorizing “criminal activity” is offered, the jury must be instructed on the material elements of the particular crime or crimes if sufficient evidence has been presented to justify submitting this issue to the jury.

The Nebraska Supreme Court has held that the words “serious”, “assaultive”, and “terrorizing” are words of common usage with meanings well-fixed and generally clearly understood, and are not vague or indefinite. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Holtan*, *supra*; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). The term “substantial history” is likewise reasonably clear. *State v. Ellis*, *supra*.

The Nebraska Supreme Court held that the fact that a defendant was previously convicted of two assaults of unspecified degree and of an attempted second degree assault does not, in and of itself, establish beyond a reasonable doubt the existence of this aggravating circumstance. *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987). The language used in element (2) above is quoted from *id.*, 225 Neb. at 836, 408 N.W.2d at 319.

The Eighth Circuit has held that *one* prior, premeditated, first degree murder constitutes a substantial prior history of assaultive crim-

inal activity. *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996), cert. denied, 518 U.S. 1029, 116 S.Ct. 2574, 135 L.Ed.2d 1090 (1996).

IV. PRIOR TO THE CURRENT MURDER

Where the killing of one victim, and the wounding of another victim occurred at the same time and arose out of the same events, this aggravating circumstance is inapplicable. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *State v. Palmer, supra*.

V. PRIOR CONVICTIONS

Before evidence of conviction of another crime is admissible, the court must determine as a matter of law that the prior conviction was in accordance with constitutional requirements even if it is a conviction in a foreign country.

VI. PRIOR MURDER CONVICTION

The Nebraska Supreme Court has held that a prior second degree murder conviction, standing alone, was sufficient to support a finding that this aggravating circumstance existed beyond a reasonable doubt. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), cert. denied 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1195 (1991).

A conviction for an attempt to commit murder does not constitute a "previous conviction of another murder," *State v. Rust, supra*.

AUTHORITIES

Neb. Rev. Stat. § 29-2523 (Reissue 2008); *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, cert. denied, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876; *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996), cert. denied, 518 U.S. 1029, 116 S.Ct. 2574, 135 L.Ed.2d 1090 (1996); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), cert. denied 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1195 (1991).

Research References

West's Key Number Digest
Sentencing and Punishment ⇨ 1705, 1780(3)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1346, 1499, 1530, 1534, 1540, 1606 to 1608

NJI2d Crim. 10.2**MURDER TO CONCEAL COMMISSION OF
ANOTHER CRIME OR TO CONCEAL THE IDENTITY
OF ITS PERPETRATOR**

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

1. The defendant committed the murder for the specific purpose of trying to conceal the commission of another crime; or
2. The defendant committed the murder for the specific purpose of trying to conceal the identity of the perpetrator of another crime.

[only submit those elements that are supported by the pleadings and sufficient evidence]

COMMENT

The statutory language to define this aggravating circumstance is found in Neb. Rev. Stat. § 29-2523 (1)(b) (Reissue 2008) as follows: "The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime."

A murder committed to conceal commission of another crime is rare. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977) offers examples such as murder by arson trying to conceal another murder or burglary that happened—or where the murder of a witness will prevent the discovery of a prior crime that is not otherwise likely to be discovered. Murders committed to conceal the *identity* of a perpetrator, on the other hand, are common.

The Nebraska Supreme court noted a truism that all killings render the victim incapable of identifying the killer. For this reason, a trial court finding that the aggravating circumstance existed was reversed in *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), where the defendant killed the victim in order to fulfill his fantasy of sexually assaulting a female corpse, and therefore didn't kill to silence a witness to a crime. The court later explained that the crime to be concealed, or the crime where the identity of the perpetrator is to be concealed, must be a crime that is not the murder itself. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

The perpetrator of the other crime can be someone other than the murderer, as was possible in the case of *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). In that case, the defendant and his wife had frequented the coin shop/home of the victim and sold jewelry several

times. The victim could identify either of them. The defendant attacked, beat, tied, robbed, and killed the victim on the last visit. It made no difference whether the defendant thought he needed to kill the victim because the victim knew the defendant or because the victim knew the defendant's wife. If he identified either of them (Palmer or Palmer's wife), Palmer clearly could have considered the victim to be a witness to the crime of robbery.

In a direct attack on this aggravating circumstance on the grounds of being overbroad, the Nebraska Supreme Court concluded that it is not overbroad because the killing requires a "specific motive" of concealing the identity of someone committing another crime. Thus, it does not apply to all killings where another felony happens to be committed. This limitation was explained by the Supreme Court in *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996) where the defendant robbed and killed two cab drivers within four days, had a plan to select older victims, and confessed that he killed them so they could not identify him as the robber.

In a post-conviction appeal, the Nebraska Supreme Court rejected a claim of overlapping this aggravating circumstance with the aggravating circumstance of committing another murder at the same time. *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). The defendant had shot and killed two female victims in an apartment. One had been sexually assaulted and the other had not. The court said there was no overlapping because the defendant was found to kill only the woman who had been sexually assaulted in order to cover up that he assaulted her, and there was no mutuality of that fact with the fact that both women had been killed at the same time. Without discussion, a similar fact pattern received the very same result in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

The Nebraska Supreme Court has found facts sufficient to support this aggravating circumstance in a number of cases. See, e.g., *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012) (where sentencing panel could infer that victim who was robbed was killed to conceal defendant's identity as perpetrator of robbery and that other victim was killed to conceal defendant's identity as murderer of first victim); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011) (where jury could infer that victims were killed in effort to conceal identity of defendant and his accomplices in bank robbery); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005) (where defendant raped and murdered 13-year-old girl and murdered her 7-year-old brother because he was potential witness); *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007) (where murder was committed in effort to conceal commission of crimes of kidnapping and sexual assault of murder victim and sexual assault of another person); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000) (where victim was killed to cover up that defendant had abducted and raped her); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986) (where on two separate occasions defendant had kidnapped young boys, then killed them because they

could identify him as kidnapper); State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979) (where victim was killed after burglary, robbery, and sexual assault on her that she witnessed); State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979) (where defendant shot two women, after raping one of them); State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977) (where coin shop proprietor was bound, gagged, robbed and then shot to death); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977) (where five other family members were killed after discovering defendant had murdered and sexually assaulted a sixth family member); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977) (where bartender was killed after witnessing defendant rob cash drawer from him); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977) (where defendant shot victim and burned van to cover up that he was stealing marijuana).

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(b) (Reissue 2008); State v. Torres, 283 Neb. 142, 812 N.W.2d 213 (2012); State v. Sandoval, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011); State v. Gales, 269 Neb. 443, 694 N.W.2d 124 (2005); State v. Hessler, 274 Neb. 478, 741 N.W.2d 406 (2007); State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000); State v. Palmer, 257 Neb. 702, 600 N.W.2d 756 (1999); State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998); State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986); State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985); State v. Williams, 217 Neb. 539, 352 N.W.2d 538 (1984); State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984); State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979); State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979); State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

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C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.3

MURDER FOR HIRE OR PECUNIARY GAIN, OR HIRING ANOTHER TO MURDER FOR THE DEFENDANT

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

1. The murder was committed for hire [The defendant was hired

or paid money or any other thing of monetary value to commit the murder]; or

2. The defendant hired [paid money or any other thing of monetary value to] another to commit the murder for the defendant; or
3. The murder was motivated primarily by a desire for [financial/pecuniary] gain.

COMMENT

I. INTRODUCTION

The statutory language defining this aggravating circumstance is found in Neb. Rev. Stat. § 29-2523 (1)(c) (Reissue 2008) as follows: "The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant."

The Nebraska Supreme Court has construed this language to apply to the hired gun, the hirer of the gun, and to murder motivated primarily by desire for pecuniary gain. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). The committee suggests that this instruction is appropriate when the defendant is alleged to have committed the murder pursuant to a contract, agreement, request, command, or understanding by which he/she was to receive money or anything of monetary value in return for committing the murder, when the defendant is alleged to have procured another to commit the murder for money or anything of monetary value, or when the defendant commits the murder primarily motivated by the belief that the death of the victim would result in his/her financial gain.

II. FOR HIRE

Imposition of death penalty against two defendants for a first-degree murder was appropriate where one defendant paid the other defendant \$1,500 to kill the victim. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

III. HIRED ANOTHER

The Nebraska Supreme Court has noted that "a portion of this circumstance is intended to apply to murder actually committed by another at the instance and request of the defendant." *State v. Peery*, 199 Neb. 656, 673-74, 216 N.W.2d 95, 104 (1977).

Imposition of death penalty against two defendants for a first-degree murder was appropriate where one defendant had paid the other defendant \$1,500 to kill the victim. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

IV. PRIMARY MOTIVATION

A murder is committed for financial gain when the murder itself is motivated primarily by desire for financial gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds or the murder of a testator by a legatee or devisee to secure a legacy or devise. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Peery*, 199 Neb. 656, 216 N.W.2d 95 (1977).

A murder shall not be considered as primarily motivated by pecuniary gain where the murder was committed as part of an attempt to escape or to conceal the identity of the perpetrator of a robbery even though the result may have been intended to enable the perpetrator to keep the proceeds of the robbery. To do so would result in double counting as the aggravating circumstance in Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 2008) would also be applicable. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Commission of a murder during the course of a robbery does not trigger this circumstance either even if the robbery itself contributed to the financial gain of the perpetrator. *State v. Peery*, 199 Neb. 656, 216 N.W.2d 95 (1977). Consequently, this instruction should not be given in the case of a murder occurring in the course of a robbery, or theft, or in the case of a murder during an attempt to flee from a robbery or theft.

Conceptually this aggravator could attach in cases involving a robbery where there is a primary motivation for financial gain apart from the robbery itself. An example would be a murder where a beneficiary kills the insured to gain the proceeds of an insurance policy but does so during the commission of a robbery of the insured to confuse the police as to the true motivation. In a case of mixed motivations, it would be necessary to alter "(3)" as follows:

(3) The murder was motivated primarily by a desire for [financial/pecuniary] gain. The primary motivation for financial gain must exist independent of and apart from a [robbery, attempted robbery, theft, attempted theft, attempt to escape or conceal the identity of the perpetrator of the robbery, attempted robbery, theft, or attempted theft].

V. MISCELLANEOUS

The applicable statute utilizes the term "pecuniary". However, the term "financial" would tend to be more jury-friendly and may be substituted accordingly. The phrase "murder for hire" may be used as words of common knowledge thus normally requiring no separate instruction or may be substituted with an explanation that money or any other thing of monetary value was exchanged in furtherance of the commission of the murder.

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(c) (Reissue 2008); State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980); State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977).

Research References

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Sentencing and Punishment ⇨1673, 1674, 1780(3)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.4**MURDER THAT IS ESPECIALLY HEINOUS,
ATROCIOUS, OR CRUEL, OR MURDER
MANIFESTING EXCEPTIONAL DEPRAVITY**

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

On the especially heinous, atrocious, or cruel prong—which means unnecessarily torturous to the victim:

1. The defendant tortured the victim before the victim's death; or
2. The defendant performed sadistic acts on the victim before the victim's death; or
3. The defendant inflicted sexual abuse on the victim before the victim's death.

Or

On the exceptional depravity prong:

1. The defendant apparently relished the murder; or
2. The defendant inflicted gratuitous violence on the victim; or
3. The defendant needlessly mutilated the victim; or
4. The murder was senseless; or
5. The victim was helpless.

[On both prongs, only submit those elements that are supported by the pleadings and sufficient evidence]

When this aggravating circumstance is alleged, it may be based on either proof on the especially heinous, atrocious or cruel prong elements, or proof on the exceptional depravity prong elements. It matters not if some jurors believe that this aggravating circumstance has been proved based on proof that the defendant inflicted torture, sadism, or sexual abuse on the victim before the victim's death; and some jurors believe that this aggravating circumstance has been proved based on criteria under the exceptional depravity prong. Each juror need only be convinced beyond a reasonable doubt that this aggravating circumstance has been proven in one of the above ways as defined in these instructions.

COMMENT

I. INTRODUCTION

The statutory language to define this aggravating circumstance is found in Neb.Rev.Stat. § 29-2523(1)(d) (Reissue 2008) as follows: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The Nebraska Supreme Court has interpreted that the disjunctive word "or" before the phrase referring to depravity means that the subsection actually defines at least two distinct notions. The first prong of "heinous, atrocious, cruel" focuses on the experience of the victim. In contrast, the second prong of "exceptional depravity" focuses on the defendant's state of mind. *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). The language used in the last paragraph is based on the language used in the jury instruction given in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011).

Language similar to Nebraska's statutory language has been ruled unconstitutionally broad by the United States Supreme Court in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), involving the Oklahoma aggravating circumstance "especially heinous, atrocious, or cruel". The ruling was that the language doesn't give "specific and detailed guidance". Therefore, this choice of words does not become an effective limitation on cases deserving the death sentence because an ordinary person could honestly believe that any intentional first degree murder is especially heinous. Adding words like "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of

others” doesn’t cure the problem. *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The U.S. Court of Appeals for the Eighth Circuit has found the text of Neb.Rev.Stat. § 29-2523(1)(d) (Reissue 2008), standing alone, to be constitutionally insufficient. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh’g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992). But the Eighth Circuit stated that “a state supreme court may salvage a facially-vague statute by construing it to provide the sentencing body with objective criteria for applying the statute.” *Moore v. Clarke*, 904 F.2d at 1229. Thus, the Eighth Circuit has held that the first prong of Neb.Rev.Stat. § 29-2523(1)(d) (Reissue 2008), narrowed by the Nebraska Supreme Court’s decisions defining the phrase “especially heinous, atrocious, cruel” to mean unnecessarily torturous to the victim, satisfies the constitutional requirements of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). See *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990).

The Nebraska Supreme Court has concluded that the first prong of Neb.Rev.Stat. § 29-2523(1)(d) (Reissue 2008) was facially constitutional to the extent that the court had narrowed and defined it. See, *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995).

When post conviction relief was denied, the Nebraska Supreme Court discussed the meaning of heinous, atrocious, cruel as follows in *State v. Ryan*, 248 Neb. 405, 446–447, 534 N.W.2d 766, 793 (1995):

We have said this circumstance includes a “ ‘pitiless crime which is unnecessarily torturous to the victim’ and . . . cases where torture, sadism, or the imposition of extreme suffering exists.” [Citations omitted] This first circumstance is typically referred to as the “first prong” of (1)(d). This court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. [Citations omitted] Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death We have also held the first prong of (1)(d) to be applicable when the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain exists for any prolonged period of time. [Citations omitted] In other words, this prong must be looked upon through the eyes of the victim.

Some courts, including the quote from the Nebraska Supreme Court above, persist in adding synonyms to the words such as “vile, pitiless, sadistic, evil, wicked” or adding adjectives such as “outrageous, shocking, extreme” and the like. As a result, the element of heinous, atrocious, cruel becomes much more wordy. At the same time, the added

words can easily allow challenges that the approved limitations are being watered down. See, *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001).

A jury may not consider a victim's mental anguish in finding the existence of the aggravating circumstance that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied, 133 S.Ct. 244, 184 L.Ed.2d 129; *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011).

III. EXCEPTIONALLY DEPRAVED MURDERERS

The Nebraska Supreme Court has expressly ruled that exceptional depravity has the elements that are listed in this pattern instruction. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied, 133 S.Ct. 244, 184 L.Ed.2d 129. Specific narrowing factors that support a finding of exceptional depravity include: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. *Id.*

Therefore, the subcommittee proposes use of elements 1 and 2 of the exceptional depravity prong with assurance that they have been approved by both the Nebraska and United States Supreme Court. Relishing the murder and inflicting gratuitous violence on the victim have become well-settled features of a case that sets it off from the run of the mill first degree murder and justifies a death penalty.

Element 3 of the exceptional depravity prong (mutilation of a body) is probably an appropriate limitation on the generality of exceptionally depraved murders because it is included in inflicting gratuitous violence on the victim. However, mutilation cases should be limited to cases where the mutilation is not simply an effort to hide the crime. Some examples of cases where mutilation or dismemberment was held to establish "depravity" as an aggravating circumstance are, *Cavanaugh v. State*, 102 Nev. 478, 729 P.2d 481 (1986) (defendant's removal of victim's vocal cords while the victim was still alive constituted mutilation, and amputation of victim's feet and hands with an electric saw after death, along with an attempt to cut off the victim's head showed "depravity of mind" within the meaning of Nev. Rev. Stat. § 200.033); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984) (an aggravated battery such as mutilation or gross disfigurement committed upon a corpse or an unconscious body evidences "depravity of mind" within the contemplation of Va. Code Ann. § 19-2-264.2 (1995); after gouging his elderly female victim and shooting her at point blank range, defendant set her body on fire, burning away her left arm and hand, as well as both feet). Examples of cases where the mutilation was an effort to hide the crime and the sentence was life imprisonment include *State v. Jones*,

213 Neb. 1, 328 N.W.2d 166 (1982); and *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975).

Elements 4 and 5 of the exceptional depravity prong should be used with caution, because most premeditated murders are senseless and most murder victims are helpless. First degree murder cases often involve victims who are aged and infirm, are children, are incapacitated by restraint or injury before being killed, or are overwhelmed by a show of force with numbers or weapons. Constitutional problems may exist if these elements are given without definition of senseless or helpless. That being said, the Nebraska Supreme Court has stated that a “helpless” victim is readily understood to be one who is unable to defend oneself or to act without help. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied, 133 S.Ct. 244, 184 L.Ed.2d 129; *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). Sufficient evidence established beyond a reasonable doubt the presence of the “exceptional depravity” aggravating factor with respect to one of defendant’s victims, where the victim was bound and gagged when he was shot, establishing both that the victim was helpless and that the murder was senseless since the victim posed no threat to defendant. See *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied, 133 S.Ct. 244, 184 L.Ed.2d 129. An abducted 12-year-old girl was a helpless victim. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). The helplessness of a victim was evidenced by the fact that the victim was immediately bound and could not have prevented a robbery. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

An additional element sometimes used under the exceptional depravity prong is, “There was a cold, calculated planning of the victim’s death, as exemplified by experimentation with the method of causing the death or by the purposeful selection of a particular victim on the basis of specific characteristics.” This element has a lengthy history in the courts, bouncing back and forth between the Nebraska Supreme Court and the Eighth Circuit Court of Appeals. That history is amply documented in the last word on the subject found at *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003), which is an Eighth Circuit *en banc* opinion approving the element. The Nebraska Supreme Court has approved the language twice, in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and in a later opinion in the same case, *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996). However, the most recent Nebraska Supreme Court cases addressing exceptional depravity do not include the “coldly calculated” element as a narrowing factor. See, e.g., *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied, 133 S.Ct. 244, 184 L.Ed.2d 129; *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011).

IV. SUMMARY

The Nebraska statutory language of an aggravating circumstance

limiting the death penalty to especially heinous, atrocious or cruel murders, or to murders manifesting exceptional depravity is facially invalid. However, invalid statutes can be saved if the state's courts give the language "a narrowing construction." *Gregg v. Georgia*, 428 U.S. 153, 201, 92 S.Ct. 2909, 2938, 49 L.Ed.2d 869 (1976). Whether the state courts apply an adequate narrowing construction is left to federal constitutional interpretation and failure to show it will result in invalidity of a death sentence. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Therefore, the subcommittee counsels trial courts that appropriate "narrowing constructions" to Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008) can be developed. However, whether any future limitations would be approved cannot be known because the subcommittee cannot foretell the future.

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(d) (Reissue 2008); *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990); *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003); *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), reh'g denied 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992); *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990); *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), *cert. denied*, 133 S.Ct. 244, 184 L.Ed.2d 129; *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975); *Arizona v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), *overruled in part on other grounds*, *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004); *Cavanaugh v. State*, 102 Nev. 478, 729 P.2d 481 (1986); *Jones v. Commonwealth*, 228 Va. 427, 323, S.E.2d 554 (1984).

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NJI2d Crim. 10.5**MURDER COMMITTED AT THE TIME THE
OFFENDER ALSO COMMITTED ANOTHER
MURDER**

The essential element necessary to prove this aggravating circumstance beyond a reasonable doubt is:

(1) The offender murdered more than one person during the same criminal transaction.

COMMENT**I. INTRODUCTION**

The language currently defining this aggravating circumstance is found in Neb.Rev.Stat. § 29-2523(1)(e) (Reissue 2008) and is as follows: "At the time the murder was committed, the offender also committed another murder."

The Nebraska Supreme Court has not commented on this particular aggravating circumstance at any length. Perhaps this is because the court has determined that subdivision (1)(e) is "clear, easily understood, and no clarification or construction is necessary." *State v. Simants*, 197 Neb. 549, 566-67, 250 N.W.2d 881, 891 (1977), cert. denied, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158. The court did clarify that subdivision (1)(e) applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), overruled on the other grounds; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

II. SAME CRIMINAL TRANSACTION

As previously stated, this aggravating circumstance has not been addressed at any length in the legislative history or in Nebraska case law. Therefore, the addition of the phrase "during the same criminal transaction" is modeled after Texas Penal Code § 19.03 (a)(7)(A). Although the Texas legislature did not define the term "same criminal transaction" in the statute, Texas courts have interpreted the phrase to mean "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events." *Jackson v. Texas*, 17 S.W.3d 664 (Tex.Crim.App. 2000); *Rios v. Texas*, 846 S.W.2d 310 (Tex.Crim.App.1992).

In reviewing the sufficiency of the evidence to show that the defendant committed more than one murder during the course of the same criminal transaction, the issue is whether the jury could rationally

conclude that the defendant engaged in a continuous and uninterrupted process, over a short period of time, of killing more than one person. *Richardson v. Texas*, 879 S.W.2d 874 (Tex.Crim.App.1993), rehearing denied, certiorari denied 513 U.S. 1085, 115 S.Ct. 741, 130 L.Ed.2d 643, habeas corpus granted 70 S.W.3d 865. "The term 'same criminal transaction' is certainly not vague." *Vuong v. Texas*, 830 S.W.2d 929 (Tex.Crim.App.1992).

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(e) (Reissue 2008); Texas Penal Code § 19.03(a)(7)(A); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *Jackson v. Texas*, 17 S.W.3d 664 (Tex.Crim.App. 2000); *Rios v. Texas*, 846 S.W.2d 310 (Tex.Crim.App. 1992); *Richardson v. Texas*, 879 S.W.2d 874 (Tex.Crim.App.1993); *Vuong v. Texas*, 830 S.W.2d 929 (Tex.Crim.App.1992).

Research References

West's Key Number Digest

Sentencing and Punishment ⇨1683, 1780(3)

Legal Encyclopedias

C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.6

MURDER COMMITTED WHILE KNOWINGLY CREATING A GREAT RISK OF DEATH TO AT LEAST SEVERAL PERSONS

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

1. The offender knowingly created a great risk of death, and
2. The risk was to more than two persons, including [name of murder victim].

COMMENT

The statutory language to define this aggravating circumstance is found in Neb.Rev.Stat. § 29-2523(1)(f) (Reissue 2008) as follows: "The offender knowingly created a great risk of death to at least several persons."

This aggravating circumstance was discussed by a quartet of Nebraska Supreme Court opinions in the same volume of the Nebraska Reports. The cases were decided in conjunction with one another, and

each illustrates some differences between the cases on this aggravating circumstance. The opinions are: *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); and *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977).

Stewart was a drug deal gone bad where a teenager shot and killed his drug supplier in a van. The teenager also shot, but only wounded, the dealer's companion in the same van; set the van on fire to burn those he had shot; then the defendant ran away. The companion survived, and got out of the van to roll in the snow and extinguish his burning clothes. The trial court found the aggravating circumstance existed and the Supreme Court reversed because only a total of two—not several—persons were subjected to a great risk of death.

Rust was a Hinky Dinky armed robbery by three persons who fled in a car and were pursued by police. The robbers' car got stuck and penned in by police, and the driver was shot and killed by police officers. The other robber surrendered; but the defendant fled on foot from the car. During the auto chase, the defendant had shot at two police automobiles—breaking the windshield in one car—and striking the fender of another police auto. After running from the disabled car, the defendant shot and killed a bystander and wounded two police officers. The trial court finding that the aggravating circumstance existed was affirmed by the Supreme Court.

Holtan was a robbery at a bar. The defendant herded the bartender, the bartender's friend, and one patron into a bathroom. The bartender was told to tie up his friend and the patron on the floor. Then the defendant shot and killed the bartender, shot and injured the bartender's friend on the floor, and shot at — but missed — the patron on the floor. The trial court found the aggravating circumstance existed and was affirmed by the Supreme Court.

Simants involved the murder of six people. The defendant went to an acquaintance's home. He sexually assaulted, shot, and killed a ten-year-old girl. The girl's grandfather noticed the crime and was promptly shot and killed by the defendant. The girl's grandmother entered the house shortly thereafter and was also shot and killed by the defendant. Last, the girl's brother and his two children entered the house shortly thereafter and all three of them were shot and killed by the defendant. The trial court found that the aggravating circumstance did not exist and was affirmed by the Supreme Court.

The *Stewart* and *Simants* opinions state, "We interpret [the aggravating circumstance] to cover those situations where the act of the defendant jeopardizes the lives of more than two *other* persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations." *Stewart*, 197 Neb. at 524, 250 N.W.2d at 865 (emphasis added); *Simants*, 197 Neb. at 567, 250 N.W.2d at 891 (emphasis added).

The *Holtan* case affirmed a finding that the aggravating circumstance exists and only involved a total of three people—the murdered bartender, the injured friend of his, and the patron shot at and missed. The *Simants* case involved a total of six people being killed and affirmed a finding that the aggravating circumstance did not exist. The direct holding of *Holtan* includes the murder victim in the count of more than two, and the statutory language supports that interpretation. The word “other” in the quote of the Nebraska Supreme Court above must refer to people “other” than the defendant. Therefore the committee includes the murder victim in the count of “more than two” in the pattern instruction because of the direct holding of *Holtan* and the express language of the statute defining the aggravating circumstance.

The reason that this aggravating circumstance was found not to exist in the *Simants* case (which included a total of six killings) is because of a principle of overlapping. The *Simants* case included finding the existence of Neb. Rev. Stat. § 29-2523(1)(e), an aggravating circumstance of committing more than one murder at the time the six murders were committed. If the fact that Mr. Simants killed six people in the same family at the same time also established the existence of the aggravating circumstance that he created a great risk of death to several people, it would be like double-dipping or using the same facts to establish more than one aggravating circumstance. The principle of overlapping was explained in the *Rust* opinion as follows:

We think it is not reasonable to construe the definitions [of the aggravating circumstances in § 29-2523] in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances.

We believe the legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element, e.g., motive or purpose, is included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions, e.g., pecuniary gain may be the result. This principle is also illustrated by our holding in *Simants* where the multiple murders satisfy aggravating circumstance (e), but are not construed to also include circumstance (f), i.e., “created a great risk of death to at least several persons.”

State v. Rust, 197, Neb. at 538, 250 N.W.2d at 874.

In *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), the Nebraska Supreme Court elaborated that the ruling in *State v. Rust* prevents the use of the same evidence to support different aggravating factors, but that it does not prevent consideration of evidence of distinct incidents to support different aggravating factors.

In *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011), the Nebraska Supreme Court found this aggravator to exist where, during the course of a bank

robbery in which four bank employees and a customer were killed, two other employees and a customer were placed at great risk of death due to their presence in the bank and proximity to the gunfire. The defendant argued that the three individuals not killed were more directly placed at a great risk of death by his accomplices, but the Nebraska Supreme Court reasoned: "Sandoval shot and killed every person near him. Considering the confined area of the bank, the three individuals who survived the incident were within range of Sandoval's weapon at all times and he unquestionably placed them at a great risk of death." *Id.* at 366, 788 N.W.2d at 220. The court further reasoned that the defendant placed the three individuals at a great risk of death by "planning and carrying out a bank robbery in which three men with loaded weapons entered a small bank full of people." *Id.* at 367, 788 N.W.2d at 220.

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(f) (Reissue 2008); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), cert. denied 131 S.Ct. 2912, 179 L.Ed.2d 1254 (2011); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

NJI2d Crim. 10.7

MURDER OF A PUBLIC SERVANT HAVING LAWFUL CUSTODY OF SOMEONE WHEN THE OFFENDER KNEW OR SHOULD HAVE KNOWN THE VICTIM WAS A PUBLIC SERVANT PERFORMING OFFICIAL DUTIES

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

1. The victim was a public servant; that is, the victim was (a/an) (specify appropriate description from the following: officer or employee of the government, whether elected or appointed, or a person participating as an advisor, consultant, process server, or otherwise in performing a governmental function); and
2. The defendant (or name of other person) was in the lawful custody of the victim; that is, the holding or confinement of the defendant (or name of other person) was authorized, sanctioned, or not forbidden; and
3. The defendant knew or should have known that the victim was a public servant performing (his or her) official duties.

COMMENT

This aggravating circumstance is set forth in Neb.Rev.Stat. § 29-2523(1)(g) (Reissue 2008) which provides: "The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties."

In 1998, the Nebraska Legislature amended this aggravating circumstance. Laws 1998, LB 422 § 1 ("LB 422"). The statute formerly read as follows: "The victim was a law enforcement officer or a public servant having custody of the offender or another." Section 29-2523(1)(g) was amended to address persons in the custody of public servants. The circumstance of a law enforcement officer's death was removed to the newly created § 29-2523(1)(i).

The legislative history indicates a clear intent to apply § 29-2523(1)(g) to a narrow class of "public servants" consisting of correctional officials, jailers and generally officials and employees within confinement and detention facilities. There was also an intent to remove law enforcement officers from the scope of § 29-2523(1)(g) through the creation of § 29-2523(1)(i). Floor Debate, 95th Leg., 1st Sess. 2104-2119 (March 12, 1997).

When a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment. In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. The court must place on the statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature.

Premium Farms v. County of Holt, 263 Neb. 415, 424, 640 N.W.2d 633, 640 (2002) (citations omitted). *See, also*, *Jacobson v. Solid Waste Agency of Northwest Nebraska (SWANN)*, 264 Neb. 961, 653 N.W.2d 482 (2002); *Volquardson v. Hartford Ins. Co. of the Midwest*, 264 Neb. 337, 647 N.W.2d 599 (2002).

The committee takes no position as to whether § 29-2523(1)(g) is ambiguous.

Statutory definitions for the following terms exist:

Public Servant — Neb. Rev. Stat. § 28-109(18) (Reissue 2008) "Public servant shall mean any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses";

Government — Neb. Rev. Stat. § 28-109(10) (Reissue 2008) “Government shall mean the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function”; and

Governmental Function — Neb. Rev. Stat. § 28-109(11) (Reissue 2008) “Governmental function shall mean any activity which a public servant is legally authorized to undertake on behalf of government.”

– Within Neb. Rev. Stat. § 28-916.01 (Reissue 2008) there are also definitions provided but limited to offenses involving integrity of government for the terms “government” and “public servant.”

No statutory definition of “lawful custody” is provided. These words frequently appear in jurisprudence but are typically unaccompanied by precise definition. Cases involving criminal charges of escape provide some guidance.

In *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980), *opinion confirmed with modification*, 207 Neb. 663, 300 N.W.2d 194 (1981) the Nebraska Supreme Court held that when “lawful custody” is an essential element of a crime, that element is to be decided by a jury on proper instructions by the trial court. The defendant was charged with escape under Neb.Rev.Stat. § 28-912 (Reissue 1979).

The failure to establish a sufficient factual basis for lawful custody led to the reversal and dismissal of an escape charge in *State v. Dickson*, 205 Neb. 476, 288 N.W.2d 48 (1980). Therein, the Nebraska Supreme Court stated that legal custody was an essential element of the crime of escape under the pre-code statute: § 28-736, R.R.S. 1943. *Dickson* involved a circumstance of a warrantless arrest and escape while en route to the jail. The case distinguished itself from the facts before the Court in *State v. Reeves*, 199 Neb. 725, 261 N.W.2d 110 (1978), wherein an escape conviction was upheld in a situation of an arrest upon probable cause during the execution of a search warrant. Subsequently, in *Reeves*, a motion to suppress the search warrant was sustained.

Reeves upheld a jury instruction which defined “legal custody” as “the holding or confinement under color of law.” 199 Neb. at 729, 261 N.W.2d at 113. The ability to apply this definition to “lawful custody”; however, should be tempered with the following caution given by the Court:

The statute in question does not expressly require “lawful” custody, nor a “lawful” arrest, nor probable cause, as *Reeves* maintains. The statute simply requires that the individual at the time of escape be in “legal” custody. Although the distinction between the terms “legal” and “lawful” is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some importance. This distinction is set

forth in the narrative following the definition of “lawful” as stated in Black’s Law Dictionary (4th Ed.), p. 1032. It reads as follows: “The principal distinction between the terms ‘lawful’ and ‘legal’ is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is ‘lawful’ implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is ‘legal’ implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner.”

199 Neb. at 727–28, 261 N.W.2d at 112–13.

The Nebraska Supreme Court has not examined § 29-2523(1)(g) since the most recent enactment of the legislature. In *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), the State appealed the life sentence received by Terry Reynolds. At issue, was the interpretation by the three-judge sentencing panel of § 29-2523 (1)(g) as it existed prior to LB 422. That panel determined that the mere fact that a victim was a law enforcement officer is not sufficient where there is no evidence that the defendant was in custody at the time the crime was committed. *Reynolds* compared § 29-2523(1)(g) to 27 other states that have a similar provision. The Nebraska Supreme Court affirmed the decision of the sentencing panel finding the “in custody” provision applies to both law enforcement officers and public servants.

AUTHORITIES

Neb. Rev. Stat. § 28-109(10), (11), (18) (Reissue 2008); Neb. Rev. Stat. § 28-912 (Reissue 2008); Neb. Rev. Stat. § 29-2523(1)(g) and (i) (Reissue 2008); *Jacobson v. Solid Waste Agency of Northwest Nebraska*, 264 Neb. 961, 653 N.W.2d 482 (2002); *Volquardson v. Hartford Ins. Co. of the Midwest*, 264 Neb. 337, 647 N.W.2d 599 (2002); *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980), *opinion confirmed with modification*, 207 Neb. 663, 300 N.W.2d 194 (1981); *State v. Dickson*, 205 Neb. 476, 288 N.W.2d 48 (1980); *State v. Reeves*, 199 Neb. 725, 261 N.W.2d 110 (1978).

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Sentencing and Punishment ⇨ 1729, 1780(3)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.8**MURDER COMMITTED KNOWINGLY TO DISRUPT
OR HINDER LAWFUL EXERCISE OF GOVERNMENT
FUNCTION OR ENFORCEMENT OF THE LAWS**

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

- 1) that the lawful exercise of any governmental function; that is, (describe the acts that are the basis for Instruction); or
- 2) that the enforcement of the laws; that is, (describe the acts that are the basis for instruction).

A defendant acts knowingly when (he, she) is aware that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

COMMENT

This aggravating circumstance is set forth in Neb.Rev.Stat. § 29-2523(1)(h) (Reissue 2008) which provides: "The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws."

The Committee suggests that there may be circumstances in which the instruction should be modified to include either the lawful exercise of any governmental function alternative or the enforcement of the laws alternative. The factual context of the case may require the inclusion of only one of the alternatives.

The Nebraska Supreme Court has rarely had occasion to address this particular aggravating circumstance. In *State v. Lotter*, 255 Neb. 456, 523, 586 N.W.2d 591, 636 (1998), the court explained that for § 29-2523(1)(h) to apply, "a defendant must be aware that the murder was committed to 'disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.'" Because the trial court found that Lotter murdered the victim to prevent her from testifying in a potential state prosecution against him, the knowingly requirement of the statute was met. *Id.* at 523-24, 586 N.W.2d at 636. In addition to clarifying the knowingly requirement of the statute, the court also addressed the significance of the Legislature's replacing the word "crime" that was found in the former subsection of the statute with the word "murder". The court noted that

[i]n the absence of any specific limitation, the word "murder," which replaces the word "crime" in subsection (1)(h), must necessarily refer to both felony and premeditated murder. Accord-

ingly, we must conclude that the Legislature replaced the word “crime” with the word “murder” to ensure that the act referred to was limited to the murder to which the subsection was to be applied, as opposed to the underlying felony in a felony murder or some other unrelated crime.

Id. at 523, 586 N.W.2d at 636 (citation omitted).

The Nebraska Supreme Court also addressed the applicability of § 29-2523(1)(h) in *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). In *Rust*, the language of the statute was slightly different (as noted above) in that it did not contain the knowingly requirement of the current statute and the statute required that a crime be committed and not specifically a murder as the current statute requires. The court explained that the section was applicable because

the murder of Kellogg was committed in an attempt to avoid capture and this was part of an attempt to prevent the apprehension and arrest by law enforcement officers of the defendant and his companion Ell. It is the fact that the murder of Kellogg was a part of the defendant’s resistance to his capture and arrest which makes circumstance (h) applicable in this case. Such an act, in our judgment, clearly comes within the definition of aggravating circumstance (h).

Rust, 197 Neb. at 541–42, 250 N.W.2d at 875.

In *Rust* the Court made it clear that § 29-2523(1)(h) is separate and distinct from the aggravator set out in § 29-2523(1)(b) (murder committed to conceal the commission of the crime or the perpetrator). Subdivision (1)(h) applies to the murder of a witness when the defendant’s motive is to prevent the witness from testifying but not when the killing is done at the time of the crime to conceal his or her commission of the crime or identity. However if the murder occurs in the attempt to escape capture or arrest (1)(h) becomes applicable. *Rust*, 197 Neb. at 541–542, 250 N.W.2d at 875.

The statutory language of § 29-2523(1)(h) is broad and could apply in many different factual contexts, thus a review of case law from other jurisdictions may shed light on when instruction on this aggravating circumstance is appropriate. See *White v. State*, 817 So.2d 799 (Fla. 2002)(application of aggravating circumstance appropriate where defendant murdered victim to avoid discovery and prosecution for a different crime perpetrated by the defendant); *State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001)(application of aggravating circumstance appropriate where the defendant murdered the victim to prevent her from seeking an extension of a domestic violence protective order); *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997)(application of aggravating circumstance appropriate where defendant murdered wife to prevent her from proceeding with a divorce action); *Phillips v. State*, 705 So.2d 1320 (Fla. 1997)(application of aggravating circumstance appropriate

where defendant murdered a parole officer who was trying to have the defendant's parole revoked); *Hodges v. State*, 595 So.2d 929, 934 (Fla. 1992)(application of aggravating circumstance appropriate where defendant's "sole purpose in killing the victim was to prevent his being prosecuted for indecent exposure," an act that the victim had witnessed and reported); *Grossman v. State*, 525 So.2d 833 (Fla. 1988)(application of aggravating circumstance appropriate where defendant murdered victim to "escape from, avoid, or prevent, an arrest and to disrupt or hinder the enforcement of probation laws"); *Provenzano v. State*, 497 So.2d 1177, 1183 (Fla. 1986)(application of aggravating circumstance appropriate where defendant committed murder in an effort to disrupt his trial "thus hindering one of the most basic government functions"); *Francis v. State*, 473 So.2d 672 (Fla. 1985)(application of aggravating circumstance appropriate where defendant murdered the victim who was a confidential informant in a narcotics investigation and provided information to authorities that led to the defendant's arrest); *Antone v. State*, 382 So.2d 1205 (Fla. 1980)(application of aggravating circumstance appropriate where defendant murdered victim to prevent victim from testifying before a grand jury). The Committee notes that the aggravating circumstance as set forth in § 29-2523(1)(h) ("The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws") differs from the aggravating circumstance as set forth in Fla. Stat. Ann. § 921.141(5)(g) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws") and N.C. Gen. Stat. § 15A-2000(e)(7) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"). Given this discrepancy in statutory language, the Committee stresses that citation to these authorities is meant to provide guidance as to what factual circumstances may require instruction on this aggravating circumstance.

AUTHORITIES

Neb.Rev.Stat. § 29-2523(1)(h) (Reissue 2008); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *White v. State*, 817 So.2d 799 (Fla. 2002); *State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001); *State v. Gray*, 347 N.C. 143, 491 S.E.2d 538 (1997); *Phillips v. State*, 705 So.2d 1320 (Fla. 1997); *Hodges v. State*, 595 So.2d 929, 934 (Fla. 1992); *Grossman v. State*, 525 So.2d 833 (Fla. 1988); *Provenzano v. State*, 497 So.2d 1177, 1183 (Fla. 1986); *Francis v. State*, 473 So.2d 672 (Fla. 1985); *Antone v. State*, 382 So.2d 1205 (Fla. 1980).

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West's Key Number Digest
Sentencing and Punishment ⇨1682, 1780(3)

Legal Encyclopedias
C.J.S., Criminal Law §§ 1346, 1499, 1540, 1608

NJI2d Crim. 10.9**MURDER OF A LAW ENFORCEMENT OFFICER ON DUTY**

The essential elements necessary to prove this aggravating circumstance beyond a reasonable doubt are:

1. That the victim was a law enforcement officer; and
2. That at the time the offense was committed the victim was engaged in the lawful performance of his or her official duties as a law enforcement officer; and
3. That the defendant knew or reasonably should have known that the victim was a law enforcement officer.

The phrase “in the performance of [his] [her] official duties” means:

[Any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime]

[Making or attempting to make a lawful arrest]

[Lawfully detaining or attempting to detain a person for questioning or investigation]

COMMENTS

The statutory language defining this aggravated circumstance is found in Neb.Rev.Stat. § 29-2523(1)(i) (Reissue 2008) as follows:

The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

Neb.Rev.Stat. § 81-1401(8)(a) (Reissue 2014) provides a definition of the term “law enforcement officer.”

Statutes involving assault on law enforcement personnel use the term “peace officer” rather than law enforcement officer. *See* Neb.Rev.Stat. § 28-929 to 28-931.01 (Cum. Supp. 2014). The term “peace officer” is defined in Neb.Rev.Stat. § 28-109(14) (Reissue 2008).

In *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997), the defendant was charged with assault on a peace officer. At issue was whether the State must prove that the defendant knew that the person

assaulted was a peace officer in order to be convicted. The Supreme Court concluded that although the State must prove the victim assaulted was, in fact, a peace officer engaged in the performance of his or her official duties, it was not necessary to prove that the defendant was so aware “under the circumstances of this case.” In some situations in which the officer is the aggressor and his or her identity is not known (e.g., undercover officer), then the defendant may use such force as is necessary to protect himself or herself from an impending assault and can assert a lack of intent based upon an honest mistake of fact with respect to an officer’s official status. In that case, however, there was no claim or evidence of mistaken belief.

In *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010), a private security officer and a uniformed and armed off-duty police officer were providing security outside of a nightclub and engaged in a search of a patron. The Nebraska Supreme Court reasoned that the police officer, although off duty, was acting as a governmental official in his capacity as a police officer. The court noted that police officers are considered to be under a duty to respond as police officers 24 hours a day and that a police officer is not relieved of his or her obligation to preserve the peace while off duty.

In *State v. Wilen*, 4 Neb.App. 132, 539 N.W.2d 650 (1995), the defendant was charged with attempting to run over an off-duty Bellevue police officer who was “moonlighting” at a fast food restaurant. The trial court dismissed the complaint, concluding that the officer was not engaged in the performance of her official duties at the time. The court of appeals reversed, holding that where an off-duty officer is in uniform and has been hired to curtail disorderly conduct and provide security to her employer, the officer’s functions are consistent with the duties of her primary employment as a law enforcement officer and she was acting in her official capacity at the time. The court considered (a) the nature of the secondary employment; (b) the manner in which the employer and employee regard the employment; and (c) the nature of the acts performed by the officer.

Neb.Rev.Stat. § 28-1409(2) (Reissue 2008) provides that the use of force is not justified to resist an arrest which the actor knows is being made by a peace officer, even though the arrest is unlawful. Nonetheless, in *State v. Wallace*, 223 Neb. 465, 390 N.W.2d 530 (1986), the Supreme Court held that the trial court properly instructed the jury that an officer may only use reasonably necessary force when making an arrest and properly instructed the jury regarding the extent to which one may resort to force in defending himself during an arrest. See Neb.Rev.Stat. § 28-1409 and § 28-1412 (Reissue 2008).

The prior aggravating circumstance regarding the killing of a law enforcement officer required that the victim be a law enforcement officer or public servant “having custody” of the offender or another. Thus, in *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), where the defendant killed a deputy sheriff as the deputy was responding to a dis-

turbance call, the Supreme Court held that the trial court was correct in not considering that particular aggravating circumstance since the defendant was not in custody at the time. The trial court did properly consider another aggravating circumstance under former § 29-2523, in that it found that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

AUTHORITIES

Neb.Rev.Stat. § 28-109(14) (Reissue 2008); Neb.Rev.Stat. § 28-929 to 28-931.01 (Cum. Supp. 2014); Neb.Rev.Stat. § 28-1409 (Reissue 2008); Neb.Rev.Stat. § 28-1412 (Reissue 2008); Neb.Rev.Stat. § 29-2523(1)(i) (Reissue 2008); Neb.Rev.Stat. § 81-1401(8)(a) (Reissue 2014); State v. Smith, 279 Neb. 918, 782 N.W.2d 913 (2010); State v. Cebuhar, 252 Neb. 796, 567 N.W.2d 129 (1997); State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990); State v. Wilen, 4 Neb.App. 132, 539 N.W.2d 650 (1995).

APPENDIX

LIMITING INSTRUCTIONS

To Be Given During Trial When Appropriate

TABLE OF INSTRUCTIONS

Subject Matter

Instruction Number

X5.3	
X5.7	Limited Use—Multiple Defendants; Evidence Admissible Against One or More but Not All
X5.10	Other Similar Acts
X5.11	Impeachment—Prior Conviction
X5.12	Impeachment—Opinion or Reputation Evidence
X6.0	Impeachment—Miranda-Violative Previous Inconsistent Statement
X9.0	Sequestration Explained at Voir Dire

SELECTED INSTRUCTIONS

To Be Given When Appropriate During Trial

NJI2d Crim. X5.3

A. GENERAL LIMITED PURPOSE

Members of the jury, the evidence of (here insert description) was received for the limited purpose of (here insert purpose); you must consider the evidence only for that limited purpose and for no other.

B. IMPEACHMENT—PREVIOUS INCONSISTENT STATEMENT

Members of the jury, the evidence that (this witness (here insert name), the defendant) allegedly made (a statement, statements) that may be inconsistent with (his, her) testimony in court was brought to your attention only to help you decide if you believe what (the witness (here insert name), the defendant) testified to in court and, if so, how much to rely on that testimony. If you believe that (he, she) said something different earlier, then it will be up to you to decide if what (he, she) said here in court was true. You may not consider what may have been said earlier as proof of [the defendant's guilt or of] any fact contained in (that, those) earlier statement(s).

Research References

West's Key Number Digest
Criminal Law Ⓒ673(3), 783(2)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. X5.7**LIMITED USE—MULTIPLE DEFENDANTS;
EVIDENCE ADMISSIBLE AGAINST ONE OR MORE
BUT NOT ALL**

Members of the jury, you just heard (testimony, evidence) that (here briefly insert particulars). You may consider this (testimony, evidence) only with respect to defendant (here insert name). Do not consider, this (testimony, evidence) with respect to (defendant (here insert name), any of the other defendants).

Research References

West's Key Number Digest
Criminal Law Ⓒ673(4), 783

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. X5.10**OTHER SIMILAR ACTS**

Members of the jury, the evidence that the defendant may have (here insert particulars of prior similar acts) has been received only for the limited purpose of helping you to decide whether the defendant had the (intent, motive, opportunity, here insert pertinent fact in issue from Neb.Rev.Stat. § 404 (Reissue 1989)) to commit the (here insert crime) charged. You must consider the evidence for that limited purpose and for no other.

Research References

West's Key Number Digest
Criminal Law Ⓒ673(5), 783(1)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. X5.11**IMPEACHMENT—PRIOR CONVICTION**

Members of the jury, you just heard that (the defendant, a wit-

ness, here insert name) was once convicted of a crime. You may consider that prior conviction only to help you decide if you believe what (the defendant, witness) testified to here in court and how much to rely on (his, her) testimony. [You may not treat the defendant's prior conviction as proof of (his, her) guilt of the (here insert crime(s)) for which (he, she) now is charged.]

Research References

West's Key Number Digest
Criminal Law ⇨673(3), 783(2)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. X5.12**IMPEACHMENT—OPINION OR REPUTATION
EVIDENCE**

Members of the jury, you just heard testimony from (here insert witness's name) regarding [(his, her) opinion of the character] [and][the general reputation] of (the defendant, here insert name of other witness) regarding truthfulness. This testimony was received only to help you to decide whether you believe (the defendant, here insert name of other witness) and, if so, how much to rely on (his, her) testimony. You may consider (here insert witness's name who gave opinion or reputation, evidence)'s testimony for that limited purpose and for no other.

Research References

West's Key Number Digest
Criminal Law ⇨673(3), 783(2)

Legal Encyclopedias
C.J.S., Criminal Law § 1206

NJI2d Crim. X6.0**IMPEACHMENT—MIRANDA-VIOLATIVE PREVIOUS
INCONSISTENT STATEMENT**

Members of the jury, the evidence that the defendant was questioned prior to this trial and allegedly made (a statement, statements) that may be inconsistent with (his, her) testimony in court today was brought to your attention only to help you decide if you believe what the defendant testified to here in court and, if so, how much to rely on that testimony. If you believe that (he, she) said

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APPENDIX

something different earlier, then it will be up to you to decide if what (he, she) said here in court was true. You may not consider what may have been said earlier as proof of the defendant's guilt or of any fact contained in (that, those) earlier statement(s).

Research References

West's Key Number Digest
Criminal Law ◊673, 781

Legal Encyclopedias
C.J.S., Criminal Law §§ 1206, 1336

NJI2d Crim. X9.0

SEQUESTRATION EXPLAINED AT VOIR DIRE

(The Committee recommends that the judge give neither explanation for the sequestration decision nor information as to where the jury is staying.)

I have decided that during this trial the jurors must stay together while the court is not in session. I realize that this may be a hardship for some of you. When you are called, please tell me about any hardship you anticipate.

Research References

West's Key Number Digest
Criminal Law ◊768; Jury ◊131

Legal Encyclopedias
C.J.S., Criminal Law §§ 1308, 1350, 1499, 1540; Juries §§ 367, 372, 462 to 488

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The following are the names of the persons who have been
admitted to the office of the Secretary of the State
since the last report of the Board of Education.

1. John A. Smith, Secretary of the State.
2. John B. Jones, Secretary of the State.
3. John C. Brown, Secretary of the State.
4. John D. White, Secretary of the State.
5. John E. Black, Secretary of the State.
6. John F. Green, Secretary of the State.
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